[2021] UKUT 0157 (TCC)

Appeal number: UT/2020/0066 (V)

CORPORATION TAX – Land remediation relief – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

NORTHERN GAS NETWORKS LIMITED	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: **MR JUSTICE MEADE**
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 22 June 2021

Jonathan Peacock QC, instructed by Enyo Law LLP for the Appellant

David Yates QC, instructed by General Counsel and Solicitor for Her Majesty's Revenue & Customs, for the Respondents

DECISION

1.
The appellant company ("NGN") appeals against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") dated 2 March 2020 (the "Decision"). In the Decision, the FTT dismissed NGN's appeal against HMRC's refusal of its claim for land remediation relief under Schedule 22 of the Finance Act 2001 ("Schedule 22").

2.
NGN owns and operates one of the eight regional gas distribution networks in the UK. It acquired that network in 2005 and thereby obtained, and became responsible for, some 37,000 kilometres of gas pipeline much of which was made of iron. Iron pipes are liable to corrode or fracture over time and thus gave rise to the risk of escaping gas and gas explosions. In consequence, the Health and Safety Executive has, since 2001, introduced a compulsory requirement for gas distribution companies, such as NGN, to update and improve their networks of iron pipes. That programme was known as the

“30/30 Programme” because it required the replacement or improvement, over a 30-year period, of “at risk” mains pipelines located within 30 metres of a building. Following its acquisition of the network in 2005, NGN complied with this requirement by replacing certain of its iron pipes with high density polyethylene (“HDPE”) pipes or lining existing iron pipes with HDPE pipes. The dispute between the parties relates to the question whether this expenditure qualified for land remediation relief.

Summary of issues arising in this appeal

3.
NGN’s expenditure was of a revenue rather than a capital nature. Therefore, its entitlement to land remediation relief, which provided for an enhanced deduction of 150% of the amount that would otherwise be allowable, was governed by Part 2 of Schedule 22. The parties were agreed that, at [7] of the Decision, the FTT had correctly summarised the relevant requirements necessary for NGN’s expenditure to qualify namely that all the following conditions are met:

(1)
NGN acquired “land” in the UK.

(2)
The land was acquired for the purposes of NGN’s trade.

(3)
At the time of acquisition, all or part of the land was in a “contaminated state”.

(4)
NGN incurred qualifying land remediation expenditure (“QLRE”) in respect of the land.

(5)
The QLRE was allowable as a deduction in computing the profits of NGN’s trade.

(6)
The land must not have been in a contaminated state wholly or partly as a result of anything done or omitted to be done at any time by NGN or a person with a relevant connection to NGN.

4.
It was common ground before the FTT that Conditions (2) and (5) were satisfied. The FTT determined, contrary to HMRC’s submissions, that Conditions (1) and (3) were satisfied. The FTT also decided, contrary to NGN’s submissions that Condition (4) was not satisfied. That was enough to dispose of NGN’s claim for land remediation since NGN needed to satisfy all of Conditions (1) to (6). However, the FTT went on to conclude that Condition (6) was not satisfied either.

5.
NGN appeals against the FTT’s conclusions on Conditions (4) and (6). HMRC do not seek to challenge the FTT’s conclusion on Condition (1). HMRC have, however, asked in their Response to NGN’s appeal, that this Tribunal revisit the FTT’s decision on Condition (3). NGN disputes HMRC’s entitlement, as a matter of procedure, to raise this issue in a Response, arguing that, applying the principles set out in the recent judgment of the Court of Appeal in Revenue & Customs Commissioners v SSE Generation Ltd[2021] EWCA Civ 105, since HMRC have made no application to the FTT for permission to appeal against the Decision, they are not entitled to argue the Condition (3) issue in the Upper Tribunal.

6.
NGN has also applied to put forward additional witness evidence in the Upper Tribunal proceedings that was not before the FTT. HMRC contested that application.

The Decision

7.
At [2], [3], [11] and [12], the FTT made findings of fact. None of these findings is disputed in this appeal (there was also little if any dispute before the FTT) and we gratefully adopt all of them. The following summary of the factual background is particularly relevant to the issues under appeal:

(1)
NGN acquired its gas distribution business by means of a purchase of assets (referred to as the "hive down" before us) from National Grid Transco plc ("NGT") in 2005. At the time of the hive down, NGN was a subsidiary of NGT (see [12(1)] of the Decision). A few months after the hive down, the shares in NGN were sold out of the NGT group with the result that, at that point, NGN ceased to be a subsidiary of NGT.

