Neutral Citation: [2023] UKUT 260 (TCC)

Case Number: UT/2022/00053-57

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CORPORATION TAX – s11 Capital Allowances Act 2001 – taxpayers designed and constructed offshore windfarms – FTT entitled to hold wind turbines and cables together were single item of plant – HMRC's appeal dismissed – whether expenditure on environmental and technical studies qualified for allowance as expenditure "on provision of plant" – no – jurisdiction of the tribunal where HMRC had made the wrong amendment to a return – when an amount in a tax return is conclusively determined – Schedule 18 Finance Act 1998

Heard on: 5,6,7,8 June 2023
Judgment date: 26 October 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE TRACEY BOWLER

Between

(1) GUNFLEET SANDS LIMITED
(2) GUNFLEET SANDS II LIMITED
(3) WALNEY (UK) OFFSHORE WINDFARMS LIMITED
(4) ORSTED WEST OF DUDDON SANDS (UK) LIMITED

Appellants / Respondents

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents /Appellants

Representation:

For the Appellants: Michael Jones KC, Counsel, instructed by Herbert Smith Freehills LLP

For the Respondents: Elizabeth Wilson KC, and Angharad Parry, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This decision deals with HMRC's and the taxpayers' appeals against a decision of the First-tier Tribunal (Tax Chamber) ("FTT") published as *Gunfleet Sands Limited and others v HMRC* [2022] UKFTT 35 (TC) ("the **Decision**"). The appellant companies, (each members of the same corporate group headed by Orsted A/S, a Danish company ("**Orsted**")) each carry on the trade of generating and selling electricity from windfarms located on various sites off the UK coastline. The appeals principally concern whether expenditure the taxpayers incurred on various environmental impact, technical/engineering studies (e.g. on wind, ocean and seabed conditions) and project management costs when setting up the windfarms was qualifying expenditure for the purposes of s11 of the Capital Allowances Act 2001 ("**CAA 2001**"), the particular issue being whether that expenditure was "on the provision of" plant or machinery. The relevant expenditure was significant and totals around £48 million.

2. Because it affected the ensuing analysis of what expenditure qualified, the question of what constituted the plant was itself disputed ("**the single/multiple issue**"). The FTT rejected HMRC's case that each wind turbine and each connector cable were separate items of plant instead agreeing with the taxpayers that the plant was made up, in respect of each windfarm site, of the wind turbines and cabling collectively (the so called "**generation assets**"). HMRC appeal the FTT's conclusion on the single/multiple issue.

3. The FTT went on to consider each of the sets of environmental and other technical studies, finding that only some types of study (and in some cases study expenditure only in relation to a particular windfarm site) were qualifying, while others were not ("**the qualifying expenditure issue**"). The taxpayers and HMRC each appeal respectively against the FTT's decision in relation to the study expenditure which the FTT found against them on.

4. The taxpayers also appeal various other issues on which the FTT found against them: whether the taxpayers were otherwise entitled to relief for the expenditure claimed as a revenue deduction under s61 Corporation Tax Act 2009 ("**CTA 2009**") (the "**revenue deduction issue**") and as to whether amounts had been conclusively determined as well as the tribunal's jurisdiction and power to amend the returns in view of the relevant returns and closure notices ("**the quantum and closure notice issue**").

BACKGROUND FACTS AND FTT DECISION

5. Over the course of the two-week hearing, the FTT received a great deal of evidence comprising documents, a slideshow including videos, and oral evidence from five witnesses including two expert engineering witnesses. We pay tribute to the FTT's effort and skill in distilling these vast materials into a set of relevant and well organised underlying findings of fact, to which no challenge is made by either party. We do not, in our decision attempt to replicate the full detail of those findings, but merely to reflect enough of it to put the parties' respective appeals in context.

6. Each windfarm consists of a collection or array of wind turbine generators ("**wind turbines**") which are usually identical and are connected together electrically by cables and then further connected via substations to the public grid. The areas of sea in which the windfarms are located are vast. To give a sense of scale, the two windfarms at Gunfleet, off the coast of Essex, comprise 30 wind turbines covering approximately 17.5 km2. The windfarm at Walney off the coast of Cumbria was made up of 102 turbines covering approximately 73 km2.

7. We were shown pictures of a typical off-shore wind turbine, which broadly resemble the on-shore wind turbines which are a familiar sight around the country. Each wind turbine, which is designed to convert kinetic energy in the wind into electrical energy, is made up of a number

of component parts. At the top is the rotor (normally three blades of approximately 50-60m in length), the gearbox and generator, housed in a covering called a nacelle. This is the turbine. A cable conveys the electricity generated by the turbine down the inside of a metal tube (the tower) on which the turbine sits. The wind turbine is secured to the seabed by a foundation which is connected to the tower by way of a transition piece.

8. Each wind turbine is connected by a cable known as an array cable to an offshore substation. Each array will usually connect five or six wind turbines to the substation. A high voltage cable (export cable) transmits electricity from offshore to an onshore substation from which the electricity is then transmitted to the National Grid.

9. The FTT made findings on: the operation of the wind turbines and the windfarms (each turbine behaves and operates as a single system and can operate independently of the others, but the windfarm was designed to work as a single system), the functioning of "SCADA" (supervisory control and data acquisition system) a high level control data collection system housed in the onshore substation, and on how layout or configuration needed to be optimised so as to maximise energy yield (by placement of turbines so as to minimise the "wake" of a given turbine which could reduce the efficiency of other turbines downwind).

10. It set out the construction process which included design, procurement, manufacture, supply and installation of the wind turbines (external manufacturers, such as Siemens, and contractors were used to fabricate and install the wind turbines) and the fact that while the foundations were bespoke to each turbine, the turbines were not.

11. The FTT summarised the steps in developing an offshore windfarm from the Crown Estate seeking bids and its identification of sites for each development, Orsted's pre-bid "desk-top" studies to assess site suitability and whether to make a bid, and the consents it required following bid acceptance, part of which process entailed submitting an environmental statement produced after it had carried out various environmental impact assessments. At the same time initial "metocean" studies and surveys (of wave and sea conditions) and geophysical and geotechnical investigations took place. Post-consent, further detailed geophysical and geotechnical studies were undertaken which enabled the design of the individual wind turbine foundation locations and the design of the foundations and which could mean reconfiguration of the site. We will cover more of the detail of the various environmental and other studies under Issue 2.

LAW

12. Section 1(2)(a) of CAA 2001 provides allowances in respect of capital expenditure in respect of, inter alia, plant and machinery.

13. Section 11 of CAA 2001 sets out the general conditions as to the availability of plant and machinery allowances:

> **"11 General conditions as to availability of plant and machinery allowances**
>
> (1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
>
> (2) "Qualifying activity" has the meaning given by Chapter 2.
>
> (3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.
>
> (4) The general rule is that expenditure is qualifying expenditure if—

> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
>
> (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
>
> (5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3."

GROUNDS OF APPEAL AND ISSUES

14. We address the parties' grounds of appeal as we go through the issues.

ISSUE 1 – SINGLE/MULTIPLE PLANT

15. As to what constitutes plant, as is well-established, and as the Court of Appeal noted in *Cheshire Cavity Storage 1 Ltd v HMRC* (at [32]), there is no statutory definition of "plant" but the meaning of the term has been discussed in a large number of cases. Reflecting the way the parties have argued their cases, we come on to focus on two in particular: *IRC v Barclay Curle Co Ltd* [1969] 1 WLR 675 (expenditure in relation to a dry dock) and *Cole Brothers Ltd v Phillips* [1980] STC 518 (expenditure in relation to electrical installation in a department store).

16. It is not in dispute that the considerable amount of expenditure on buying the wind turbines is qualifying expenditure and that the wind turbines and cables are items which are capable of being plant. The relevant issue here is whether *each* wind turbine and *each* connected array cable are single items of plant, as HMRC argue, or whether the wind turbines and array cables *collectively* (the "generation assets") are an item of plant, as the taxpayers argue. This issue may affect the analysis of what study expenditure qualifies under Issue 2 as expenditure "on provision of plant". For instance, expenditure relevant to the general configuration or layout of the wind turbines on the site could more readily be argued by the taxpayers to be "on the provision of plant" if the wind turbines and cabling collectively were a single item of plant.

17. The FTT considered the parties' competing submissions on this issue, which we outline and address in more detail below, concluding (at [112](2)) that the relevant test was that set out in *Cole Bros.* The FTT described the first-instance Special Commissioners decision in that case, (which was upheld by the House of Lords), as being a case where:

> "… taking into account the dry dock in *Barclay Curle*, [the Special Commissioners had] indicated that the component (or individual) parts need[ed] to be directed towards a single purpose"

18. The FTT noted the above test was:

> "endorsed by Lord Hailsham when he said that the analysis needs to be of the individual components regarding the nature and function of each."

19. Accordingly, the FTT continued (at [112(2)]), that meant that:

> "…if, on the evidence, the component parts of the windfarm [were] directed towards a single purpose, then those assets [could] be treated as a single item of plant."

20. The FTT also described the test this way at [112(4)]:

> "(4)… the test is whether, taking into account the nature and function of the individual components of a composite item, those components are directed towards a single purpose."

21. Ms Wilson KC, who, along with Ms Parry, also appeared before the FTT, argues on behalf of HMRC that this "directed towards a single purpose" test was wrong and that the FTT

therefore erred in its approach. The FTT ought to have adopted the test set out in *Barclay Curle*. That was whether the putative single item was "one integral item of plant" and whether it had a "distinct operational function". HMRC argue the FTT not only misinterpreted *Cole Bros* (which understood properly was doing no more than applying the correct test in *Barclay Curle*) but then went on to apply an erroneous test of whether there was a single *business* purpose. HMRC also argue the FTT's approach amounted to "an aggregation test" which had no authority.

22. Mr Jones KC for the taxpayers, who also appeared before the FTT below, argues the test the FTT adopted and applied was the correct test: as set out in the House of Lords' endorsement of the Special Commissioners' decision in *Cole Bros*, the issue was one of fact and degree taking into the account nature and functions of the component parts and whether they were "directed towards a single purpose".

23. As regards the FTT's *application* of the relevant test *to the facts*, the taxpayers argue the "generation assets" i.e. the wind turbines and array cables together (but not the onshore substation or cable onshore) were plant, whereas HMRC argue each wind-turbine (and each set of array cables connecting the five or six wind turbines to the offshore substation) were individual items of plant.

24. The FTT in fact found at [145] that "each windfarm" was a single item of plant stating, "Their function is to generate electricity, ramp up the voltage of that electricity, and then feed it into the National Grid". Both parties highlight that neither of them invited the FTT to consider whether the windfarm, as a whole, was an item of plant.

25. However, agreeing with the taxpayers, the FTT also found the "generation assets" (the wind turbines and array cables) comprised a single item of plant at [147], explaining their purpose was "directed to the single purpose of generating electricity". They also went on to make a finding in the alternative that "each wind turbine is an item of plant as, too, are the array cables".

Discussion on Issue 1

26. Whether something is a single item of plant or multiple items is not an issue that arrives for decision by a court or tribunal as an abstract matter at large. There is typically a financial imperative underlying the question "is it [*it being the putative item*] plant?" to ascertain what expenditure qualifies. The "plant" is thus put in opposition to something else. The "something else" is usually framed by the parties' competing submissions. More specifically in very many cases the definitional issue of plant concerns whether something is expenditure on plant on the one hand and expenditure on the setting or premises for the plant on the other because to analyse whether something is plant or premises one needs to know what the plant in question is. That was the context for the House of Lords' decision in *Barclay Curle.*

Barclay Curle

27. The case concerned a shipbuilder's capital expenditure for the purposes of s279 Income Tax Act 1952, a predecessor provision to s11, on 1) excavating a dock basin and 2) concrete work to the walls and bottom of it used for the construction of a dry dock. The function of the dry dock was "to lower ships into a position where they [could] be securely held exposed out of the water and inspected and repaired and to raise them again to a level where they [were] free to sail away". The taxpayer was successful on the concrete works, but not the excavation costs, before the Special Commissioners, and on both sets of expenditure on appeal to the Divisional Court and before the House of Lords, where the Revenue's appeal was dismissed by the majority (Lords Reid, Guest and Donovan) with Lord Hodson and Lord Upjohn dissenting.

28. Lord Reid, at page 679C when asking whether the item was "plant" explained:

> "The only reason why a structure should also be plant which had been suggested or which occurred to me is that it fulfils the function of plant in the trader's operations."

29. Lord Reid noted (page 679F) there were two stages to the operations, first isolation of the ship from the water, second, carrying out inspection and repairs, the first stage being equally important. He considered:

> "the whole dock, I think, is the means by which, or plant with which, the operation is performed."

30. Lord Guest, after noting the classic definition of plant in *Yarmouth v France* (1887) 19 QBD 647, at 658[1] said (at 685G) the "functional test is… essential at any rate as a preliminary". Considering the concrete work in isolation from the rest of the dry dock was unrealistic in his view. It was "the level of the bottom of the basin, in conjunction with the river level which enable[d] the function of dry docking to be performed …To effect this purpose excavation and concrete work were necessary" (at 685H).

31. Lord Donovan considered the "dry dock ought…for present purposes to be regarded as a whole with all its appurtenances of operating machinery, power installations…".

32. The House of Lords further held that the expenditure on the excavation of the dock basin was "on the provision of plant". That part of the decision is relevant to Issue 2 and we discuss it there.

Cole Brothers

33. Just over a decade later, another case concerning the meaning of "plant" was decided by the Special Commissioners and appealed via the Court of Appeal to the House of Lords. The taxpayer was a member of the John Lewis group and the facts concerned expenditure on the installation of various items of electrical equipment in a John Lewis department store in the Brent Cross shopping centre such as light fittings, conduits and cables, transformers, a main electrical switchboard and "riser cubicles".

34. As mentioned above, it was the Special Commissioners' decision which first mentioned the "directed towards a single purpose" test which features in the argument before us. That appeared in the following extract from the Special Commissioners' decision:

> "We do not accept Mr. Heyworth Talbot's [*the taxpayer's counsel's*] contention that the entire electrical installation should be regarded as a single whole; and we reject his submissions (1) and (2). Notwithstanding the *Barclay, Curle* case, where Lord Reid and Lord Donovan set their faces against the ' piecemeal' approach, and the *St. John's School* case, where Templeman J., as he then was, said ' In my judgment, one looks at the whole...' we consider, after careful reflection, that the multiplicity of elements in the Brent Cross installation, and the differing purposes which they serve, make the present case distinguishable from the dry dock in *Barclay, Curle* and the laboratory and the gymnasium in *St. John's School*, each of which, despite its component parts, was directed towards a single purpose. To adopt the approach advocated by Mr. Heyworth Talbot seems to us to be too sweeping, not only in the particular circumstances we have before us, but as a general approach."

[1] "in its ordinary sense, [plant] includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business: "

35. The Special Commissioners thus rejected the taxpayer's case that the various items of equipment constituted a single entity of plant and went on to categorise the various individual items. The taxpayer appealed some of those categorisations with mixed success in the Court of Appeal and further appealed some of the Court of Appeal's rejection of these to the House of Lords together with the initial issue of whether the electrical installation was a single whole. The House of Lords found unanimously against the taxpayer on that question in separate speeches.

36. Lord Hailsham, (in a speech with which Lord Bridge agreed) noted [at 1454B] the question which underlay much of the controversy (as it was in decided cases such as *Barclay Curle*) was the contrast between plant and the place in which the business was carried on. The key issue for him was whether an issue of law had been identified (the appeal was restricted to points of law) as opposed to an issue of fact and degree. He considered [1457C-D] the decision "was one of fact and degree to be decided on evidence and inspection". He continued:

> "Once it is accepted that it was open to the commissioners to decide as a tribunal of fact that " the multiplicity of elements in the Brent Cross installation and the differing purposes which they serve " entitled the commissioners to reject the " entire entity " submission and come to an analysis of its individual components having regard to the nature and function of each, it seems to me that we are clearly in the realm of fact and degree, and, in the absence of a clear and " identifiable misdirection in point of law, I do not think it possible to differ from it, at least as to the items still in dispute…"

37. Lord Wilberforce also considered the arguments in favour of the single entity approach failed because, whatever their merits, they involved no error of law. The Special Commissioners had not rejected the single entity approach as a matter of principle. Their decision was "based on their examination of the facts and upon their personal inspection and so was in the realm of pure fact". The only possible principle of law would be that "no reasonable body of commissioners could have come to the conclusion which they reached". What remained was an ultimately unsuccessful attack on the individual findings.

