

## **Premises or plant? (Lecture B1262 – 13.08 minutes)**

### *Cheshire Cavity Storage 1 Ltd v HMRC (2021)*

The Upper Tribunal have recently clarified the meaning of 'plant' for capital allowances purposes in *Cheshire Cavity Storage 1 Ltd v HMRC (2021)*. The appellant and a fellow group member were both companies in the EDF Energy Group whose business comprised energy generation and supply.

This appeal concerned the availability of plant or machinery allowances under CAA 2001 on expenditure incurred in connection with underground cavities for gas storage in Cheshire. The cavities were formed by injecting water into naturally-occurring salt rock which, when the salt rock dissolved, left a hole filled with saltwater. Gas was then pumped into the hole and the saltwater in it expelled. The rock around the hole created an impervious barrier so that the gas could not escape. The cavity was connected by pipes to the national transmission system for gas owned by the National Grid which supplies gas to end users.

### *The First tier Tribunal decision*

In 2019, the main issue before the First-Tier Tribunal was whether the cavities met the common law definition of 'plant'. The First-Tier Tribunal concluded that the cavities were not 'plant' which resulted in the taxpayer companies' appeals being dismissed. As is well known, case law distinguishes between the premises in which the business is carried on and the plant with which the business is carried on. The question was whether the items functioned as premises and therefore could not qualify for capital allowances or, alternatively, as plant which could.

With regard to immovable property structures used for storage, the First-Tier Tribunal noted that providing shelter and protection for plant, stock and customer possessions was regarded as a premises function.

Where premises had both plant-like and premises-like

functions, the question was which of the functions predominated. The First-Tier Tribunal was prepared to accept that the cavities did have a plant-like function similar to that of a pump or compressor, but the judge determined that the premises function of storage was the predominant factor. This meant that the cavities were not plant so that the relevant

### *The Upper Tribunal decision*

The companies therefore appealed to the Upper Tribunal on the ground that the First-Tier Tribunal had erred in law in its approach to the common law meaning of 'plant'. A considerable number of cases were cited in this context. In chronological order, these were:

- *Yarmouth v France (1887)*;
- *Jarrold v John Good & Sons Ltd (1963)*;
- *CIR v Barclay Curle & Co Ltd (1969)*;
- *Cooke v Beach Station Caravans Ltd (1974)*;
- *Schofield v R&H Hall Ltd (1975)*;

- Benson v Yard Arm Club Ltd (1979);
- Wimpy International Ltd v Warland (1989);
- Carr v Sayer (1992);
- Bradley v London Electricity plc (1996); and
- Attwood v Anduff Car Wash Ltd (1997).

### *Principles derived*

The starting point is that plant is the apparatus used for the carrying on of a business (Yarmouth).

Even though premises are normally regarded as the setting in which the trade is carried on (and are therefore not plant), premises and plant are not mutually exclusive, with each case depending on its facts. There are cases where an item is excluded from being classified as plant on the basis that it is more part of the setting than part of the apparatus (Jarrold).

The function of an item is an important consideration. The functional test is a preliminary to the assessment of whether a particular item is apparatus. A structure can be plant if it fulfils the function of plant in a trader's operations. However, not every structure which fulfils the function of plant will be regarded as plant if there is a good reason to exclude such a structure (Barclay Curle and Benson).

A decision on whether an item is plant is a decision on a question of fact and degree and there are a number of cases which, on the facts, are capable of being decided either way (Schofield and Anduff).

Although the premises in which a business is carried on can accurately be described as being provided for the purposes of the business, it is not enough for that reason alone to be held to be plant (Benson).

Where premises also perform a plant-like function, the question is whether it is more appropriate to describe the item as having become part of the premises rather than retaining a separate identity. If the item functions as part of the premises, it cannot be plant (Wimpy and London Electricity).

Equipment does not cease to be plant merely because it discharges an additional function such as providing the place in which the business is carried on (Sayer).

The question in each case is whether the item functions as premises or plant. To answer this may involve deciding whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in which the business is conducted (Wimpy and Anduff).

### *The decision*

The judges in the Upper Tribunal disagreed with the taxpayer company. They held that the First Tier Tribunal had applied the correct test, although its terminology could perhaps be said to be inconsistent with case law. The correct approach in the view of the Upper Tribunal is to consider which function is *more appropriate* (the author's emphasis) rather than which function predominates. It was more appropriate to classify the cavities as premises, based on the facts of the case. The expenditure was not therefore eligible for capital allowances.

*Contributed by Robert Jamieson*