(2)
One category of assets that NGN purchased from NGT consisted of the pipes comprising a gas distribution network. It was common ground that the pipes themselves were chattels and not fixtures which had become part of land (see [15] of the Decision). Those pipes were laid underneath various pieces of land, some privately owned (including by NGN itself) and some publicly owned (see [12(6)] of the Decision).

(3)
Accordingly, when NGN acquired its business and assets from NGT, it also obtained certain rights to locate those pipes on land owned by others, and to access those pipes. In relation to pipes located on private land (though not pipes located on private streets) NGN took an assignment of private law land rights that NGT had previously obtained from owners of the relevant land. In relation to pipes located on public land, NGN obtained its rights under Schedule 4 to the Gas Act 1986 (see [12(7)] and [12(8)] of the Decision).

(4)
No new iron pipes have been laid since the 1970s for the purposes of transporting gas. It was common ground before us that neither NGN, NGT or any company connected with either of them had themselves laid the iron pipes that were the object of the expenditure in dispute.

(5)
The 30-30 Programme imposed statutory obligations on NGN to replace or renew its network of iron pipes (see [2] and [12(11)] of the Decision). It was common ground between us that, when performing work on a particular pipe, NGN would ensure that the flow of gas through that pipe was suspended. It was also common ground that it would not have been practicable for NGN to pause all transmission of gas through iron pipes until those pipes were satisfactorily renewed or replaced. Such a pause would have lasted for several years at least, would have prevented many households in the North and North East of England from obtaining gas during that period and would have caused NGN to be in breach of its statutory and regulatory obligations.

8.

At paragraphs [14] to [25], the FTT considered Condition (1), namely whether NGN had acquired land in the UK. The definition of “land” for these purposes is set out in paragraph 31(1) of Schedule 22 as meaning:

any estate, interest or rights in or over land.

9.
Accordingly, the FTT engaged in a detailed analysis of the precise nature of the rights that NGN acquired from NGT including the question whether, by acquiring the pipes, NGN also acquired “rights in or over land” consisting of rights to locate the pipes on land that NGN did not own. Since the FTT’s conclusion on Condition (1) is not under appeal, it is sufficient to note that, at [25] of the Decision, the FTT concluded that in relation to certain categories of pipes, Condition (1) was satisfied.

10.
At [26] to [48], the FTT considered Condition (3), namely whether the land that NGN acquired was in a “contaminated state”. In doing so, it applied the statutory definition set out in paragraph 3(1) of Schedule 22 as follows:

3 Land in a contaminated state

(1) For the purposes of this Schedule land is in a contaminated state if, and only if, it is in such a condition, by reason of substances in, on or under the land, that—

(a) harm is being caused or there is a possibility of harm being caused; …

11.
Paragraph 31(1) of Schedule 22 sets out a definition of “harm” which includes “harm to the health of living organisms” and “damage to property”

12.
Paragraph 31(1) also contains the following definition of “substances”:

“substance” means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour.

13.
Although superficially straightforward, the test set out in paragraph 3(1) of Schedule 22 gave rise to some difficulty. First, the question posed was whether “land” was in a contaminated state. However, the definition of “land” to which we have already referred appeared to be directed at a legal estate or interest in land (a “non-physical incorporeal asset” as the FTT put it at [30] of the Decision) rather than to “physical” land. The FTT resolved this difficulty by concluding that paragraph 3(1) should be construed as asking whether physical land was in a “contaminated state” (see [39] of the Decision) and both parties now accept that to be the correct approach. This has the result that the word “land” has a different meaning in different parts of Schedule 22, but we are satisfied that the differing contexts and purposes of its use justify such a conclusion.

14.
The FTT concluded that there were two relevant “substances” that were present in, on or under the land for the purposes of the definition in paragraph 3(1): the iron pipes themselves and the gas flowing through those pipes.

15.

As regards the gas, the FTT concluded that it was present “in, on or under the land” (by virtue of being contained within pipes underneath the land) and was so present at the very moment NGN acquired the land (see [46]). The presence of the gas in pipes under land gave rise to a risk of “harm” because it could escape and cause an explosion. That caused the FTT to conclude that the land in question was in a “contaminated state” and that Condition (3) was met.