38. Lord Edmund-Davies also considered the appeal had to be dismissed as no question of law had been identified, the question was one of fact for the Special Commissioners alone. Similarly, Lord Russell considered the question was one of fact and degree for the Special Commissioners and, no error having been identified, the House of Lords could not substitute its view. In a passage which the FTT referred to (at [148]) (albeit with some transcription errors) Lord Russell explained (1461 A-B) he might well have come to the view the disputed equipment was plant:

> "It was ordered and installed under a contract separate from the contract under which the building designed for use as a department store was erected. The equipment had as its purpose the lighting of the department store in the manner considered most appropriate for the use of the building in carrying on the trade therein of selling such goods as are commonly found on sale in a department store. The equipment was not integral structurally with the building."

39. Emphasising the references to function and operations in the above extracts, Ms Wilson submits the appropriate approach, as set out in *Barclay Curle* entails a granular analysis, not a high-level business purpose or "directed towards a single purpose" test. The question is: what are the trading operations? However simply saying the trading operation is the sale of usable electricity to National Grid is, in her submission, too high level. In *Barclay Curle*, the hydraulic function identified in respect of the dry dock was obviously not the only operation. The question is "What is the tool, the piece of apparatus that is performing that particular trading operation?". The test was whether there was a "distinct operational function". (That adopted

the term used by Carnwath J, as he then was, in *Attwood (HMIT) v Anduff Car Wash Ltd* [1997] STC 1167 in contrasting the dry dock in *Barclay Curle* which had such function with a V shaped roof in the taxpayer's car-wash facility building which collected water to use for car washing (and where Carnwath J made the point the disposal of rainwater was a normal function of a building which did not turn the building into plant)).

40. Ms Wilson's submission is that *Cole Bros*, a case where the onward appeal was based on *Edwards v Bairstow*, did not intend to, or indeed set out a new test. The FTT wrongly used the Special Commissioners' single purpose test when all the Commissioners had been doing was applying *Barclay Curle*.

41. Mr Jones submits however that *Barclay Curle* is to be understood as a case probing the plant/premises distinction as opposed to the single or multiple entities point. *Cole Bros* was a case where the House of Lords were scrutinising the decision for an error of law but could not find it. The Special Commissioners "directed towards a single purpose" test was thereby clearly endorsed.

What is the correct test?

42. The first point to note is the uncontroversial proposition that the issue of whether something constitutes single or multiple items of plant is one of fact and degree. It will depend on the facts and circumstances and is a question for the fact-finding tribunal. This comes across clearly and consistently from the reasoning in *Cole Bros.*

43. We also note that this aspect of the test more generally reflects the nature of the question "is it plant?" (see [3] *Cheshire Cavity Storage 1 Ltd v HMRC* [2022] EWCA Civ 305 which was also referred to subsequently by the Court of Appeal in *Urenco Chemplants Ltd and another v HMRC* [2022] EWCA Civ 1587]).

44. Both parties also agree the test is not a question of whether there is a single business purpose (in other words, the taxpayer's business purpose of electricity generation is not the determinant just as the taxpayer's business purpose of John Lewis in *Cole Brothers* of selling retail goods did not mean all the items directed to that purpose were one composite item of plant).

45. Although on the face of it the parties argue for different tests, properly construed there is (unsurprisingly) little real difference, as we explain below, between HMRC's emphasis on *Barclay Curle* and the taxpayers' emphasis on *Cole Bros*. We understood this was acknowledged by the end of the parties' oral submissions.

Did Cole Bros set up a different test from Barclay Curle?

46. We agree with Ms Wilson that the House of Lords in *Cole Bros* did not purport to, and did not, set up a different test to *Barclay Curle.* As Ms Wilson points out it would be odd if it had, given *Barclay Curle* was the leading authority regarding plant at House of Lords level. We also consider that to say the House of Lords *endorsed* the "directed towards a single purpose" test gives a prominence to the test which it did not take on. The House of Lords' main concern, as regards whether there had been any error of law, was that *if* the Special Commissioners *had* said that a single plant analysis was not possible *as a matter of principle* then that would be an error of law – but their lordships were satisfied the Special Commissioners had not made that error. The emphasis was on looking at the facts and circumstances and the impression formed. The "directed to a single purpose" test was an element in that and it therefore passed muster as not amounting to an error of law. But in that context, we do not see that the "directed towards a single purpose" test was a conclusive tool. That was also, we think, the sense in which the Special Commissioners used the test in their analysis. We think Ms Wilson is right that the Special Commissioners would have had *Barclay*

Curle at the forefront of their mind and would not be seeking to take a different tack from it. The House of Lords in *Cole Bros* obviously thought so too because if they had thought the "directed to a single purpose test" was different, they presumably would have had to address that.

47. Mr Jones sought to explain why there was no dissonance between *Cole Bros* and *Barclay Curle* and therefore no need for the House of Lords in *Cole Bros* to have addressed any difference because *Barclay Curle* was a plant vs. setting case not a single vs. multiple item case. But that in our view is an artificial distinction to draw given the plant/ premises distinction very much entails reaching a view on whether something is plant. Even if *Barclay Curle* were badged as a "plant vs setting" case, the House of Lords' reasoning in *Barclay Curle* on the test necessitating consideration of function was clearly also relevant more generally (see Lord Guest above that the functional test was "essential at any rate as a preliminary"). In any case *Cole Bros* must, similarly, as indicated in Lord Hailsham's speech (see [36] above) be viewed as a definition of plant case which arose in the context of a debate around plant vs. setting.

48. The debate in this case thus condenses down to whether one should put the test (although not exclusively given the issue is one of fact and degree) in terms of "distinct operational function" or "directed towards a single purpose".

49. We see force in the submission Mr Jones developed orally that there is not a great deal of difference between the distinct operational function test and the directed towards a single purpose test given that the question of purpose when considered in respect of *things* (as opposed to persons) amounts to asking what the function of the thing is. We note Lord Guest's reasoning in *Barclay Curle* used function and purpose interchangeably (see [30] above).

50. However, there is a risk in both parties' positions that both the directed towards a single purpose test and the "distinct operational function" tests are elevated to hard and fast rules whereas the clear message from *Cole Bros* is that assessment of whether something is a single or multiple item of plant, is a matter of fact and degree. (Moreover, we do not think the FTT truly saw *Barclay Curle* and *Cole Bros* as evincing opposing tests - if it did it would be odd that it did not make this point when setting out (at [112(2)]) the Special Commissioners' reference in *Cole Bros* back to *Barclay Curle*). Instead, it is just that the single/multiple item of plant question was raised more explicitly (and more recently) in *Cole Bros*).

51. The correct approach therefore is one of ascertaining the facts and circumstances. In doing that it is relevant to look at the function of the item(s) under consideration. Whether that is described as "distinct operational function" or the item being "directed towards a single purpose" does not matter. The real point of difference between the parties here is, we consider, therefore about the *level* at which the purpose or function test is applied. This is revealed by the way Ms Wilson put her submission. She argued the FTT's analysis (at the level of the trading operation as the sale of usable electricity to National Grid) was at too high a level. In her submission, the FTT started to err by seeing the test as a separate test for single/multiple items when there was just one test – "is it plant?". She also submits that the way in which the FTT expressed the purpose of the plant actually shows there were multiple purposes: the FTT referred to purposes that wind turbines generate / array cables transport, substations step-up or transform, export cables export.

52. These submissions highlight the perhaps unrealistic aspiration of trying to encapsulate something the authorities acknowledge is a matter of fact, degree and impression in a single unifying test. Whether the item under consideration has a distinct operational function, or whether it is "directed towards a single purpose" are important questions to ask but they are not definitive.

53. With both formulations there is the potential to "aggregate up" or "disaggregate down" in that any plant of any complexity will have components with "distinct operational functions". Seemingly multiple items of plant may similarly be viewed as directed towards a single purpose when the purpose is the same or articulated as a higher-level purpose.

54. At the level of principle, it also seems arbitrary that the granularity of the vocabulary which the tribunal can summon to describe the function should drive the definition of a question of fact. A person with a more technical eye might look at the components within those purposes and discern an even more distinct operational function. A wind turbine might be said to have the multiple different purposes of its component parts. It also begs the question what is an operational function? In *Barclay Curle* the fact components within the dry dock could be broken down into more distinct operational functions did not stop the analysis that the dry dock was a functional whole.

55. HMRC also criticise the FTT for applying this single purpose test as a matter of principle because it does not exclude the substation (which may or may not have been premises) as the FTT ought to have done per a *Barclay Curle* analysis. We agree with Mr Jones, this submission is wrong as a matter of principle. Whether the whole thing is plant on proper analysis was the very point in *Barclay Curle* (if one had isolated the concrete basin then that would be premises). We consider that if there are missing steps in the analysis, as Ms Wilson suggests, that does not follow from the test (however it is described) but from the fact any test is not exhaustive. That an item can be described by a "single purpose" or "operational function" is not the end of the analysis but part of it. In any case, as a plant/premises point also underlay *Cole Bros* it would be odd if the House of Lords had thought the "directed to a single purpose test" was deficient. *Cole Bros* was not saying something different from *Barclay Curle.*

56. Similarly, the "directed towards a single purpose" test (when deployed non-exhaustively) is no more prone to give odd results than a distinct operational function test. HMRC's submissions made use of an example (given by the High Court of Australia in *Wangaratta Woollen Mills Ltd v Federal Commissioner of Taxation* [1969] 2 All ER 771) of a tractor and mower unit. That was clearly two separate items of plant despite being used together for the single purpose of providing gardening services. However, the distinct operational function of the two items together could equally be described as cutting grass and constituting the two items together as a single item. Again, the point is that the test is not definitive.

57. The "directed towards a single purpose" test does not entail a principle that one must keep aggregating to the highest level susceptible to a linguistic description or disaggregating to the lowest level of detail. The appropriate level lies in the skill and evaluative judgment of the first instance panel hearing and seeing all the evidence. Case-law establishes this is a matter of fact and degree. But it is not a free for all. There are outer limits, as with all questions of fact on familiar *Edwards v Bairstow* terms, which this is, beyond which it is not possible to say something is a single item of plant. The reasoning in *Cole Bros* acknowledges an error of law would lie where "no reasonable Commissioners could find that…" (see Lord Wilberforce extract [37] above). Similarly, in *Anduff* the main question was identified in *Edwards v Bairstow* terms. The Court of Appeal's conclusion that the findings reached by the Special Commissioners there (namely that the entire site consisting of the wash hall and the paved areas over which cars were driven or parked, or else the wash hall was a single unit of plant) were <u>not</u> open to them on the primary facts illustrates that there are limits.

Did the FTT misapply the Barclays Curle (and following what we have said above the substantively similar Cole Bros) test by adopting a single <u>business</u> purpose test?

58. Ms Wilson argues that, even if the FTT started with a focus on operational purpose, it "unmoored" itself bit by bit so as to wrongly adopt a business purpose test.

59. She submits that having set out the single purpose test at [112] (as set out at [19] above) the FTT by the time it got to apply the test at [145] moved on to a different concept of a single purpose as an over-arching purpose equivalent in *Cole Bros* to the purpose of a department store being to sell goods.

60. In support, Ms Wilson argues the FTT misread Lord Russell's reasoning in *Cole Bros* (see extract above at [38]) and *Urenco* (where the taxpayer's business was uranium enrichment and the issue concerned whether various facilities, including management of a toxic by-product, constituted items of plant in that context). The FTT's treatment there showed it wrongly considered that, like selling goods in a department store, enriching uranium could be a single business purpose. Taking the facts of *Cole Bros* by way of illustration, Ms Wilson contrasts the business purpose of selling goods with the functional purpose of lighting.

61. We do not consider this a fair reflection of the FTT's reasoning when considered as a whole. It is true generation of electricity was the taxpayer's purpose. But the FTT's reasoning was not that *because* generation was the taxpayers' purpose, and the items were directed towards that purpose they were a single item. It was that the single purpose the turbines and cables comprising the generation assets was directed to was electricity generation. The fact that the generation of electricity purpose *happened to coincide* with the business purpose does not show the FTT wrongly identified or adopted a business purpose test.

62. The FTT explained at [143] the question is "taking into account the nature and function of the individual components of the windfarm, they are directed towards a single purpose". That indicates the FTT's starting point was the various components, and the single purpose in question was disclosed by that functional analysis. That is also reflected in the series of additional facts going to the functioning and operation of the wind turbines and windfarm at [141](1) to (9). If the FTT was wrongly looking for a single business purpose it appears unlikely to us that the FTT would have built its analysis from the bottom up in this way. Rather it would have straightforwardly started with setting out the taxpayers' business purpose (which it could have clearly expressed in those terms if it had wanted) and then considered whether the components were directed to that.

63. We also do not agree that the FTT's reference to Lord Russell's speech indicates any misconception on the FTT's part. The reasoning at [148] mentions the greater purpose of selling goods in a department store which the FTT clearly did not view as representing the be all and end all test. Rather its point here (and in relation to [149] regarding *Urenco*) was that this was a wider purpose within which a narrower "single purpose" could sit. (That question flowed from it looking first at whether the windfarm was a single item of plant – where the purpose was generation and transmission; and then at whether the plant consisted of the generation assets - where the narrower purpose was generation.) The FTT must have recognised the test was not about business purpose because there was no suggestion that it thought the purpose of selling goods in a department store would count as a purpose, by virtue of it being the ultimate business purpose under the "directed towards a single purpose" test. If it thought the business purpose was the relevant test it would not have been able to reconcile that with the end result and reasoning reached in *Cole Bros.*

64. Similarly, the FTT did not, at [149], reason that *because* the business purpose of the taxpayer in *Urenco* was uranium enrichment, that that could constitute a relevant single purpose. The FTT described the taxpayer in that case as "[carrying] on a uranium enrichment *process*" (emphasis added). The FTT was not setting out to describe the taxpayer's business purpose (although that coincided with it). Again, if it thought the business purpose was the relevant purpose it would not have been able to reconcile that with the result in the case which

was that the various individual facilities undertaken within the broader overall function of uranium enrichment, were single items of plant.

65. HMRC also say the FTT wrongly "aggregated" the individual items. But we do not see that it did. It is true the FTT's conclusion means that an aggregation of wind turbines constitutes a single item of plant but the FTT's reasoning was not to the effect that each turbine generates electricity and that because there are lots of them doing that then all the turbines collectively are plant. Its findings of fact show the issue was far more nuanced but that, ultimately, the FTT came to the view that the single system of wind turbines and array cabling connected together constituted a single item of plant. That was what was being advanced as "plant" by the taxpayers and the FTT agreed with it.

Conclusion on whether wrong test identified

66. In referring to the "directed towards a single purpose" test the FTT did not identify a wrong test. There was an error, insofar as the FTT considered that test was a hard and fast rule applicable in all circumstances, but it was open to use that sort of test as part of its analysis. It was consistent with *Barclay Curle* and the test HMRC advances of "distinct operational function".

Did the FTT apply the test wrongly?

67. HMRC further argue that the FTT wrongly applied the test. Given all we have said about the issue being of fact, degree and impression there can be no dispute that this is a high hurdle to get over. HMRC must show the FTT's finding was not one that it was open to reach.

68. In support, HMRC refer to a number of facts but principally those which showed the wind turbines could operate separately and independently as a single system to generate electricity individually, each having its own unique foundation built to a unique depth ([43][46] [51] [141](4) and [145]). Each turbine could be turned on and off individually without affecting other wind turbines, with sophisticated sensors and controls and each was "able to look after itself" (even if the SCADA were cut off) [44] [141(4) and (6)].

