

Was a potato store plant? (Lecture B1287 – 24.57 minutes)

On 12 July 2021, the First-Tier Tribunal published their decision in *JRO Griffiths Ltd v HMRC (2021)* which concerned a claim for capital allowances on a potato storage facility.

During the accounting period ended 31 March 2015, the appellant company (G) incurred capital expenditure of £319,483 on the construction of a specially designed warehouse which was used to store potatoes. G claimed capital allowances on this expenditure, but, following several enquiries and a review, HMRC disallowed the claim. G then appealed to the First-Tier Tribunal on 11 June 2019.

G is a private company involved in producing specialist crisping potatoes. Based on 1,500 acres in Shropshire, the company grows 28,000 tons of potatoes each year which are sold to crisp manufacturers, principally Walkers, for which it is the largest UK supplier. Growing this type of potato is a very specialised activity. Walkers and other manufacturers require a constant supply throughout the year and it is fundamental to G's business that it is able to store potatoes in a controlled environment so that they maintain a consistent quality from harvesting in September through until May, June or even July in the following year which is generally accepted to be the end of the season for crisping potatoes.

If the potatoes are not stored in a controlled environment, they will only last a few weeks before they start to deteriorate to a condition where they are no longer saleable. In a normal commercial warehouse, this might be from September to early November. It is no secret that the condition and storage of potatoes affect their value to crisp manufacturers such as Walkers who require a supply of potatoes all year round which:

- is consistent; and
- meets their manufacturing standards.

G is paid a base price by Walkers for their potatoes, but this is topped up by a bonus if the product has a very low defect level. The best case scenario attracts a bonus of £20 per ton. On, say, 20,000 tons, a £20 bonus is worth £400,000 per annum. A bonus of this size would represent approximately two-thirds of the company's profits. It is therefore vitally important for G's finances to achieve this sort of result.

The case report contains detailed information about the structure, design and function of G's potato store. It was designed by a Dutch company and built in 2014 in accordance with the Dutch principles of potato storage, under which a large amount of air is introduced for a very short period of time. The process is managed by a computerised control system which operates a sophisticated air management algorithm so as to keep the store cooler and uses less air than the English system.

The additional engineering requirements of the store mean that its cost is in excess of £300,000 as against a figure of some £55,000 for a general purpose warehouse of the same size.

It is now time to consider the capital allowances legislation.

The conditions for claiming plant or machinery allowances in the current appeal can be summarised as follows:

- (i) The company must carry on a qualifying activity (S11(1) CAA 2001).
- (ii) The company must incur capital expenditure (S11(1) and (2) CAA 2001).
- (iii) The expenditure must be on plant or machinery (S11(4)(a) CAA 2001).
- (iv) The company must own the plant or machinery as a result of incurring the expenditure (S11(4)(b) CAA 2001).
- (v) If the expenditure is on a building or structure, it does not qualify (see Ss21 and 22 CAA 2001) unless it satisfies one of the descriptions in List C in S23 CAA 2001. For this purpose, the relevant items in List C are:

Item 18 (cold stores); and

Item 28(a) (silos provided for temporary storage).

It was common ground that G satisfied conditions (i), (ii) and (iv) above. It was also common ground that the potato storage facility was either a building or a structure. The issues in this case are therefore:

- (i) whether the expenditure was on plant or machinery; and
- (ii) whether the potato storage facility constituted a cold store or a silo.

G's barrister argued that the potato store was plant, given that it carried out a critical function in the company's activities (ie. to store the potatoes in the right condition until they were needed by Walkers and the other crisp manufacturers with which G dealt). He cited, in particular, the decisions in *Yarmouth v France* (1887) and *CIR v Barclay Curle & Co Ltd* (1969). He also relied on the comments of the First-Tier Tribunal in *May v HMRC* (2019) which, while not binding, was a decision on facts very similar to those of the current appeal. In that case, the First-Tier Tribunal held that a horizontal grain store was indeed plant.

The gist of HMRC's case was that the potato store is not the apparatus with which the farming trade is carried on but rather premises or a setting for the company's trade.

The two judges sided with the company – the potato storage facility was plant. They said:

‘The functions that are carried out by the structure and equipment integrated into the potato store satisfy Lindley LJ's test in *Yarmouth v France* (1887) of being the “apparatus . . . used by a businessman for carrying on his business”. We accept (the owner's) evidence that it is central to the appellant's business of growing and selling crisping potatoes to Walkers and other crisp manufacturers. In order to do so, the potatoes must be stored until Walkers need them, potentially as late as May following the harvest the previous autumn, and that, during that time, they do not deteriorate. To achieve that – and so to be a supplier to Walkers at the prices the appellant wishes to charge – the potatoes need to be treated in the way the potato store is designed to achieve. The potatoes need to be dried and quality-maintained by being kept at a precise temperature with no condensation or variation in sugar content. This treatment enables the potatoes not only to be kept for longer than would otherwise be the case, but also at a quality that means Walkers will both

buy them and pay the significant quality-related bonuses. Each item of machinery integrated into the store functions as part of the whole. The store is not the setting for the appellant's trade but an integral part of how the appellant carries out its qualifying activity.'

Even if the potato store can qualify as plant, it is excluded from the capital allowances regime unless it satisfies any of the definitions in List C. Clearly, the potato store is a building or structure and so, in order for G to be entitled to capital allowances, the store must fall into one of the items in List C.

Turning to Item 28(a), there was a good deal of discussion about whether the potato store could be described as a silo. The First-Tier Tribunal accepted the Shorter Oxford English Dictionary's definition:

'A pit or underground chamber used for storing grain, roots etc; specifically one in which green crops are compressed and preserved for fodder as silage. Also, a cylindrical tower or other structure built above ground for the same purpose.'

The judges concluded that the store was a silo in that it was a structure built above ground for the purpose of storing roots (ie. potatoes). It was specifically designed to perform the functions of drying and conditioning the crops.

There is one other point which needs highlighting. The judges stated that the facts in this latest appeal 'are, if anything, stronger than those in *May v HMRC (2019)*'. They pointed out that HMRC's representative had used the same arguments in this appeal as HMRC had done in the *May* case (which they lost and did not seek to appeal). It is, the First-Tier Tribunal said, 'not appropriate for HMRC to fail to bring an appeal to the Upper Tribunal on a point of law decided by the First-Tier Tribunal and then seek to litigate the same point repeatedly at first instance'. The speaker feels that these words should be given more publicity.

In view of the fact that the First-Tier Tribunal found that the potato store amounted to a silo provided for temporary storage, it was not necessary for them to consider Item 18. However, they decided, for completeness, to rule on this matter as well. G's barrister highlighted the company's evidence that one of the functions of a potato store was to cool the potatoes down after harvest and then maintain them at a temperature of between 6.5°C and 11.5°C, depending on the variety. This cooling is done artificially in order to preserve the potatoes. The barrister rejected HMRC's submission that, in order for it to be a 'cold store', the facility must be 'objectively cold', ie. colder than the outside temperature. The judges agreed with the barrister's contention.

The First-Tier Tribunal therefore allowed the company's appeal. The expenditure incurred by G was on plant or machinery within S11(4)(a) CAA 2001 and the potato store satisfied the definition of being both a silo provided for temporary storage and a cold store (either of which findings would have been sufficient for the company).

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