16.
The position with the iron pipes was more complicated. The FTT considered that the iron from which the pipes were made was a “substance”. However, the FTT said at [43] that there was force in the view that risk of harm did not arise from the iron itself, or indeed from the pipes themselves, and instead arose from the gas in the pipes. Against that at [44] the FTT noted that the fact that the pipes were made of iron was not wholly irrelevant because, since iron pipes were more likely to fracture than pipes made of HDPE, the risk of “harm” could be said to arise from the material out of which the pipes were constructed. Ultimately the FTT decided that it did not need to reach a settled conclusion on these issues because its conclusion set out at [46] of the Decision was sufficient for Condition (3) to be met.

17.
The question whether NGN incurred QLRE is at the heart of this appeal. Paragraph 2 of Schedule 22 provides as follows:

2 Qualifying land remediation expenditure

(1) For the purposes of this Schedule “qualifying land remediation expenditure” of a company means expenditure of the company that meets the conditions in sub-paragraphs (2) to (6).

(2) The first condition is that it is expenditure on land all or part of which is in a contaminated state (see paragraph 3).

(3) The second condition is that the expenditure is expenditure on relevant land remediation directly undertaken by the company or on its behalf (see paragraph 4).

(4) The third condition is that the expenditure is incurred—

(a) on employee costs (see paragraph 5), or

(b) on materials (see paragraph 6),

or is qualifying expenditure on sub-contracted land remediation (see paragraphs 9 to 11).

(5) The fourth condition is that the expenditure would not have been incurred had the land not been in a contaminated state (see paragraph 7).

(6) The fifth condition is that the expenditure is not subsidised (see paragraph 8)

18.
The parties were agreed that the third condition and the fifth condition, set out in paragraphs 2(4) and 2(6) were satisfied. The dispute was therefore focused on the other conditions.

19.
The FTT decided at [58] that the three conditions in dispute all required a degree of nexus between expenditure and land specifically. Paragraph 2(2) required the expenditure to be “on land”. By paragraph 2(3) of Schedule 22, the expenditure in question had to be “on relevant land remediation”

which, when the definition of that term in paragraph 4 was applied, required that the expenditure be "in relation to land". The FTT also proceeded on the basis that paragraph 2(5) required an application of the test laid down by paragraph 7 in order to determine whether the expenditure would not have been incurred had the land not been in a contaminated state and that paragraph 7 of Schedule 22 necessitated an examination of whether expenditure was "on the land" [1] .

20.
The FTT started by considering whether the requisite nexus between the expenditure and the land was present in situations where NGN laid a completely new HDPE pipe, concluding that it was not for the following reasons:

60. If we start first with the situations where the Appellant lined an existing irons mains pipe with an HDPE pipe, we consider that that expenditure clearly related in its entirety to the improvement of a chattel - being the iron mains pipe through which the new HDPE pipe ran - and cannot properly be said to be expenditure "on land", "in relation to land" or "on the land" through which the chattel ran. As such, none of the first, second or fourth conditions in paragraph 2 was met in relation to that expenditure, which amounted to 80% to 90% of the expenditure which is the subject of this appeal.

21.
The FTT then turned to the situation where NGN laid an HDPE pipe alongside an iron pipe. The FTT took "pause for thought" because in this case it considered that NGN would be exercising a right to occupy a different part of the land from that previously used in connection with the existing iron pipe. The FTT's conclusion on this expenditure was set out at [61] of the Decision as follows:

61…the key question in this context is not whether the Appellant exercised a right in or over land in order to carry out the replacement but rather whether the expenditure which was incurred in effecting the replacement was incurred on or in relation to a right in or over land and, in that regard, when one examines the expenditure itself, that expenditure was still "on" and "in relation to" the chattel comprising the new pipe. It was not "on" or "in relation to" the right in or over the land itself.

22.
At [63] and [64] the FTT considered NGN's submission that, using the first condition set out in paragraph 2(2) as an example, the requirement was not that the expenditure should be incurred "on land", but rather that it should be incurred "on land … in a contaminated state". Therefore, NGN submitted that expenditure that NGN incurred on changing the state of the land met the requirements of paragraph 2(2) and, by similar reasoning, the other requirements of paragraph 2. The FTT rejected that argument holding that the requirement was that expenditure be on, or in relation to, physical land.