69. But as Mr Jones explained, the above does not reflect the wider nature of the findings the FTT made (including those at [141] to [146]). We note for instance other facts enabling a conclusion to be drawn (although not compelling it) that the generation assets were items of plant - the turbines were also controlled by SCADA. That system provided the means of controlling the whole windfarm as a single entity, and the location of each turbine was optimised to achieve "the maximum yield for the entire windfarms at the lowest cost."

70. Based on <u>all of the</u> facts it was in our view open to the FTT to reach the conclusion it did that the generation assets at each windfarm were plant. The generation assets also conformed to the regulatory framework which distinguished between generation and transmission assets but the FTT's reasoning was not based on that but coincided with it. That was true whether the test was "distinct operational function" or "directed towards a single purpose" to the extent that was a key factor in the analysis.

71. The facts HMRC rely on do not *compel* a conclusion that each wind turbine and set of array cables are separate items of plant. We reject HMRC's *Edwards v Bairstow* ground based on the misapplication of the legal test.

72. We acknowledge that the fact the FTT considered the whole "windfarm" was plant was wrong as neither side argued for it. However that did not undermine the fact that the FTT's ultimate conclusion was the generation assets constituted plant.

73. HMRC's skeleton also alleged the FTT erred in law in adopting Dr Andrew Garrad's evidence that there was a single "wind power station". (Dr Garrad, a Fellow of the Institution

of Mechanical Engineers and the Royal Academy of Engineering, was one of the two expert engineering witnesses). We see no evidence this was the case and Ms Wilson was right not to pursue the argument with any vigour in her oral submissions. We agree with Mr Jones' point that the FTT heard factual evidence on the operation of windfarms. Dr Garrad did not opine on whether the items were plant and there was no issue of the FTT giving undue weight or having conclusions dictated to it by a witness.

74. Even if the FTT did incorrectly *identify* a business purpose test, then that would be an immaterial error because the FTT ultimately took the *right* approach of considering whether there was a single operational function (here generating electricity) reaching a finding on that issue that was open to it.

ISSUE 2 – S11(4)(A) CAA 2001 QUALIFYING EXPENDITURE ISSUE

75. This issue concerns the various environmental impact studies, geo-technical and engineering studies and project management costs incurred. We set out further detail on those and the FTT's decision in respect of whether the relevant expenditure on them qualified below.

76. The statutory question was whether the expenditure was "on the provision of plant…". A common question relevant to many of those studies arose as to whether those statutory words captured expenditure incurred in relation to the design of the plant (which, following the earlier analysis was the generation assets), including data gathering to inform the design or installation of the plant. In the light of the case law, principally, the House of Lord's reasoning on a further issue which arose in *Barclay Curle*, and also on its own reasoning, the FTT derived a number of tests by which to determine whether the various heads of expenditure qualified or not. Both parties take issue with those tests, which the FTT arrived at as follows.

77. The FTT started by noting the taxpayers' case at [120] that "on the provision of" plant extended to expenditure which directly related to the design of the plant or its installation "since designing the plant is as necessary to its provision as its fabrication". The FTT's instinct was that there was a distinction between designs without which fabrication or installation would not be possible and those which were merely peripheral without which the windfarm and wind turbines would still be able to carry out their electricity generation function. It found support for this instinctive distinction based on necessity in the reasoning of Lord Reid and Lord Guest in *Barclay Curle* (which we discuss in more detail below) and held at [123]

> "Expenditure on design which is necessary or which must be incurred before plant can be provided, qualifies for allowances."

78. The FTT then explained this needed "… to be tested against the function or purpose for which the plant is designed". Here that was the "generation of electricity". The key to the allowability of deduction (at [124]) was whether the design was "necessary design" or "unnecessary design" – in other words without which the windfarm would be "operationally useless". In the FTT's view, if the windfarms could continue to generate electricity "(even if the amount of electricity [was] lower than might otherwise be the case if it were designed differently") then that design expenditure "fell outside the "must" or "necessary" criteria and [was] too remote."

79. The FTT also saw no principled reason for not allowing "necessary design" costs incurred by *the customer* but not the design costs incorporated within the purchase price the customer paid, and which had been borne by the manufacturer (which were allowable) ([132]).

80. In relation to expenditure on installation, the FTT considered the same legal principle applied, namely that the installation expenditure should be necessary in order to qualify. In the FTT's view, necessity, in this context, meant the taxpayers had to show "the studies [went] to

the heart of the installation process and directly related to that. The essential elements were that the installation should be undertaken "safely and effectively" ([140]).

81. In summary then, the test the FTT identified was to ask whether the expenditure was directly related to the design of plant or its installation and in doing so it drew a distinction between design which was "necessary" (without which the plant would be operationally useless) and "unnecessary design" which went to optimisation. In the context of expenditure related to installation, necessity referred to those costs incurred to ensure that the installation was safe and effective. (We adopt the shorthand the parties used of calling these tests the "necessary/unnecessary design" test and the "safe and effective installation" test.)

82. In applying the necessary/unnecessary design test the FTT also drew a distinction between studies which changed the design (which qualified) and studies which simply confirmed the design (which did not qualify) (we refer to this as the "change vs. confirmation test").

The studies and the FTT's decision in relation to them

83. The FTT proceeded to apply the above analysis to the various studies (in some cases differentiating them by reference to the respective sites). The studies can broadly be grouped into environmental impact studies, sea and sea-bed technical studies and surveys ("metocean", geo-engineering and geo-technical), and project management. Mr Jones' skeleton helpfully summarised the FTT's findings on the studies (which summary HMRC agreed). In the following section we gratefully adopt this with some minor modification and also summarise the FTT's conclusions on them.

84. In broad terms each of the environmental impact studies involved determining the potential impacts of the windfarm to the particular environmental topic and identifying potential mitigation measures to reduce those impacts.

(1) The "**Landscape, seascape and visual assessment"** (FTT [163]-[165]) addressed the impact of the windfarm on the surrounding landscape and seascape, as well as the visual impact of the windfarm by reference to different layout options together with potential mitigations.

The FTT found these studies did not directly relate to necessary design.

(2) The **"*Benthos*"** studies (FTT [166]-[172]) addressed the impact and mitigation measures in relation to benthic species (i.e. organisms living in or on the seabed) present at the site. (For example, the greater impact of tripod type foundations vs "monopile" foundations; the use of high voltage cables to reduce the number of export cables; the impact of the feet of jack up vessels (at the West of Duddon Sands ("**WODs**" site) minimising jetting operations during cable laying (at Walney); avoiding spawning periods for species using the site or sensitive to increased sediment in suspension, so avoiding mid-January to May (at Gunfleet); and the mitigation of pollutants e.g. diesel and sewage discharges from construction vehicle and activities as well as using aluminium anodes for wind turbine protection as this was non-toxic).

The FTT decided the studies only qualified insofar as they related to safe installation (which included safety from the perspective of the benthos living organisms) and only qualified for necessary design on WODs.

(3) **Ornithology and collision risk studies** addressed the potential impacts and mitigations arising from the construction, operation and decommissioning of the windfarm identifying the type and population of birds likely to be affected; their migratory and other habits; whether they were protected species; and their range of flight heights.

The FTT found these were not qualifying.

(4) **Fish and shellfish studies** addressed impacts and mitigations in relation to the presence of fish and shellfish species in the vicinity of the windfarm and export cable routes.

The FTT found these were qualifying insofar as they went to safe installation (safety being assessed from the perspective of the fish and shellfish populations).

(5) **Marine mammal studies** involved determining the key species in the area of the windfarm and their populations, such as of whales, dolphins and seals and the impacts on them and possible mitigations.

The FTT found these studies were qualifying insofar as they informed the companies how to install safely from the perspective of the marine mammals.

(6) **Archaeology, wrecks and cultural heritage site studies** involved determining the number of maritime and archaeological sites and finds such as known wrecks, reported losses and recorded obstructions including unexploded bombs or war graves within the area of the windfarm and historic settlements; showing the location of wrecks, obstructions and finds; identifying the potential impact during construction, operation and decommissioning on archaeological remains; and proposing mitigation to minimise those impacts.

The FTT found the studies were qualifying insofar as they informed the companies how to install safely.

(7) **Noise assessment studies** addressed the level of underwater noise and airborne noise during the construction, operation and decommissioning of the windfarm; determining the patterns of noise during those phases and proposing mitigation measures.

The FTT found these qualified in principle but duplicated the work of the marine mammal studies.

(8) **Telecoms and radar interference studies** addressed the determination of existing cable routes and the location of television and radio transmitters. They involved the determination of potential electromagnetic interference to signals by radiation emitted from generator equipment on the windfarm site; and determining potential disturbance to submarine telecommunication cables by electricity export cables from the windfarms.

The FTT found these studies to be non-qualifying.

(9) **Traffic, transport and access studies** addressed the level and type of air and maritime traffic in the windfarm area and the risks of collision; determining any interference with aviation routes from nearby airfields; identifying navigational risks for commercial and recreational shipping and options to mitigate these risks; identifying the impact on tourism in the local area; identifying vessel anchoring and dredging spots; and determining cumulative impacts with other planned windfarm developments nearby.

The FTT found these studies qualifying in so far as they went to safe installation.

(10) **Socio-economic and tourism assessments** addressed the impact of the windfarm construction and operation on the human environment in the region, including any increase in employment and impact on tourism.

The FTT found these studies did not qualify.

(11) "*Scoping*" (FTT [159] - [162]); The FTT described these as a prelude to the above environmental studies identifying the matters that would be considered by those studies and the reasons for them.

The FTT found none of these studies qualified.

Metocean studies

85. Metocean studies are studies of sea depth, wind conditions, wave conditions, tidal conditions and current conditions obtaining and generating data for a number of purposes.

(1) Wind conditions determine the likely energy yield and are required to ensure that the windfarm is configured to maximise economic profitability.

(2) Regarding the choice of the turbines, the data enables the design loads to be calculated (these are essentially the maximum stress and fatigue from external forces that a structure is designed to tolerate) and the capacity of the turbine chosen.

(3) The data feeds into the design of the foundations and the transition pieces. Maximum water depth is relevant to foundation dimensions and the foundation and transition piece must be designed at the right height to ensure that the upper part of the wind turbine and the rotor blades are adequately clear of the water. Once the detailed metocean studies have been carried out, simulations are then made by Orsted and the manufacturer to calculate design loads on wind turbines with different design frequencies. The manufacturer will produce foundations and tower designs based on the design load simulations in an iterative process until final design is reached. This process takes into account the impact of the changes to the design on the natural frequency of each wind turbine. The thickness of the steel cans that comprise the transition piece varies according to the loads that will be placed on the turbines by the waves and the wind and it is therefore necessary to know the wind wave and current loads on the structure in order to design the transition pieces.

(4) The data enables an assessment to be made of scour effects (erosion by hydrodynamic forces) and thus what scour protection is required (particularly for the cables). The information regarding water depth plays a significant role in determining the platform levels for each wind turbine and vessel interfaces and access ladders. A bigger depth range results in more steelwork in the foundation, thus impacting cost and overall design.

(5) Metocean conditions must be understood in connection with all offshore engineering activities such as transportation of components to the project site, positioning of construction vessels, jacking and crane operations, vessel selection, piling, drilling, seabed levelling and placement of scour protection, diving, cable laying and burial.

86. There are two stages of metocean studies:

(1) The first takes place at the time of the desktop assessments to assess the viability of the project in the first place. This tends to use relevant information which is in the public domain, having been obtained in previous metocean studies of the same region. It is at this stage that the studies feed into the economic viability of the project.

(2) The second stage metocean studies are more detailed and bespoke and ideally would take place after the operator has access to the site. In these appeals, the detailed metocean studies took place following the environmental impact assessment.

87. Data gathered from the metocean studies is used in specialist software to determine the optimal turbine layout for that site. There are no statutory or regulatory obligations on Orsted to carry out the metocean studies.

88. *The FTT found the desktop studies were non qualifying whereas the detailed metocean studies were necessary design for the windfarms and thus qualified.*

Geophysical and Geotechnical surveys

89. **Geophysical surveys** provide data on seafloor features, water depth and soil stratigraphy as well as identifying hazardous areas on the seafloor and man-made risks such as unexploded ordnance using non-intrusive techniques such as echo sounding.

90. **Geotechnical investigations** (which were conducted following geophysical surveys) use the information obtained to target soil/rock strata boundaries and engineering properties or specific seabed features to ascertain the characteristics of the soil. They involved such techniques as borehole drilling and laboratory tests.

91. There are a number of rounds of geophysical and geotechnical studies, which are carried out at the same time as the environmental impact studies. At this stage these reconnaissance studies are site wide since the specific location of the wind turbines has yet to be established. Being generally the most expensive surveys, the detailed investigations only take place as it becomes increasingly apparent that there is a firm commitment to proceed with the project. The results affect turbine and foundation design as the data from them is built on by the detailed second round studies.

92. The purpose of the reconnaissance studies is to determine whether the site is suitable for the installation of a windfarm in the first place. But they can also contribute to the configuration and layout of the site and the particular sites on which the wind turbines and the substations might be located. This is critical to energy yield and thus the economics of the project. They also contribute to the routes of the cables.

93. The detailed geophysical and geotechnical studies are usually undertaken after certain consents have been granted and involve an examination of each proposed wind turbine location. This leads to the significantly higher level of detail and consequently costs. These final studies feed into the design of the foundations of each individual wind turbine. They also feed into the design for the foundations of the offshore substation. The results of the studies might also have an impact on the overall configuration of the site in the event that there are anticipated findings relating to geological or other seabed issues (for example boulders or unexploded ordnance).

94. These studies are an absolute prerequisite to the design, engineering, manufacture and installation of the wind turbines and the data obtained from them directly informs the precise design of each wind turbine and its foundation. The soil profile at each location is one of the primary determinants of the design load of the wind turbine. Each foundation is bespoke to its particular location and its design is shaped by the data from the geophysical and geotechnical surveys (as well as the metocean surveys).

95. In particular, the geophysical and geotechnical studies directly affect the choice of foundation for the particular wind turbine location; the design of the foundation and the nature of the materials to be used in its construction and the depth to which it should be sunk; protection and mitigation against scour; the design of the transition pieces; the design and choice of the other components of the wind turbine; analysis of corrosion effects; the routes of the array and export cables; and the construction and installation process.

96. Orsted also carries out a further round of geophysical and geotechnical investigations, after the final investment decision (FTT [32])) and just before the construction phase. It does this partly to check whether there have been any changes since the first investigations and to obtain a detailed soil profile of each individual location into which the foundation is to be installed and partly to obtain final geological data to input into its computer models.

97. There are no statutory or regulatory obligations on Orsted to carry out the geophysical or geotechnical studies.

98. *The FTT found all three rounds of studies qualified.*

Project management

99. Each project company has a separate board, steering committee and management team. The board includes executives from the Orsted group and is where formal high-level decisions are made. The board appoints a steering committee to manage the project and ensures that it performs as intended and decided by the board and that it is compliant with all relevant rules and regulations. The steering committee makes decisions on behalf of the project when outside the approved mandate of the project or if the project is looking to commit to larger contracts.

100. Personnel from different lines and functions within Orsted are pulled together to form a project team dedicated to work on a specific project. Resources are drawn internally from all technical and specialist areas. The project companies do not have employees. The services of the Orsted personnel which are supplied to the project company are charged to their project company on a cost-plus basis.

101. Within Orsted a programme director has responsibility for the capital expenditure budget for a windfarm construction project and each work stream is headed by a package manager. Seconded personnel working on a particular project record their time on that project on a timesheet. Personnel who are not working on a specific project are cross charged on the basis of a pre-agreed budget.

102. The metocean studies, geophysical and geotechnical studies, environmental impact surveys, legal advice, obtaining of consents and other land rights, along with the construction of the windfarms and the wind turbines and their certification all required the involvement of external contractors.

103. Project managing those external contractors was undertaken by personnel seconded to the project companies, acting on behalf of the project companies. Such personnel were also involved in evaluating data from the surveys.

104. *The FTT considered these items of expenditure could comprise preliminaries (in the nature of general overheads) and should be allowed to the extent they could be apportioned to the studies which attracted allowances. As regards project management fees the FTT allowed the costs of negotiating contracts with manufacturers, oversight of fabrication and installation and the costs of procuring and managing those commissioned to produce the studies (that the FTT allowed) and the evaluation and analysis of the data.*

105. In summary, the FTT found in the taxpayers' favour on expenditure on the **Benthos studies** (WODs only for necessary design and all studies for installation), the **Fish and Shellfish studies**, the **Marine mammal studies** (in principle only, but not in practice because of double-counting) the **noise assessment studies, and the traffic transport and access studies** (for installation only). Expenditure on the geophysical and geotechnical studies also qualified for all rounds both in terms of necessary design and safe and effective installation. As for the metocean studies, the detailed studies, but not the desktop studies, also qualified both in terms of necessary design and installation. Finally, the project management expenditure qualified in principle (as preliminaries).

Parties' submissions on Issue 2

106. Both sides appeal on this issue. The taxpayers appeal each of the conclusions against them on the remainder of the studies and elements where the relevant taxpayer company or companies did not succeed apart from the socioeconomic studies and desktop metocean studies

(where they say the FTT was wrong in principle but where the taxpayers do not challenge the FTT's conclusion in view of the factual findings it reached). HMRC challenge each of the findings that the expenditure was qualifying except in relation to preliminaries (apart from the extent to which there was double counting).

107. Both parties agree the FTT identified the wrong test but disagree on the appropriate test. The taxpayers say the FTT's necessity test was too strict, whereas HMRC say it was too generous.

108. The taxpayers' submission, in summary, is that the FTT misinterpreted *Barclay Curle* as setting out a definitive test of necessity when all the case established was that where the expenditure was necessary (as it was on the facts there) it should not be excluded from qualification. The FTT's formulation would also discourage innovation and inefficiency, and safety (to the extent the focus was on functional necessity). There was also no logical basis for the change vs confirmation of design test (something which confirmed design is just as valuable and one would not know at the outset that it would confirm the design). The taxpayers accept the FTT correctly identified that safety was a key feature of installation (so do not take issue with how necessity was interpreted in the context of installation) but submit there were instances where the FTT wrongly applied its safe and effective installation test to disqualify expenditure.

109. HMRC agree the FTT misinterpreted *Barclay Curle* but conversely submit the FTT's necessity test wrongly broadened the scope of s11. The test gave too wide a meaning of "on the provision of" leaving no meaningful scope for questions of remoteness contrary to the House of Lords' guidance in *Ben Odeco Ltd v Powlson (HMIT)* [1978] 1 WLR 1093 and *Barclay Curle.* The focus of s11(4) was the actual physical supply of the actual item of plant. That would include the purchase price, the actual installation cost or actual fabrication cost and "parasitical" items such as transport or basic installation. The statutory question at all times remained: is it expenditure on the provision of the plant for the purposes of the trade? Transport and installation expenditure could be understood as falling within "on provision of plant" in the sense that they made the provision choate or complete.

Discussion on Issue 2

Legal principles – what is the correct approach to interpretation of s11?

110. In deciding whether we agree with the parties that the FTT erred, and if so what the correct approach is, it is convenient to start with the primary source of case-law for the FTT's test: *Barclay Curle.*

Barclay Curle

111. As mentioned above, *Barclay Curle*, as well as dealing with the disputed issue of what constituted the plant, also raised a further second issue that even if the dock or concrete work were plant, the cost of excavating it did not qualify. Lord Reid and Lord Guest reasoned as follows:

112. Lord Reid (at 680D) said:

> "So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of the plant for the purpose of the trade of the dock owner. In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed: until then it is of no use for the purposes of the trade. This plant, the dock, could not even be made until the necessary excavating had been done. All the commissioners say in refusing this part of the claim is that this expenditure was too remote from the provision of the dry dock. There, I think, they misdirected themselves. If the cost of the provision

> of plant can include more than the cost of the plant itself, I do not see how expenditure, which must be incurred before the plant can be provided, can be too remote."

113. Lord Guest said at 686F:

> "The commissioners …view [was] that the expenditure was 'too remote' from the provision of the dry dock. In my view, they were wrong in excluding this expenditure. The excavation was a necessary preliminary to the construction of the dry dock and, in my view, was covered by the provision of plant under section 279. 'Provision' must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid."
>
> It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the drydock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary."

114. He also said later:

> "The excavation was a necessary preliminary to the construction of the dry dock and in my view, was covered by the provision of plant under section 279. 'Provision' must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid."

115. Lord Donovan also agreed the excavation costs qualified noting that:

> "Similar expenditure incurred in relation to a building or structure is now regarded as " expenditure on the construction " of such building or structure for the purposes of section 265 (1) without any further or more express provision, and I think rightly so…"

116. Lord Upjohn (who had dissented on the first issue of whether the dock was plant) agreed with Lord Reid's reasoning on the second point. Lord Hodson who similarly had dissented on the first issue did not express a view on the second.

117. The FTT explained *Barclay Curle's* support for the test of necessity in the following terms at [121]:

> "*Barclay Curle*…authority for the proposition, derived from the extracts from the judgment of Lord Reid and Lord Guest which are set out above [*these appear at [112] and [113] above*], that expenditure which must be incurred before plant can be provided is not too remote. It qualifies for allowances as being "on the provision of" the plant. The word "must" in Lord Reid's judgment chimes with the word "necessary" in Lord Guest's judgment."

118. HMRC disagree that the House of Lords was saying any expenditure that had to necessarily be incurred before the plant could be provided qualified. The FTT and taxpayers were wrong to read "before" in Lord Reid's speech as referring to "what must be done before there is a provision". That was different to expenditure incurred <u>on</u> provision. All Lord Reid was saying, HMRC submit, was that on the facts of that case there was not an <u>actual provision</u> without the plant being installed or transported. Similarly, HMRC submit, Lord Guest was not advancing a necessity test. The hole below water level was an integral part of the plant – it was in that sense of <u>constructing</u> the plant (which included the concrete lined basin) that the excavation and concrete work were considered "necessary". This was also how the House of Lords read the case in *Ben-Odeco* – see [128] below. The taxpayers argue the House of Lords was saying that such expenditure would qualify, but it was not saying that that was the <u>only</u> way expenditure could qualify.

119. We agree with both parties' submissions that the House of Lords was not expressing any general requirement of necessity, certainly in the way the FTT understood it. However, we prefer HMRC's interpretation, in essence for the reasons Ms Wilson, advanced, that the House of Lords was not saying that *anything that had to be done* before a provision of plant could take place qualified. We thus disagree with the taxpayers' interpretation that the House of Lords was simply confirming that necessary expenditure incurred before provision could take place should not be excluded.

120. The House of Lords' reasoning, in our view, must be reconciled with the particular statutory words that were being construed ("on the provision of plant") and the particular nature of the plant in question there – a basin that was excavated below sea level. The House of Lords made clear that the provision of plant could include more than the supply and the purchase price, but Lord Reid's reasoning is instructive insofar as it clarified the reason the installation of plant was covered. That was because, without the excavation, the plant could not be said to have been provided. As Ms Wilson put it, the provision of the plant was inchoate or incomplete.

121. In summary therefore, *Barclay Curle* does not impose a necessity test but makes the point that "provision of plant" may cover more than the cost of plant itself or its actual supply. It can also cover expenditure on installing the plant on the basis that without installation the plant cannot be said to have been provided for the purposes of the trade.

Ben-Odeco

122. *Ben-Odeco* was a decision of the House of Lords which concerned whether finance costs and commitment fees the taxpayer had to incur for it to finance the construction of plant in the form of oil rigs for its oil rig hire trade were "on the provision of" plant. The House of Lords dismissed the taxpayers' appeal (Lord Salmon dissenting) holding that the expenditure was not incurred on the provision of the oil rig.

123. The taxpayer's arguments included that the statutory words included all items of expenditure properly incurred in the provision of the oil rig (which would include the cost of financing the payment for it) whereas the Revenue argued the only expenditure on the provision of the oil rig was in effect on its price, the fees and interest being on the money to pay for it.

124. Lord Wilberforce discussed various authorities. In contrasting the different legislation relevant to a Commonwealth authority, he said this about the UK legislation:

> "…I bear in mind that it arose under a different statute and one which not only uses a different expression, but whose policy as regards deductions seems to be more liberal than the U.K. statute. The expression " capital cost to the taxpayer " makes it easier to include within deductible expenditure costs which the particular taxpayer incurs, whereas the U.K. words, more objectively, focus on expenditure directly related to the plant. The one draws a line round the taxpayer and the plant; the other confines the limiting curve to the plant itself."

125. The authorities not being of decisive assistance he moved on, at 1098B to discuss:

> "An important principle of the laws of taxation… that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment…".

126. He noted different results would follow depending on the means by which the plant was paid for e.g. debenture vs shareholder funding and whether interest on borrowing could be capitalised. He acknowledged "If the law is that it offers the taxpayer these options, he is of course entitled to select that which suits him best" continuing "but an interpretation which introduces such a large element of subjectivity is to be avoided."

127. Concluding the appeal should be dismissed, he explained (1098 D-F):

> "The words 'expenditure on the provision of' does not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant", so that is the word "on" not limiting it necessarily to the bare purchase price, but including such items as transport and installation in any event not extending to expenditure more remote in purpose. In the end the issue remains whether it is correct to say that the interest and commitment fees are expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision of plant...."

128. Lord Hailsham (1100A-B) rejected any analogy with *Barclay Curle* on describing it as a case:

> "which decided that the excavation of the necessary basin for the construction of a dry dock was physically part of the same operation, and ranked for allowance as part of the expenditure on the provision of the dry dock itself."

129. He continued:

> "Neither of these cases really touches the question whether the words 'expenditure on the provision of machinery or plant' are wide enough to include money spent on the acquisition of money the main purpose of which was to pay for machinery or plant, as distinct from money actually expended in order to pay for the construction (or purchase) transport and installation of the machinery or plant itself."

130. At (1099F), noting the parties' respective arguments he acknowledged the statutory words could bear either construction but preferred "decisively" (1100E) the narrower construction advanced by the Revenue that had been accepted below by the Special Commissioners and Brightman J below in the High Court. His reasoning included his view that the taxpayer's contention did not conform to the policy of the statute without that giving rise to abuse, the similar point Lord Wilberforce had raised that taxpayers should be treated the same irrespective of their means of funding, and that the expenditure was on the provision of money not plant which he explained as follows (at 1100F):

> "... In the first place I believe that the more accurate and the more natural answer to the question on what was the £5½ million spent, is that £5 million was spent on the provision of plant and machinery and £500,000 on the loan charges required in order to obtain the money to pay for the plant and machinery."

131. Lord Russell dismissed the appeal on the basis of similar points regarding the similar treatment of taxpayers irrespective of their funding means noting (at 1105H):

> "It may in the net result be in the financial position to incur capital expenditure on the provision of plant, to provide itself with plant; but expenditure incidental to obtaining that financial position is not in my opinion within the language of the section. Had it been otherwise intended quite different language would have been selected in order to embrace expenditure so commonly involved as a preliminary to the provision of plant of magnitude"

132. Lord Russell also considered the taxpayer's argument regarding a disparity in treatment between the situation where the person providing the plant had incorporated finance costs into the price of the plant (which would qualify) and the non-qualification of their financing costs if their argument were not accepted. He rejected that argument as follows (1106B):

> "That is so: but I do not follow the conclusion from that fact. It does not appear to me to be an alternative to borrowing by the purchaser. The supplier's price

> would reflect the whole cost to him of supplying the plant, including overheads, interest on necessary borrowing, or on commitment of working capital, and a profit element, the whole price being subject to a perhaps competitive market. I am not able to see how the build-up of the supplier's price can have any relevance to the problem raised in this appeal."

133. He went on similarly to dismiss the appeal on the basis that the provision was of finance not plant (1106G):

> "In my view the question to be asked is, what is the effect of particular capital expenditure? Is it the provision of finance to the taxpayer, or is it the provision of plant to the taxpayer? In my opinion the effect of the expenditure was the provision of finance and not the provision of plant. I would add that I do not seek to confine qualifying capital expenditure to the price paid to the supplier of the plant. I should have thought, for example, that if the cost of transport from the supplier to the place of user is directly borne by the taxpayer it would be expenditure on the provision of plant for the purposes of the taxpayer's trade. And there may well be other examples of expenditure, additional to the price paid to the supplier, which would qualify on similar grounds. But such matters are not for decision in this appeal."

134. Lord Salmon dissenting considered, in agreement with Lord Hailsham, that both meanings were possible but that the Revenue's narrow construction, favoured by the majority, was not in accordance with the policy or objective of the statute of incentivising undertakings to provide themselves with new and efficient plant and machinery and where it must have been generally recognised new plant was often acquired with borrowed money.

135. Two clear themes emerge in the majority's reasoning. First the need to avoid an interpretation which entails subjectivity thereby wrongly treating taxpayers, in similar circumstances from the point of view of the legislation, differently. The question of subjectivity is less relevant on the facts here – there is no suggestion that the taxpayers are incurring expenditure because of their particular circumstances that other taxpayers in a similar position would not incur. The second theme, which is more fundamental to the issues in this case, is the importance of asking what the effect of the expenditure is. In other words is it on the provision of plant or something else?

136. In agreement with HMRC, a closer analysis of *Ben Odeco* also reveals the different sense in which the "directly-related" test the FTT seized on was used (see [124] above). Mr Jones submitted, that test correctly reflected what Lord Wilberforce said. However, as Ms Wilson highlighted, the context was a contrast between a more widely worded Canadian authority which concerned plant *and taxpayer* whereas the UK legislation was concerned just with plant. Ms Wilson rightly points out the term "directly-related" is a gloss on "on". (Mr Jones makes the point that HMRC's own manuals refer to "directly related" but the answer to that is that to the extent those seek to gloss the legislation that would equally be unwarranted).

137. The fact that "directly-related" represents an unsupported gloss on "on" is consistent with Ms Wilson's submissions on the statutory language Parliament has chosen. We agree with HMRC that "on" does not mean "in connection with" or "directly related to" but signals a closer connection.

138. As regards the interpretation of "provision", it is helpful to note Brightman J's judgment [1978] STC 111 (pg120 d-h) where he noted the analogous term used in relation to relief in the Capital Allowance Act for buildings and structures was "construction". Brightman J thought that if it were accepted Parliament did not intend to have a different code for buildings and structure on the one hand, and machinery and plant on the other, the reasonable conclusion was that the two formulations were intended to comprise the same type of expenditure. The

buildings and structure provision referred to "capital expenditure on the construction of a building or structure" (he explained it would have been inelegant to use that same wording in relation to the provision of machinery and that it would be a little strange to refer to expenditure on the provision of a building or structure). He had difficulty believing interest on borrowed money "could aptly be described as part of the expenditure on the "construction" of a building or structure". This reason, while not specifically endorsed was not disapproved of in the House of Lords, resonates with the use of the term "construction" in Lord Hailsham's speech in that case and the similar comparison Lord Donovan made in *Barclay Curle* (see [129] and [115] above). While not determinative, it serves as a useful guide to test out whether the relevant expenditure would make sense under the term "construction". The clear sense that also comes across from that comparison is a focus on "doing" and "making" rather than *advice* on doing and making.

139. At a high level we would agree with Mr Jones' summary that *Barclay Curle* and *Ben Odeco* are landmarks in this area which cast light on, but do not define the parameters of, "on the provision of plant and machinery". Insofar as they both mention expenditure beyond the purchase price and transport and installation, neither case closes the door in principle to other types of expenditure. But the significance of *Ben-Odeco* is not in the parameters but the approach it indicates, and in our view, the narrowness of the sorts of expenditure contemplated by the words.

140. We can summarise the principles from *Barclay Curle* and *Ben Odeco* of relevance to this appeal as follows:

(1) "on the provision of" is not restricted to the purchase price or supply but may cover installation and transport of plant (and in principle other similar expenditure) so that the plant can be used for the purposes of the trade. (It is worth remembering that "installation" and "transport" are not included in the statutory language – these are things the expenditure on which cases have decided is "on the provision of plant".) (*Barclay Curle* and *Ben Odeco*)

(2) Provision of plant can also include construction of the plant (see Lord Hailsham above in *Ben Odeco* at [129] above). As Mr Jones points out, this reflects that some items of plant have to be built from scratch.

(3) It is not the case that any expenditure that the taxpayer needs to incur in order for the plant to be provided is allowed. One should ask what is the effect of incurring the expenditure. Is it on provision of plant or on something else? (*Ben-Odeco*)

(4) Any disparity in treatment between situations where the expenditure is built into a sale price is allowed whereas if the expenditure is incurred by the taxpayer it is not, is a function of regime (*Ben Odeco* – Lord Russell).

141. As discussed, *Barclay Curle* does not establish a test of necessity. A whole host of expenditure may be necessary before a taxpayer is in a position to provide plant, but, as the reasoning in *Ben-Odeco* illustrates, that does not make such expenditure "on the provision of plant".

142. The narrowness of the test and centrality of the plant is also consistent with Henderson LJ's summary in *Urenco* of the authorities (he referred to *Barclay Curle* and *Ben-Odeco* as the leading authorities) when he contrasted the facts of *Urenco* with:

> "…examples given in authorities of parasitical expenditure which qualifies for allowances because it is incurred in installing an item of plant or otherwise enabling it to function."

143. The result of the above in real terms is a strict and narrow application of the statutory words.The taxpayers rely on various other authorities to show in essence a wider test. We do not agree they do.

144. *Inmarsat Global Ltd v HMRC* [2022] EWCA Civ 1076 concerned the extent to which the taxpayer was entitled to capital allowances on satellite launch costs incurred by an international organisation whose satellite launch trade the taxpayer had taken over. The taxpayers rely on a statement in the reasoning in an *obiter* section of the judgment (at [66]) which concerned whether the satellite launch costs were "on the provision of" plant where the Court of Appeal said: "To give rise to capital allowances, expenditure must facilitate the 'provision' of machinery or plant…". Mr Jones emphasises the breadth and openness of the term "facilitate".

145. We consider however this argument wrongly seizes on a term used by way of explanation for a different point and elevates it to the status of a legislative term which it is not. We agree with HMRC that the reference to "facilitate" must be read in the context of the Court of Appeal's rejection of HMRC's argument that the expenditure had to be on something "leading towards ownership". The focus was on the provision of the plant and that could cover installation costs directed towards ownership. The extract relied upon followed the Court of Appeal's mention of Lord Wilberforce's explanation in *Ben-Odeco* that the legislation confined the "limiting curve to the plant itself" and *Barclay Curle* which had referred to the costs of installation without which the plant would be of no use for the purposes of the trade. There was no suggestion the term "facilitate" was intended to gloss what was said in those House of Lords authorities, thereby expanding the scope of the provision.

146. Mr Jones also submitted that the launch costs which were thought to be qualifying must have included considerable planning costs to get the satellite into orbit. While it would be reasonable to assume considerable planning was involved, we do not know whether such costs were encapsulated in the launch costs and, even if they were, the authoritative value of that would be limited as the point not being in issue did not even feature in the Court's reasoning.

147. *Samarkand Film Partnership No. 3 & Ors v HMRC* [2011] UKFTT 610 (TC) was a film scheme case where the issues included the question of whether the relevant expenditure was "incurred on the acquisition of the film" under s130 ITTOIA and whether, having concluded it was capital expenditure, it could be revenue by virtue of s134 which applied to "expenditure on the acquisition of the asset". In respect of that latter formulation the FTT drew an analogy with s11 CAA and referred to Lord Russell's explanation of the meaning of "on" in the following passage:–

> "[393] We note that s 134 is not confined to expenditure 'on the asset' but applies to expenditure 'on the acquisition' of the asset. The natural meaning of that is to include costs directly related to the acquisition.
>
> [394] If we apply Lord Russell's test: 'what was the effect of the expenditure?', in relation to the cost of negotiating and preparing the agreements, it seems to us that the answer is not that the effect was the production of a piece of paper, but was the acquisition of an asset.
>
> [395] For this reason we find that expenditure on the negotiation and drafting of the agreement to acquire the films (but not their leasing) would be expenditure on the acquisition of films, and thus deemed to be a revenue nature by s 134."

148. Mr Jones highlights that the costs of paying lawyers to negotiate a contract for acquisition was not the purchase price of the film, but one step removed from the cost of acquisition; but it was nevertheless considered part of the acquisition cost. The FTT's reasoning also held at

[395] that advice on what to buy qualified despite the test being that the costs were "on [in that case the "acquisition"]". The case showed "on" included things which were directly related to "the acquisition". Similarly, "on" included things directly related to the provision of plant such as costs of negotiating contracts for acquisition of the plant and for obtaining advice as to the plant to be acquired.

149. We agree with HMRC's submissions however that the reasoning relied on does not assist. This section of the FTT's reasoning was based on the hypothesis (which the FTT had found to be incorrect) that the relevant partnership was trading, the nature of that question and the particular trade carried on being fact-sensitive. We also do not consider one can necessarily read across the term "acquisition" vis à vis legal costs to "provision".

150. More generally Mr Jones submits the approach of asking – "is it on provision of plant or is it on something else" is not a useful analytical tool. Almost every situation can be described as on the provision of something else. For instance, in addition to the example of the cost of the negotiating of the purchase of plant with the manufacturer (expenditure which HMRC do not challenge) Mr Jones gave the example of *Inmarsat* where one could pose the question of whether the expenditure on the satellite launch was on rocket fuel rather than satellite installation or transport. However, the approach of considering whether the provision is not on plant but something else is very much part of the analysis of asking what the effect of the expenditure is and is the approach adopted by the majority in *Ben-Odeco.* The fact expenditure which is accepted to be on the provision of plant can potentially be described as on the provision of something else does not undermine the utility of the approach. If the provision on the "something else" sounds too much of a stretch to be correct, then the answer will rightly incline towards "provision on plant" (as we think it does in the rocket fuel example but is not so clear with the contract negotiation example).

151. As to HMRC's submission that the FTT's analysis on "necessary design" failed to properly address the remoteness inherent in the test of "on the provision of" plant, we would agree with the taxpayers, at the level of principle, that remoteness as an analytical tool does not really add anything insofar as it is just a conclusion that something is not "on the provision of plant". It is also difficult to discern a consistent recourse to the concept of remoteness in the cases and, although it features in some of the argument and reasoning, it does not appear instrumental. In the High Court in *Ben Odeco* remoteness was put forward by the taxpayer as reassurance that the taxpayer's interpretation was not too open ended (and Brightman J was sceptical it would function that way). In the House of Lords, Lord Wilberforce considered the words did not "extend to expenditure more remote in purpose" (1098E-F - see above [127]) (Lord Salmon also mentioned remoteness as one of the reasons why the feared abuse would not arise 1104G).

152. In broad terms we do not consider remoteness has quite the significance HMRC's submissions place on it, but would agree that to the extent it does feature in the analysis, the point at which something is adjudged too remote is not interpreted generously: while excavation costs of a hole in order to construct a dry dock basin pass muster, finance costs which were necessarily incurred in order to purchase plant did not. To the extent there is a line which needs to be drawn along a spectrum of remoteness the authorities do not suggest the marker should be placed at the more generous end. While Mr Jones is right to say their Lordships in *Barclay Curle* were dismissive of the Revenue's remoteness arguments, that was because on the facts the excavation was viewed as anything but remote.

153. Ms Parry also made some submissions on remoteness in terms of the timing of the expenditure, some of the expenditure having been incurred many years in advance of installation of the plant, but in the end she acknowledged, correctly in our view, that such

timing could not be determinative. While it was argued to be relevant, we consider it takes on an even more diminished role in our view under an interpretation where "on provision of plant" covers the making/construction of the plant, transportation of the plant and its installation. The fact some element of construction might take many years or precede the completion of the plant by many years – a not uncommon occurrence in large scale infrastructure projects – would not be any bar, in principle, to including those costs. To the extent HMRC's point is about lack of certainty, at the time the expenditure was incurred that there would be plant, we do not see the legislation requires one to take a snapshot of the state of affairs at the point in time the expenditure was incurred. On the facts of this case, there is no dispute that the plant (the generation assets – but the point would stand equally if the plant were the turbines and array cables) did come into existence. It would be extremely counter-intuitive to say some of the plant provision cost that was nearer in time to completion would qualify but that the expenditure earlier on in the project that went just as much to making the plant would not.

Safe and effective installation test

154. As to installation, the FTT developed its test of safe effective installation under the guise of a requirement of necessity. It follows from our analysis above that there was no reason to develop such test.

155. Although the taxpayers challenge the FTT's overall test of necessity, they submit the FTT was right to hold the expenditure on installation which qualified included expenditure on ensuring the installation was safe and effective.

156. The relevance of installation is that expenditure on it is capable of being qualifying pursuant to the authorities. This is on the basis that installation of the plant may be regarded as part of providing the plant. Mr Jones' submissions acknowledged this but submitted the Court of Appeal's thoughts (at [165] to [167]) on the meaning of the term in *Urenco* by reference to *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105 were relevant. (Those concerned Item 22 List C in s23 where "installation" was specifically referred to, but Mr Jones submits it is nevertheless of relevance because List C was acknowledged to be derived mainly from case-law). The Court of Appeal (Henderson LJ) in *Urenco* did not express a concluded view on the scope of the term "installation" in List C but agreed with the UT's views on the term, which included that "installation" was "apt to describe a process of integrating one thing into another, and not the construction or manufacture of an asset before it is installed". Mr Jones submits that the idea of process (which he summarised as a series of steps), where one is talking about a complex project will also involve the planning required to make those steps happen and those costs can properly be described as costs of the installation process. We consider, however, that represents an unwarranted extrapolation of what was meant by "process". The process referred to the physical activity of integration of one thing into another in contradistinction to manufacture of the plant or the act of putting a completed item of plant into place. There is no reason to suppose that physical process encompassed the intellectual effort entailed in planning and advising on how and when the installation activity should be carried out.

157. We also reject Mr Jones' submission that to disqualify the costs of ensuring safe and effective installation would mean only allowing expenditure on unsafe and ineffective installation, which clearly could not be right. The one does not obviously follow from the other. There is clearly however no prohibition on expenditure on safe and effective installation. The point is that the costs of *ensuring* safe and effective installation are not the installation activity itself. In particular, advice on how and when to install in the circumstances of a complex project might be necessary for the safe and effective installation of the plant but it is advice which puts the taxpayer in the position of being able to install the plant, not expenditure on the provision of plant (in the form of installation of the plant).

158. Mr Jones' further submission is that HMRC's stance sits oddly with its acceptance that expenditure on the contract negotiation for installation vessels qualifies. However, that is not a finding which is challenged and HMRC's acceptance of that expenditure, or, as a wider point its consistency with HMRC's guidance, is not something we consider should guide the legal interpretation of the relevant words. In conclusion on this point, we consider the FTT's test incorrectly expanded the judicial acknowledgement that installation could be encompassed within "on provision of", when there was no separate test for installation and the focus should have remained on whether the words "on the provision of" were satisfied.

Application to design?

159. With the above general principles in mind, we now turn to a central issue here: whether expenditure on design costs and on studies gathering data to input into such design qualify. The taxpayer's basic proposition is that with a bespoke item of plant, it has to be designed and fabricated before it can be provided. This can be seen most clearly with the unique wind turbine foundation which needed information from the metocean and geophysical and geotechnical studies in order to be manufactured.

160. As a starting point we note, that as with the question of installation, there is nothing to suggest there is any special rule for design. The question is always whether the expenditure is "on the provision of plant".

161. It is also important to acknowledge that design is a relatively broad term that can be understood in a variety of senses. The FTT recognised this when it said at [121] that design was a "weasel word" and then outlined two senses: a bespoke design, giving the tailor made wind turbine foundations as an example, or in a broader sense identifying the type of turbine or features it should bear.

162. In the context of design of plant or machinery we consider the above contrasts the two senses as between the *process* of design and the design as an *end product* made real in substance. The design process may be thought of as the process by which any of number of decisions including size, dimensions, material composition, component type, fabrication method are made, so as to come up with a set of instructions which can then be used to make or construct the plant. Those design decisions will be informed by the desired function of the plant and an evaluation of data. The end product of plant may well be described as bespoke or tailor-made design. The instructions used to make that plant may also be described as designs.

163. The design costs in respect of which relief is sought are those arising in relation to the process and the data gathering to inform the design process. That can be an "iterative process", as explained in relation to the way in which the foundations and wind turbines are designed above (see [85(3)]).

164. The taxpayers based their argument that design costs qualify on the logic from *Barclay Curle* that the plant cannot be made without that step being taken and therefore cannot be too remote. But that is another way of saying design is necessary for one to have plant and we have already explained in our interpretation of *Barclay Curle* and at [119] to [121] above why that is wrong. It does not follow that something, such as design, which is required to put the taxpayer *in the position* to provide plant *is* the provision of the plant. The reasoning, that without the design there would be no plant is also inconsistent with approach in *Ben-Odeco*, where even though the financing was essential to the provision of the plant that did not then mean the finance cost qualified. As set out in *Ben-Odeco* one must ask what is the effect of the expenditure? We agree with Ms Wilson's submission here: the effect of the expenditure is to create designs which put one in the position to provide plant. Provision of plant is what happens when those designs are then turned into the plant.

165. We also consider that the clear sense from the authorities is that plant, and the provision of it, appears at the centre of the basis for deduction. To provide plant assumes that there is already some notion of the plant in respect of which provision of it becomes relevant. As we have explained, provision is focussed on the cost of doing, making or constructing. The intellectual effort which goes into the design process may be instrumental to *conceiving of* what the plant, that is to be made or constructed is, but it appears odd to refer to the design of the plant (which is something which happens when the final form and shape of the plant is still to be determined) as the provision of the plant (which assumes the plant is final such that it can be provided).

166. The process of design is obviously not installation or transport, but nor is it analogous, in our view, to those categories. It is not something which is required to make the plant function for the purpose of the trade because the plant in question has already been conceived of and designed. It is in essence *advice* on how to make the plant.

167. We can also test this result using the approach Brightman J mentioned in *Ben Odeco* by seeing whether the activity, here design, makes sense under the terminology of construction. While the design process is a pre-cursor to construction, we consider it would be odd to refer to the intellectual activity of *designing* a building as the physical process of *constructing* it.

168. We accept that very many items of plant (though not all, the horse in the seminal case of *Yarmouth v France* perhaps being a good example) will incorporate some element of design process, which design may well be priced into the amount paid if the plant were simply bought by a taxpayer. That will qualify with no stripping out of the design costs. At the level of policy, we recognise the taxpayers' point that this gives rise to a disparity in treatment, without an obvious policy justification, between expenditure on design activities incorporated into a sale price, and those which are undertaken by the taxpayer (which will be a common feature in large scale projects involving bespoke plant). But as explained by Lord Russell's reasoning in *Ben Odeco*, that disparity is built into the nature of the test. It is simply a function of the words Parliament has chosen to circumscribe the relief. It should also be recognised that in the straightforward situation where an off the shelf item of plant is acquired no such disparity arises.

169. As regards expenditure on generating data inputs for design it follows that, whether or not the gathering of data inputs is viewed as part of the design process or something separate to it, expenditure on data gathering will also not qualify.

170. In further support of the taxpayers' case, Mr Jones relies on *McVeigh (HMIT) v Arthur Sanderson Sons Ltd* [1969] 2 All ER 771 as authority for the proposition that design costs qualified as "on the provision of plant". The case concerned a wallpaper manufacturer seeking relief for expenditure on the cost of designs by free-lance and in-house artists, filed in a library, from which the business chose a selection to pattern the wooden blocks and rollers to print the wallpaper. The High Court held, on the basis of the relevant authority at the time which held that a lawyer's law library was not plant, that the designs were not themselves plant. (Cross J indicated he did not agree with the authority and said he could not see as a matter of principle why the designs should not qualify as plant). The further question was whether the expenditure was on the provision of plant (being the wooden blocks, screens and rollers). Cross J noted the legislation "isolated the provision of the patterned wooden block and pose[d] the question: What did the taxpayer company spend on it?" Dismissing the Revenue's appeal, Cross J said "To my mind it cannot be right to include nothing for the cost of the design". Mr Jones argues this case tells us costs of design of plant are expenditure on provision of plant – if that were not so, the answer would have had to be the opposite of what Cross J decided in that case.

171. We agree with HMRC (and the FTT who found the case to be of limited assistance) that this authority did not, and cannot be taken to, lay down a general proposition that design costs of plant are "on the provision" of it. The case was simply saying that production of patterns that were used to make patterned blocks to make and sell patterned wall papers was on the provision of plant (the wooden blocks). Although the case refers to "design" the specific (and different) sense in which that term arose is relevant. The designs (patterns) were used to complete the plant (i.e. the wooden block) not to *design* the wooden block. The designs (i.e. the patterns drawn by the artists) were part of making the wooden block function as a wallpaper patterning block (the Revenue had conceded the blocks would be "inchoate plant" without the patterns on them).

172. As Ms Wilson explained, the authority (*Daphne v Shaw (1926) 11 TC 258*) which stood in the way of finding the patterns were plant themselves has since been overturned by the Court of Appeal in *Munby v Furlong* (1977) 50 TC 491, so Cross J was deciding the question on a premise which would now not be correct.

173. To the extent the case is taken to set down a general proposition then we would respectfully disagree with it. The decision was a function of the constraints the High Court felt under by the authority at the time which prevented it from holding the designs were themselves plant. There was no specific reasoning given for the High Court's conclusion. As a matter of principle it is inconsistent with what we have said above about expenditure which puts the taxpayer in the position to provide plant as opposed to the activity of providing it. It is also inconsistent with the proposition that the provision of plant assumes the plant in respect of which provision is made has already been conceived of.

174. In conclusion, it does not follow that expenditure on design costs (in the sense described above as the intellectual effort for the production of instructions by which the plant can be made), or the costs of inputs into such design will be "on provision of plant" just because without such design or inputs the plant could not be fabricated. The question remains: are the relevant costs "on the provision of plant"?.

Did the FTT err in law?

175. It follows from the above analysis that there were a number of errors of approach in the FTT Decision.

(1) In agreement with both parties, the FTT's test of necessity and "directly-related" was wrong for the reasons we have outlined above. It does not reflect the legislation or the authorities. In reaching this conclusion we note some of the policy-based questions Ms Parry raised on behalf of HMRC that engaging in questions of necessity would add to the complexity of hearings and the need for expert evidence. We consider however that if that was the right test the tribunal would accept that and get on and adjudicate accordingly.

(2) The FTT erred in developing a specific test for design when the correct approach would be to keep focus on whether the expenditure was "on the provision of plant".

(3) The FTT was wrong to consider that the disparity between purchase (with design and built into price) and design by the taxpayer meant design costs would qualify.

(4) The FTT was wrong to adopt a safe and effective installation test – the test was again whether the expenditure was on installation (recognising that was not a term of art but simply something case-law acknowledged could fall within "on the provision of plant").

176. Although HMRC do not challenge the project management preliminaries it says the FTT erred in double-counting. We reject that for the reasons the taxpayers outline. The legislation

simply looks at whether the sum is "on the provision of" plant and if it is then it qualifies. To the extent HMRC's point is about the same expenditure being claimed twice then that is an issue of evidence which was not relevant to the FTT's decision (which was expressed to be one of principle).

177. The above errors were errors in relation to approach and clearly material. We consider that in relation to Issue 2, the FTT Decision should be set aside to the extent, but only to the extent, it is challenged on appeal. Given there is no challenge to the findings of fact (beyond the question of plant) that the FTT set out comprehensively, we consider we should remake the decision ourselves rather than incur the additional time and expense of remittal to the FTT.

RE-MADE DECISION

178. Our remade decision on Issue 2 deals only with the points the parties have challenged. Where the outcome of our decision in relation to a given set of expenditure coincides with the decision the FTT reached, we will set out our own reasoning.

179. In summary, the application of the strict and narrow principle encapsulated in the legislation, means that design of plant and the data inputs to that design, do not constitute provision of plant and that at (even at the level of generation assets – i.e. the level favourable to taxpayer and against HMRC's case) none of the disputed environmental impact or other technical studies qualify as "on provision of plant". None of the studies were provision of the plant (the generation assets), in that expenditure on them was not expenditure on the actual making or construction of the plant, its actual installation, or actual transport of it. Nor were they expenditure of a similar nature.

180. That is true even of the "high water mark" of the taxpayers' case: the metocean detailed studies. The information from this fed into the design of the unique foundations. However, the studies were not provision of plant because they were inputs to design and even if the studies were design themselves that was not the provision of plant but provision of design which put the taxpayers in the position of providing plant. The expenditure on provision of the plant was the expenditure on making the foundations further to the design, and the costs in installation of them.

181. We have also considered whether any element of the studies meets the threshold for counting as "installation" but conclude in summary that the studies, insofar as they concerned installation, constituted advice on where, how or when to install but were not the actual installation of the plant. There was some debate at the hearing about the nature of the work for establishing where unexploded bombs were and whether that work qualified. This was not simply generic advice that bomb locations should be avoided but included surveys undertaken which identified the precise geographic locations of ordinance. That was obviously necessary information to make sure the turbines and cables were installed safely. However even those studies and surveys were not in our view installation, they were preparatory work that needed to take place before installation could take place. The installation cost which fell under provision were the actual costs of installing the turbines and cables comprising the generation assets.

182. The result, that none of the environmental and technical studies qualify also reflects the answer given to the question per the approach in *Ben Odeco* whether the studies are on provision of plant or on something else. Our specific reasoning on the particular studies is set out below:

(1) *Landscape / visual impact*: These studies were not provision on the plant (the generation assets) but provided advice on what components to buy (e.g a three-bladed turbine, and turbines which looked the same), and on where to locate turbines.

(2) *Benthos*: These studies were not provision on the plant (the generation assets) but advice on the type of plant to use. They were also not installation but advice on how and when to install.

(3) "*Ornithology and collision risk*": These studies were not provision on the plant (the generation assets) but on the location of the plant (the generation assets as a whole), and advice on the bird-life mitigations during installation. They were therefore advice on installation rather than the actual installation.

(4) *"Fish and shellfish studies*": These studies were not provision of plant (the generation assets) but advice on the type of components that would minimise adverse effects on the fish and shellfish and advice on when and how best to install to minimise such impacts (e.g. avoiding piling operations during spawning season) rather than the actual installation of the plant.

(5) "*Marine mammal studies*": These studies were not the provision of plant (the generation assets) but advice on how best to install to avoid adverse impacts on marine mammals such as dolphins, porpoises and seals for instance by gradually starting piling operations and checking mammals were not in the vicinity before continuing. They did not entail actually installing the plant.

(6) "*Archaeology, wrecks and cultural heritage sites*": These studies were not the provision of plant (the generation assets). In some cases, they included advice on further investigation to be done, but, as mentioned above, even where they advised on specific locations of unexploded ordinance and wrecks (with a view to suggesting exclusion zones around these) they amounted to advice regarding installation not the installation itself.

(7) "*Noise assessment*": These studies were not the provision of plant (the generation assets) but advice on how to install so as to minimise noise impacts on people and wildlife; for instance, by using acoustic shield bubble curtains around the work area, "soft-start" piling and acoustic deterrents to get fish and mammals to avoid the area. They were advice on installation not the actual installation.

(8) "*Telecoms and radar interference*": These studies were not the provision of plant (the generation assets) but identified possible impacts on radio, tv and mobile phone transmission and telecom cables and microwave link networks, suggesting possible mitigations such as further work in calculating exclusion zones to avoid interference with links, or giving vessels working in the area detailed instruction on cable co-ordinates. They were advice on where to install plant components, and on the manner in which to install rather than actual provision of plant or actual installation.

(9) "*Traffic, transport and tourism*": These studies were not the provision of plant (the generation assets) but advice on how to mitigate the impacts on marine and aviation traffic; for instance, by advising on what component features should be incorporated, such as navigational aids (lights and foghorns) exclusion zones around the windfarm site and around each turbine and for example minimum blade clearance from the sea. They were also regarding the measures to be put in place during installation (such as safety zones), but the expenditure on them was not expenditure on installation.

(10) *"Scoping"*: it follows from the above that the scoping studies are not provision of plant (the generation assets). They were studies preparatory to the above (non-qualifying) environmental impact studies.

(11) "*Metocean studies*": These studies were not the provision of plant (the generation assets). They were studies which generated data. That the data was used for a variety of purposes going to configuration, choice of components and the design of components as

well as informing the transport and installation processes, did not alter its character of data gathering. Expenditure on data gathering, even if it constituted work which formed the basis for advice which could then inform the construction, transportation and installation of plant, or components of that plant, is not expenditure "on the provision of plant".

(12) "*Geophysical and geotechnical studies*": These studies similarly encompassed data generation that informed configuration, component choice and design and also the construction and installation process. Similarly however, that data gathering expenditure was not expenditure "on the provision of plant". It was not expenditure on the construction, installation or transport of plant but on collecting data which informed those activities.

(13) "*Preliminaries*": The FTT held (at [211]) these included "the costs of negotiating contracts with the manufacturers of the component parts of the wind turbines and with the installation vessel providers, and of overseeing the fabrication of those component parts and the installation of the wind turbines into their specific positions in the windfarms". HMRC do not challenge that finding; so, for the avoidance of doubt, our remade decision leaves that conclusion in place and we do not address the reasoning of that. HMRC also do not challenge the finding that "the costs of procuring, managing the persons commissioned to produce those studies on which allowances are available and reporting on them, and of the evaluation and analysis of the data provided by those studies" (emphasis added). Given our decision that none of the expenditure on those studies qualifies, although that finding remains, the practical outcome is that none of those costs are allowable either in practice. Given our decision that none of the expenditure on the studies above qualifies, no issue of double counting arises. Similarly, the issue HMRC raised that where the studies served more than one purpose there must be an apportionment does not arise for determination.

ISSUE 4 - S61 CTA 2009 - REVENUE DEDUCTION ISSUE

183. The taxpayers argued, in the alternative, that even if the expenditure was not "on the provision of plant and machinery" then it was revenue in nature (since there was no other relevant capital asset to which it could properly be attached). The relief for pre-commencement trading expenditure under s61 CTA 2009 was therefore available. In brief, that provision allows expenses incurred for the purposes of the trade incurred up to 7 years before the start date to be deducted if "in calculating the profits of the trade" a deduction would have been allowed for them if they had been incurred at the start date of the trade. However, s53(1) CTA 2009 provides that "in calculating the profits of a trade" no deduction is allowed "for items of a capital nature".

184. The FTT rejected the taxpayers' argument as a "logical fallacy". It did not follow that if expenditure was not within "the highly specific wording that appears in the capital allowances legislation" (i.e. "on provision of plant or machinery") that that then meant the expenditure could not nevertheless be of a capital nature. The FTT had held at [224] that "it was clear…that the expenditure on the studies [was] on or in respect of assets which [were] capital in nature…".

185. The taxpayers appeal that conclusion. If the expenditure was not incurred on the provision of a windfarm or any of its component parts that expenditure could not be "incurred on providing or enhancing any other asset or in creating any other enduring benefit" (the formulation used by the House of Lords in *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205 at 206 per Viscount Cave LC). It was also the case that expenditure could be on a capital asset yet still be revenue, for instance expenditure on maintaining a capital asset.

HMRC say the FTT's analysis was correct, and the expenditure was capital being part of the set-up costs which resulted in capital infrastructure and suitable premises.

186. We consider the FTT was right to reject the taxpayers' case. It was open to find that the expenditure was not "on the provision of plant or machinery" yet still conclude the expenditure was capital in nature. The House of Lords decision in *Tucker (HMIT) v Granada Mortorway Services Ltd.* [1979] 1 WLR (Lord Wilberforce) explained how indicia to capital or revenue could point different ways and that previous authority had warned against applying formulae derived on one case to another. HMRC are right to point out that the division between revenue and capital expenditure turns on its own test which is different to the "on the provision of plant or machinery" test in s11(4) CAA. While the term "test" does not quite capture the approach by which an answer is reached to the capital vs revenue question. the key point is that the questions and ensuing analysis in respect of each are different. Items can, as Ms Wilson submitted, clearly be capital (for instance the interest costs on financing of the oil rig in *Ben Odeco*, which were capitalised), but still not meet the "on the provision of" test. We accordingly dismiss the taxpayers' appeal on Issue 4.

ISSUES 5 AND 6

Overview

187. To put these issues in context it is important to note the basic structure of the capital allowances regime. Our decision so far has been addressing whether the taxpayers satisfy the general conditions as to availability of plant and machinery allowances which are available if a person carries on a qualifying activity and incurs qualifying expenditure. A depreciation allowance ("**the writing down allowance**") is calculated as a specified percentage of the qualifying expenditure. The taxpayer may claim the writing down allowance in whole or in part. The qualifying expenditure pool is then reduced each year by the writing down allowances claimed by the taxpayer.

188. The issues at the heart of the dispute between the parties to which we now turn arise from the fact that the closure notices issued to Gunfleet Sands Limited, Gunfleet Sands II Limited and Walney (UK) Offshore Windfarms Limited ("**the Issue 6 Appellants**") incorrectly deducted amounts of expenditure which HMRC did not accept as qualifying from the writing down allowance figures claimed by those taxpayers and did not reduce the qualifying expenditure amounts. To take the example of Walney, the aggregate qualifying expenditure of £15,576,689 (rather than the writing down allowance on that expenditure of £3,012,532) was deducted from the writing down allowances figure and the qualifying expenditure figure was not amended. The taxpayers say that the tribunal has no power to adjust the amounts of qualifying expenditure given the terms of the FTT's jurisdiction and the qualifying expenditure figure in the companies' tax returns cannot be altered now as a result of provisions contained in Schedule 18 Finance Act 1998 ("**Schedule 18**") setting out the operation of the self-assessment regime.

189. The FTT decided that:

(1) although HMRC did not amend the amounts of qualifying expenditure stated in the corporation tax returns, but instead amended the amounts of writing down allowances claimed in respect of the qualifying expenditure, the FTT had statutory power to adjust the amount of qualifying expenditure stated in their returns pursuant to s.50 of the TMA;

(2) the provisions of Schedule 18 did not mean that the qualifying expenditure figures in the Issue 6 Appellants' returns could not be altered as that legislation stated that amended returns are not finally determined if there is an appeal thereof which has not been finally determined.

190. In essence, the Issue 6 Appellants maintain that s.50 TMA applies only to the amendment appealed, i.e. the writing down allowances and not the qualifying expenditure. As the qualifying expenditure was not amended by HMRC in the closure notices issued to the Issue 6 Appellants ("**the Closure Notices**") that figure cannot be changed by the FTT. In addition, the amounts of qualifying expenditure are to be treated as having been conclusively determined for the purposes of Schedule 18 as that is not an amount which has been appealed.

The FTT decision

191. The FTT decided that in amending the writing down allowances in the Issue 6 Appellants' returns HMRC made a simple transcriptional error. Considering the correspondence between HMRC and those companies it was found to be inconceivable that a reasonable recipient would have thought that the amendments restricted the closure notices in the way they claimed. The recipient would have concluded that there was a simple secretarial error. In considering the correspondence, the FTT made findings (at [226] of the Decision) that:

> (1) between the dates on which the enquiries were opened and 3 August 2017 a great deal of information was sent to HMRC by the Appellants about the costs incurred on the wind farm projects, asserting that they were qualifying expenditure on plant and machinery;
>
> (2) in response HMRC said that certain elements of the expenditure did not directly relate to the provision of plant and machinery;
>
> (3) in an e-mail dated 3 August 2017 HMRC set out its view of planning and preparation costs for an offshore wind farm. In response Orsted sent HMRC figures and maintained its position that the capital allowance claims under enquiry were correct in their submitted form. It was explained that Orsted was providing figures to assist HMRC in issuing closure notices;
>
> (4) in the Closure Notices the HMRC officer wrote: "I have completed any inquiries into the company tax return and show my conclusions in the following figures and computation of tax payable. This notice amends the return to give effect to my conclusions." There then followed a table of figures, below which is the statement "amended as per communication … of 3 August 2017."
>
> (5) However, the Closure Notices adjusted the writing down allowances by the amount of the development costs for which those Appellants claimed qualified for capital allowances and did not amend the amount of qualifying expenditure that was claimed by those Appellants.

192. Further detailed findings regarding the content of the Closure Notices were made by the FTT at [232] – [235] of the Decision. In those paragraphs the FTT found that the reasonable recipient of the Closure Notices which referred to the 3 August 2017 email would have concluded that they deal with the quantum and categories of expense. In particular, the FTT took into account that the 3 August 2017 email referred to the basic question as being "is the expenditure related to the plant and machinery". The FTT then explained how the email went on to identify stages in the process of constructing an offshore wind farm and set out HMRC's view that expenditure incurred at certain stages was too remote to qualify for allowances. HMRC requested numerical information for periods before and after the design and layout of the turbines. Information was submitted on a without prejudice basis to the Appellants' contention that none of it was too remote and all of it qualified for allowances. The FTT noted

that HMRC then amended the writing down allowances rather than the qualifying expenditure and said that:

> "in light of the foregoing correspondence, it is inconceivable that the reasonable recipient would have thought those amendments restricted the ambit of the closure notices in the way suggested by the appellants… The recipient would have concluded that HMRC had simply made a secretarial error."

193. Having recognised the nature of the error in amending the writing down allowances the FTT recognised, as Mr Jones had submitted, that the error had real consequences and that it was necessary for HMRC to identify a specific statutory provision giving statutory power to adjust the amendments pursuant to s50 TMA.

194. The FTT relied upon the case of *R (Archer) v HMRC* [2018] STC 38 to conclude that amended self assessments are self assessments within the ambit of s50 TMA such that the amendments themselves fell within the scope of s. 50 TMA.

195. In addition, the Issue 6 Appellants have argued that the provisions contained in paragraph 88 of Schedule 18 ("**Paragraph 88**") mean that the amount of qualifying expenditure was "conclusively determined" such that it could "no longer be altered". The FTT disagreed, deciding that the fact that an appeal had been brought which had not been finally determined meant that under the provisions contained in Paragraph 88 the amount of qualifying expenditure was not one which "could no longer be altered". (In other words, the qualifying expenditure amount could be altered). The FTT took comfort from this conclusion being in accordance with the venerable principle that the taxpayer should pay the right amount of tax.

The legislation

The FTT's jurisdiction

196. Schedule 18 sets out the self assessment provisions dealing with company tax returns, assessments and related matters including enquiries by HMRC into a company's tax returns.

197. HMRC is empowered to enquire into a company's tax return. Such an enquiry is then concluded by the issue of a closure notice, as provided for by paragraph 32(1) of Schedule 18:

> "An enquiry is completed when [HMRC] by notice (a "closure notice") inform the company that they have completed their enquiry and state their conclusions."

198. Paragraph 34 of Schedule 18 sets out the requirements where a closure notice is issued:

> "(l) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must-
>
> (a) state that, in the officer's opinion, no amendment is required of the return thar was the subject of the enquiry, or
>
> (b) make the amendments of that, return that are required,
>
> (i) to give effect to the conclusion stated in the notice, and
>
> (ii) in the case of a return for the wrong. period to make it a return appropriate to the designated period.
>
> (2A) The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.

> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) or (2A)."

199. Section 117 FA 1998 makes clear that claims for capital allowances are dealt with by the provisions contained in Schedule 18 but the appeal provisions contained in Part V TMA continue to apply, albeit with Schedule 18 effectively incorporated into the TMA:

> "Corporation tax self-assessment
>
> 117 Company tax returns, assessments and related matters
>
> (1) The provisions of Schedule 18 to this Act have effect in place of—
>
> (a) the provisions of Parts II and IV of the Taxes Management Act 1970 (returns, assessment and claims), so far as they relate to corporation tax,
>
> (b) certain related provisions of Part X of that Act (penalties), and
>
> (c) Schedule 17A to the Taxes Act 1988 (group relief: claims),
>
> and also make provision in relation to claims for allowances under the Capital Allowances Act.
>
> (2) Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act."

200. An appeal against a closure notice is brought within the jurisdictional provisions of the TMA by s.48 TMA which provides that:

> "(1) In the following provisions of this part of this Act, unless the context otherwise requires-
>
> (a) "appeal" means any appeal under the Taxes Acts;…
>
> …(2) In the case of,
>
> (a) an appeal other than an appeal against an assessment, the following provisions of this Part of this Act shall, in their application to the appeal, have effect subject to any necessary modifications."

201. The "Part of this Act" referred to therein is Part V. The provisions in Part V proceed to set out the procedure which arises including the ability of the taxpayer to seek a review of the appealed matter and for HMRC to offer to review it. Once a taxpayer has given a notice of appeal to HMRC, the taxpayer may notify the tribunal of the appeal under s49D (or in the case of a review, under s49G TMA).

202. Section 49D TMA (and s49G) provide that the tribunal is then to "decide the matter in question". Section 49I provides that ""the matter in question" means "the matter to which an appeal relates"."

203. The tribunal's power to increase assessments and self-assessment where considered to be undercharging the taxpayer, or to reduce the assessments or self-assessments where considered to be overcharging the taxpayer is set out in s50 TMA (which is also within Part V). Section 50(7) provides that:

> "If, on an appeal notified to the tribunal, the tribunal decides:
>
> a) that the appellant is undercharged to tax by a self-assessment …the assessment shall be increased accordingly."

204. Paragraph 7 of Schedule 18 to FA 1998 provides that "Every company tax return for an accounting period must include an assessment (a "self assessment") of the amount of tax which is payable by the company for that period.". This reflected the fact that with the introduction

of self assessment the taxpayer was now required to self assess the amount of tax payable. Paragraph 8 proceeds to set the steps which must be taken to calculate the amount of tax payable for an accounting period.

Paragraph 88 of Schedule 18

205. Paragraph 88 states:

> "(1) This paragraph applies to an amount stated in a company tax return for an accounting period which is required to be included in the return and which affects or may affect—
>
> (a) the tax payable by the company making the return for another accounting period, or
>
> (b) the tax liability of another company for any accounting period.
>
> (2) If such an amount can no longer be altered it is taken to be conclusively determined for the purposes of the Corporation Tax Acts in relation to that other period or other company.
>
> (3) An amount is regarded as one that can no longer be altered if—
>
> (a) the period specified in paragraph 15(4) (general period for amendment by company) has ended,
>
> (b) any enquiry into the return has been completed (or is completed so far as relating to the matters to which the amount relates by the issue of a partial closure notice),
>
> (c) if an officer of Revenue and Customs amends the return under paragraph 34, the period within which an appeal may be brought against that amendment has ended, and
>
> (d) if an appeal is brought, the appeal has been finally determined."

The parties' arguments

The Issue 6 Appellants

206. The Issue 6 Appellants do not challenge the FTT's findings of fact on Issues 5 and 6, but rely on two lines of argument challenging the FTT's application of the law: the FTT's jurisdiction and the interpretation of the provisions setting out when an amount in a return can no longer be altered.

207. In relation to the FTT's jurisdiction, Mr Jones submits that the provisions of paragraph 34(3) of Schedule 18 say that the recipient of a closure notice is given the right to appeal against an amendment of its return. That appeal of the amendment (as opposed to some wider matter such as the return overall), once notified to the FTT, engages the FTT's jurisdiction to determine "the matter in question" in accordance with s49G(4) TMA. The jurisdiction of the FTT is fixed and defined by the terms of the closure notice as confirmed by *Daarasp LLP & Anor v HMRC* [2021] UKUT 87 (TCC) at [25(7)]. Mr Jones relies in particular on the description of the FTT's jurisdiction in the judgement of Lady Justice Rose in the Court of Appeal case of *Investec Asset Finance Plc v HMRC* [2020] STC 193 at [70] to say that it is the amendment appealed (and that alone) which sets the boundaries of the FTT's jurisdiction. That paragraph reflects the drafting of the TMA. When s50 TMA is read together with s48 TMA the result is that, in an appeal against an amendment made by a closure notice issued under paragraph 34 of Schedule 18, s50 TMA applies to "the amendment" under appeal. No other part of the tax legislation confers upon the FTT power to amend a different part of the return.

208. Furthermore, regard must be had to paragraph 88 of Schedule 18 which governs when amounts stated in a company's tax return are conclusively determined. Paragraph 88(3) sets

out when the amounts of qualifying expenditure "can no longer be altered" and consequently conclusively determined. In this case the Closure Notices did not make any amendment to the qualifying expenditure included therein. Consequently, the amounts of qualifying expenditure can no longer be altered as the time for amending the returns has expired, the enquiries into the returns have been completed, and whilst there was an amendment to the returns, that amendment was not of the amounts of qualifying expenditure set out therein. In other words, the unamended amounts are now conclusively determined.

HMRC

209. Ms Wilson submitted that the issues should be addressed in the context of the overall company return and self-assessment framework. Taxpayer companies can be required under paragraph 3 Schedule 18 to deliver a return and paragraph 7 requires that every company tax return must include a self-assessment of the amount of tax payable by the company for the relevant period. The provisions in s48 TMA dealing with appeals envisage appeals other than an appeal against an assessment, but in this case the appeal made under paragraph 34(3) FA 1998 was of each company's return which in turn included the self-assessment made by each company. The decision in *Archer* makes clear (albeit in a different context of an individual self-assessment) that an amended self-assessment is still a variety of self-assessment even where HMRC makes the amendment. Alternatively, if it was concluded that *Archer* should be distinguished given its different context, the provisions contained in s48(2)(a) should apply. Ms Wilson submitted that if "assessment" was too narrowly construed then the Appellants would have no right of appeal under s49D TMA.

210. Ms Wilson submitted that the scope of an appeal is set in ss49D and 49I by reference to the "matter in question", which in this context should be read as the conclusions of the Closure Notice. Ms Wilson relied upon the cases of *Daarasp* and *Shinelock Limited v HMRC* [2023] UKUT 00107, as well as the judgment of Lady Justice Rose in *Investec* which those cases apply. In considering Lady Justice Rose's judgment addressing the scope of closure notice appeal, paragraph 70 of *Investec* should be read together with paragraphs 71-73.

211. The result of applying the legislation in the way envisaged in those cases was that the tribunal had jurisdiction under s50 TMA to determine whether or not the Appellants were entitled to treat costs incurred as qualifying expenditure. As a matter of policy, s50 TMA must be applicable in order to give effect to the tribunal's conclusions in such a case so that the taxpayer does not benefit simply from a transcription error.

212. From 1 April 2010 paragraph 34 was amended by the insertion of sub-paragraph (2A). That paragraph enables the officer to make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice. That subparagraph can only make sense if the conclusions are something more than the amendments to figures in specific returns and if the analysis proffered by HMRC is correct.

213. Turning to the Appellants' submissions regarding paragraph 88 of Schedule 18, Ms Wilson submitted that the tests were cumulative and referenced the ordinary processes involved in the self-assessment culminating in an appeal. So, in the case of Walney, paragraph 88(3)(a) is met because the period in which the company may make an amendment to its return for the period in question has ended. Paragraph 88(3)(b) is met because any enquiry into the return (in this case the one enquiry) has been completed. Paragraph 88(3)(c) is met because an officer amended the return under paragraph 34 and the period for appealing against the amendment has ended. However, paragraph 88(3)(d) is not met because an appeal has been brought and not finally determined. Giving paragraph 88 the narrow construction sought by the Appellants undermines s50 TMA and the venerable principle that taxpayers should pay the right amount of tax.

Discussion

214. The provisions contained in paragraph 34(3) of Schedule 18 enable the taxpayer to appeal the amendment made by HMRC. They state that the taxpayer "may appeal" the amendment. We consider that they do no more than that on the face of the drafting. Indeed, it would have been strange for the drafter to say otherwise – the taxpayer will only wish to challenge the amendment or amendments made by HMRC. In providing the ability of the taxpayer to appeal an amendment the provision does not set the parameters of the Tribunal's jurisdiction which we address after setting out the context of what the issue 6 Appellants themselves said about the nature of their appeals.

215. In this case the Issue 6 Appellants appealed saying as follows:

> "The taxpayers' self-assessment returns for the relevant accounting periods, as amended pursuant to the closure notices… are incorrect in that they do not allow full relief for such expenditure, expenses and allowances.
>
> The taxpayer's self-assessment returns for the relevant accounting periods should allow full relief for expenditure, expenses and allowances as set out in the grounds of appeal."

216. In the letters of appeal sent to HMRC the companies wrote:

> "Please accept this letter as an appeal against all closure notices issued for the periods listed above…We do not consider the adjustments proposed by HMRC are correct as a matter of law. We understand that the adjustments proposed are intended to be consistent with HMRC's technical position as set out in [an e-mail]…, however we do not agree with HMRC's position. Furthermore, we do not consider that the adjustments proposed in the closure notices are in line with the position set out in that e-mail."

217. In the detailed grounds of appeal submitted to the tribunal it was specifically identified that the Closure Notices were defective. The Appellants stated that the Closure Notices made no amendment to the amount of qualifying expenditure claimed by each Issue 6 Appellant. To take the example of Walney, it was further stated that "in error, instead of adjusting the amount of qualifying expenditure by £15,576,689 and the amount of writing down allowances for the period by £3,012,532 the Closure Notice adjusted the writing down allowances by £15,576,689 and made no adjustments to the amount of qualifying expenditure."

218. The Issue 6 Appellants therefore recognised that the adjustments had been made "in error". This is not surprising given the background of communications leading up to the Closure Notices and the Notices themselves.

219. We are therefore clear from the correspondence and the grounds of appeal that, as the FTT found, the taxpayers and HMRC were clear as to what was in dispute: i.e., in essence, their entitlement to capital allowances in relation to expenditure incurred in relation to the wind farms.

220. However, the terms of an appellant's appeal do not define the jurisdiction and powers of the tribunal. The tribunal's powers are found in section 50 TMA. Those powers enable the tribunal to increase an assessment where the taxpayer is found to have been undercharged or reduce an assessment where the taxpayer is found to have been overcharged. The powers can only be exercised by reference to the jurisdiction provided by Parliament to the tribunal in legislation, which in this case is that found in s49G TMA "to decide the matter in question".

221. Both *Daarasp LLP and anor v HMRC* and *Shinelock* to which we were referred look to the authority of the Court of Appeal decision in *Investec*, which is where we start in addressing the confines of the "matter in question".

222. Lady Justice Rose said at paragraphs 70-73:

> **(c) Scope of Closure Notice Appeal: discussion**
>
> 70…. I would also go part of the way with the Appellants in accepting that the FTT does not have an unlimited discretion when determining what is 'the matter to which an appeal relates' for the purposes of s 49I(1)(a) TMA or 'the matter in question' for the purposes of s 49G(4) TMA. In their covering letter HMRC could have indicated that they might open up entirely different areas of the Appellants' tax returns if the closure notice were appealed to the tribunal. The fact that the Appellants had been warned about those potential challenges being raised would not, in my view, empower the FTT to treat those issues as within the scope of the appeal. According to para 34(3) of Sch 18 FA 1998, an appeal may be brought against an amendment of a company's return. It seems to me that 'the matter to which an appeal relates' for the purposes of s 49I(1)(a) must be that amendment and the amendment is therefore the 'matter in question' which the tribunal is required to determine by s 49G(4) TMA. That then restricts the ambit of the appeal at the conclusion of which the tribunal may decide that there has been an overcharge or an undercharge and so make a reduction or an increase in the assessment pursuant to s 50(6) or (7) as appropriate. There is a limit on the jurisdiction of the FTT which is not simply a matter of ensuring procedural fairness. Any purported exercise by the FTT of a broader power to consider matters beyond that would be an error of law.
>
> [71] The authorities do not support a narrow construction of those key phrases in ss 49I and 49G and they establish that the FTT is the appropriate stage at which the scope of the matter in question in the appeal is to be determined. The FTT is a specialist tribunal and an appellate court should not interfere with that decision unless it is clearly outside the scope of the statutory provisions. There are, as Moses LJ recognised, likely to be boundary issues whatever the test to be applied. Those issues are much more likely to be problematic and time-consuming if a narrow view is adopted…
>
> 72… *Tower MCashback* and *D'Arcy* show that despite the major change to tax law when the self-assessment regime was introduced and the importance of the finality of the self-assessment, the statutory provisions are not intended dramatically to narrow the scope of appeals. There are other checks and balances in the scheme here designed to protect the taxpayer. Those protections are the time limit imposed on HMRC in opening an enquiry, the fact that only one enquiry can be opened into any one tax return and the ability of the taxpayer to seek a direction for the issue of a closure notice. A narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer. The 'venerable principle' is also an important underlying factor in any tax matter. I accept HMRC's submission that proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here as the courts have found in the three cases which were cited to us.
>
> …73… It is for the First-tier Tribunal to decide what the subject matter of the closure notice is within the bounds I have described. They are best placed to determine whether the context of the closure notice and the surrounding circumstances demonstrate that the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice. If that is the case, it should be open to HMRC to put forward arguments in any appeal even if they result in a larger amount of tax being due, provided that the different arguments all deal with the same matters in question identified in the closure notice."

223. Mr Jones sought to persuade us that paragraph 70 should be viewed as the key paragraph setting out the confines applicable to the tribunal's jurisdiction. However, we consider that, as Ms Wilson submitted, paragraph 70-73 should be read as a whole. It is clear from the heading that paragraphs 70-73 together formed the section of the judgement dealing with the scope of closure notices. Paragraph 73 refers to the FTT determining whether the subject matter being "broader than the particular *conclusion* and adjustments addressed in the closure notice" (emphasis added) and envisages that that could enable HMRC to put forward different arguments. Also, Mr Jones' focus on paragraph 70 and the amendment setting the jurisdiction is difficult to reconcile with the Court of Appeal's application of the relevant legal principles to the facts in that it dismissed the taxpayer's appeal there. The taxpayer had argued that the amendment HMRC sought was precluded because it was not referred to in the closure notice, nor was it the result of the conclusions set out in the closure notice (see [49]). If Mr Jones were correct and the scope of appeal was circumscribed by the amendment alone, then the Court of Appeal ought to have allowed the appeal on the straightforward basis that the amendment sought by HMRC was not the same one, or even the same kind as the one HMRC had made in the closure notice. Furthermore, our conclusion that the section should be read as a whole is consistent with the decisions of this tribunal in *Daarasp* and *Shinelock* to which we now turn.

224. Consistent with the decision of the Upper Tribunal in *Shinelock* we adopt the summary of the essential workings of the enquiry and closure notice process set out in *Daarasp*:

> "22. An enquiry, begun by way of an enquiry notice, is concluded by a closure notice. The closure notice comprises two elements:
>
> (1) A statement of the officer's conclusions; and
>
> (2) A statement of what, if anything, must be done to give effect to those conclusions.
>
> 23. The whole point of tax returns and enquiries into them is to ensure that the public interest in taxpayers paying the correct amount of tax is met. To that end, HMRC must have an appropriate ability to examine the return, but the taxpayer must have a fair opportunity to challenge (by way of appeal) either (i) the conclusions of HMRC or (ii) the manner in which those conclusions have been given effect to (by way of amendments to the return). As can be seen from section 28A of the Taxes Management Act 1970, a closure notice quite clearly contains – and must contain – both elements; equally, as section 31(1)(b) of the same Act provides, an appeal lies against both "any conclusion stated" or any "amendment made".
>
> 24. It is important to appreciate that the conclusions of a closure notice are distinct from the amendments that may arise out of those conclusions. Obviously, there is a nexus between the two – the amendments implement the conclusions reached – but they are very different things. The conclusions in a closure notice consist of a statement why the taxpayer's return is incorrect (if it is), whereas the amendments set out how the return must be corrected in order to give effect to those conclusions. A closure notice must state the officer's conclusions; and having issued a closure notice, HMRC has no power to amend the relevant return other than to give effect to the conclusions: *Bristol & West* at [24]; *Investec* at [51]."

225. We also adopt the principles set out in *Daarasp* (at para 25) as having been provided by the authorities considering closure notices. In particular, we agree that:

> (5) It is desirable that the statement by the officer of his conclusions should be as informative as possible: *Tower MCashback* at [83]; *Fidex* at [42]. Furthermore, notices are given at the conclusion of an enquiry, and must be read in context. It will be rare for a notice to be sent without some previous

indication during the enquiry of the points that have attracted the officer's attention: *Tower MCashback* at [84]; *Fidex* at [42], [45]; *Lavery* at [37]. That said, a narrowly drawn closure notice – properly construed – cannot be widened by reference to the scope of the enquiry which preceded it: *Lavery* at [34].

(6) It is not appropriate to construe a closure notice as if it were a statute: *Fidex* at [51]; *Lavery* at [28]. The ordinary rules of construction apply to closure notices, and the question of construction is a mixed question of fact and law: the identification of the relevant circumstances and context in which the document is to be construed is a question of fact, whilst the meaning of the document – construed within that context, as found – is a question of law: *Lavery* at [36]. Essentially, when approaching the question of construction, it is appropriate to consider how the reasonable recipient of the notice, standing in the shoes of the taxpayer, would have construed it: *Lavery* at [42].

226. Notably, as emphasised by Lady Justice Rose in *Investec*, it is for the First-Tier Tribunal to decide what the subject matter of a closure notice is within the bounds described by her.

227. In this case the FTT concluded that the subject matter of the Closure Notice was: "is the expenditure related to the plant and machinery?" While we would encourage a clear identification specifically of the conclusions of closure notices under appeal (which will be instrumental for the FTT to decide the subject matter of a closure notice where this is a matter of dispute) we are satisfied that the FTT's reasoning and conclusions are sufficiently clear to say that the conclusion of the Closure Notices should be taken as being set out in the email of 3 August 2017 to which the Closure Notices referred. More specifically the email stated:

> "The basic question is "Is the expenditure related to the plant and machinery".
> ...
>
> Our conclusion is that a wind farm offshore is constructed at the end of an iterative process.
>
> 1. A piece of seabed is identified, and leased (or more correctly heads of terms) from the Crown Estate for the purpose of building a wind farm
> 2. the exact design of the wind farm will be determined after various studies including, but not restricted to, bird studies, seismic studies, seabed studies, strata studies, windspeed studies and wave height studies
> 3. once data from all the studies is collected and examined then a decision of what type of turbine (lots of little ones vs. several big ones), what type of foundation and precise locations can be settled-in particular, location cannot be settled until numbers and size identified because of things such as wave heights, shipping lanes etc
> 4. planning permission and suchlike are then applied for; using this settled plan of turbines and locations
> 5. the site is built and commissioned.
>
> Our view is that expenditure from 1 & 2 are too remote for capital allowances and the expenditure from 4 & 5 are within capital allowances. This leaves the expenditure from 3, which is, we feel the area of doubt. However, we think that the spending that is made before the decision about the number, type and location of specific turbines is still too remote, but once the number, type and location of the turbines are settled then the capital allowances will no longer be "too remote"."

228. The e-mail proceeded specifically to set out that initial high level spending would qualify for a revenue deduction and further spending such as that on signing a lease would qualify as capital spending but would not qualify for capital allowances. It was only once the type and location criterion were set that capital allowances would start to be available.

229. HMRC's conclusions were therefore clearly set out in the email of 3 August 2017. That email was specifically identified in the Closure Notices.

230. As stated by us earlier, we do not consider that paragraph 70 of Lady Justice Rose's judgment should be viewed in isolation. In addition, Lady Justice Rose was contemplating the normal situation where the amendments were consistent with the conclusions of a closure notice. We agree with the Upper Tribunal in *Daarasp* at [36(4)(c)] that:

> "..we must bear in mind that it is perfectly possible for the consequential adjustment in a closure notice itself to be in error, in that it fails to articulate the adjustment required by the conclusion articulated by the officer."

231. As the Upper Tribunal decided in *Daarasp,* the amendment made by the officer needs to be considered, but it does not in itself determine the matter in question where the evidence of a closure notice and its conclusions as understood by the parties in the light of their preceding exchanges casts a different light on the nature of the dispute.

232. As Lady Justice Rose stated, a narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer and in any tax case the venerable principle must be recognised. To accept the Issue 6 Appellants' arguments in seeking to rely upon the error made by HMRC in the circumstances where their conclusions have been so clearly set out and understood by the taxpayers would fly in the face of the venerable principle.

233. In this case, the conclusions of the Closure Notices as set out in the 3 August 2017 email and understood in the context of the parties' history of engagement, set the parameters of "the matter in question" for s49D TMA. The erroneous lack of amendment to the qualifying expenditure figure did not set those parameters. Once the matter in question was identified, the FTT had the powers provided in s50 TMA; i.e. the FTT could decide that the self-assessment figures should be adjusted.

234. The taxpayers also submit that regardless of the scope of the appeal, s50 TMA does not give the Tribunal the power to amend a part of the return which HMRC has not amended. They emphasise that the appeal is against an *amendment* (paragraph 34 Schedule 18). Section 48 TMA means that the TMA provisions are modified because the appeal is not against an assessment but a closure notice but the result does not confer a power to amend a part of the return which HMRC did not amend. The argument in essence is thus that even if closure notice conclusions encompass qualifying expenditure, under s50 there is no power to alter that element of return as that part lies outside the self assessment part of the return to which s50 TMA applies. We reject this argument.

235. Firstly we consider the practical context of what the taxpayers are arguing. When considering the way in fact that a company's self assessment and return is presented the steps required by paragraph 8 of Schedule 18 are reflected in the tax return's format and the boxes set out for completion. In carrying out that self assessment those preparing the return draw up calculations supporting the inclusion of figures in the tax return's boxes. All of that information feeds into and supports the calculation of the self assessment of tax. The calculations include the amounts of qualifying expenditure. It would be wholly artificial and impractical for us to conclude that the only part of the return which can be altered by the Tribunal is that part which falls within the self assessment calculation of the amount of tax

payable for the relevant period, particularly when considering the intrinsic interaction between the pool of qualifying expenditure and the writing down allowances available to the taxpayer.

236. Secondly, we are clear that this situation is a paradigm example of the need for a purposive construction of the legislation. Parliament must have intended the Tribunal's powers in s50 to align with the scope of the appeal. Otherwise, the situation arises where an appeal could properly proceed about the subject matter (informed by the conclusions of the closure notice as discussed above) only to find the tax payable amount could not be altered because of a limitation in the Tribunal's powers under s50. This lacuna could affect taxpayers too. A taxpayer who is successful in persuading the Tribunal that HMRC's closure notice conclusions are wrong on a new argument that they had not factored into their self-assessment might not be able to translate that win into a decrease in tax if HMRC had amended an irrelevant part of the return in error. They would be stuck with the Tribunal only being able to alter the amendment HMRC had incorrectly picked.

237. That this is not a result intended by Parliament is consistent with the way it has framed the Tribunal's powers. The words "undercharged to tax by…" in s50 TMA suggest the consideration is not just about correctness of the amounts which HMRC have *amended* but the *impact* of those amounts on the tax charged. In the case of a self-assessment the tribunal can amend parts of the return to give effect to its view the self-assessment undercharged (provided those parts of the return are within the scope of the appeal under principles discussed above). As applied to appeals against amendments, similarly the concern is not necessarily restricted to adjusting the given amendment up or down but can extend to those parts of the return which are consequential to the subject matter of the closure notice conclusion. Importantly, the key part of the legislation providing the scope for the purposive construction we consider is required is contained in s48(2)(a) TMA. That section provides that where there is an appeal other than an appeal against an assessment, the TMA appeal provisions have effect "subject to any necessary modifications". In this case this means that one does not simply substitute the word self-assessment with "amendment". Instead, the statutory rules are *modified* to bring them into line with the position for appeals against self-assessments. In doing so the venerable principle is given effect: the Tribunal is given the power to make the consequential amendments required for the taxpayer to pay the right amount of tax. However, for the reasons we have explained above, the modification does not mean that the Tribunal can amend any part of the return; it must be a part of the return which was consequential to the closure notice conclusions as construed by the FTT within the limits discussed above.

238. We therefore dismiss the Issue 6 Appellants' appeals as regards the ground that the FTT did not have jurisdiction to adjust the amount of the qualifying expenditure in the companies' returns.

239. Finally, we turn to the alternative argument relied upon by the Issue 6 Appellants who submit that paragraph 88 means that their returns can no longer be altered.

240. Mr Jones' submissions focus on the fact that paragraph 88 is stated to apply "to an amount stated in a company tax return". His submissions argue, in effect, that where there is no appeal in relation to an amount in a tax return, that amount must be considered to be conclusively determined even if other amounts in the tax return are disputed. The result of Mr Jones submissions would be to cut across the structure of the tribunal's jurisdiction which we have described above. For the reasons we now explain, we consider that the wording of paragraph 88(3) does not achieve this. Indeed, to find the contrary would require the clearest language given the clear framework set out by the TMA.

241. We are satisfied that the paragraph is clearly dealing with the logical order of the self-assessment regime, setting out a series of points in time when an amount can be treated as such

that it can no longer be altered. Firstly an amount can no longer be altered if the period for amendment by the taxpayer must have ended. However, where there has been any enquiry into the return that enquiry must have been completed, or, notably, completed so far as relating to the matters to which the amount relates by a partial closure notice. We note that paragraph 88(3)(b) specifically contemplates completion of the enquiry in relation to the amount alone.

242. Moving forward through the normal progression of assessment and enquiries, where an officer of HMRC amends the return and the period within which an appeal may be brought against the amendment of the return has ended an amount will be conclusively determined. The legislation does not say that it is only the amended amount which is conclusively determined at that point. This makes sense and gives the expected certainty and clarity to both HMRC and the taxpayer.

243. However, if an appeal is brought, an amount is not conclusively determined until the appeal has been finally determined. Paragraph 88(3)(d) does not refer to an appeal of an amendment to "the amount" and this is consistent with the interpretation of the jurisdiction we have set out above. The taxpayer appeals amendments made to its tax return, but the scope of the appeal is determined by the matter in question and more particularly the conclusions in a closure notice. Until the appeal is finally determined, amounts stated in the taxpayer's tax return are not conclusively determined, albeit that the only amounts which fall within the FTT's jurisdiction to amend are those which fall within the conclusions of the closure notice.

244. We therefore dismiss the Issue 6 Appellants' appeals as regards the ground that the amount of qualifying expenditure stated in their tax returns had been conclusively determined.

DECISION

245. In conclusion HMRC's appeal is dismissed on Issue 1. The taxpayers' appeals on Issues 2,4,5 and 6 are dismissed. HMRC's appeal on Issue 2 is allowed. The FTT decision is set aside and remade to the extent we have set out above at [178] to [182].

JUDGE SWAMI RAGHAVAN

JUDGE TRACEY BOWLER

Release date: 27 October 2023