23.
Therefore, the FTT concluded that NGN had not incurred any QLRE so that its claim for land remediation relief necessarily failed. For completeness the FTT went on to consider Condition (6) – namely whether the land was in a contaminated state wholly or partly as a result of anything done or omitted to be done by NGN or a person having a relevant connection with NGN. The statutory provisions relating to Condition (6) are set out in paragraph 12 of Schedule 22 as follows:

12 Entitlement to relief

(1) This paragraph applies if—

(a) land in the United Kingdom is, or has been, acquired by a company for the purposes of a Schedule A business or a trade carried on by the company,

(b) at the time of acquisition all or part of the land is or was in a contaminated state, and

(c) the company incurs qualifying land remediation expenditure in respect of the land.

(2) A company is entitled to land remediation relief for an accounting period if the company's qualifying land remediation expenditure is deductible in that period.

(3) The company's qualifying land remediation expenditure is deductible in that period if it is allowable as a deduction in computing for tax purposes the profits for that period of a Schedule A business or a trade carried on by the company.

…

(4) A company is not entitled to land remediation relief in respect of expenditure on land all or part of which is in a contaminated state, if the land is in that state wholly or partly as a result of any thing done or omitted to be done at any time by the company or a person with a relevant connection to the company.

24.
The FTT concluded that paragraph 12(1)(b) required Condition (6) to be tested at the "time of acquisition", namely when NGN acquired its interest in the land that was contaminated [2]. At this point in time, NGN was a subsidiary of NGT and so NGT had a "relevant connection" with NGN.

25.
At [69], the FTT reasoned that the land was in a "contaminated state" because of the existence of gas in iron pipes that was liable to escape. That state of affairs existed at the time of NGN's acquisition because, at that time, NGT was using the pipes as part of its gas transportation business. Accordingly, judged at the time of acquisition, the land NGN acquired was in a contaminated state because of action taken by NGT, a company which had a relevant connection with NGN. Accordingly, Condition (6) could not be satisfied, supplying a further reason why NGN was not entitled to land remediation relief.

The grounds of appeal and respondents' notice

Condition (4)

26. In its appeal against the FTT's conclusions on Condition (4), NGN makes the overarching submission that the requirements of Schedule 22 to the effect that expenditure must be "on land" or "in relation to land", or similar formulations, did not preclude relief from being available simply because it was spent on the lining or replacement of iron pipes that were chattels. NGN bases that argument on the wording and architecture of Schedule 22 and submits that the argument is only reinforced by considerations of the purpose behind Schedule 22.

27. NGN also makes some specific arguments in relation to the FTT's analysis of paragraph 2(5) of Schedule 22. Many of those arguments became common ground during the hearing and, accordingly, rather than summarising NGN's submissions in this regard we will later in this decision set out the parties' agreed approach to paragraph 2(5) which we endorse.

28. Subject to their acceptance that the FTT erred in aspects of its approach to paragraph 2(5) and paragraph 7 of Schedule 22, HMRC broadly support the FTT's reasoning on Condition (4). They

argued in their skeleton argument, that the FTT was correct to find that NGN's expenditure could not be said to be "on" or "in relation to" land since its "target" consisted of the pipes that were chattels that were distinct and separate from the land. In his oral submissions, Mr Yates QC modified that approach somewhat arguing that it was not only the pipes' status as chattels that precluded NGN having an entitlement to land remediation relief. Rather, the "object and focus" of NGN's expenditure was not land at all. NGN were simply engaged in repairing their own gas distribution network. HMRC accept that NGN is entitled to an ordinary trading deduction for that expenditure but argue that Schedule 22 could not have been intended to give it an enhanced 150% deduction for that expenditure.

Condition (6)

29. NGN argues that the analysis of Condition (6) must take as its starting point the nature of the "contaminated state" of the land in question. Here that contaminated state consisted of the combination of gas being present in iron pipes which were liable to buckle or corrode. The act of pumping gas did not of itself give rise to the contaminated state since, if gas were pumped through HDPE pipes, there would be no risk of escape or explosion. Similarly, if they contained no gas, the iron pipes would not themselves cause harm or the possibility of harm.

30. In NGN's submission, the fact that both it and NGT before it pumped gas through iron pipes does not engage paragraph 12(4) of Schedule 22 so as to fail Condition (6). Neither NGN nor NGT laid the iron pipes. The most that could be said is that it has taken NGN some time to remedy the problem posed by iron pipes which is scarcely surprising given the scale and complexity of the 30-30 Programme. However, construed purposively, paragraph 12(4) is not intended to deny relief simply because a person acquiring contaminated land is not able, immediately on acquisition, to remedy the contamination.

31. For their part, HMRC do not accept that NGN acquired any contaminated land (see their position on Condition (3) set out below). Accordingly, in their submission, it is not even necessary to consider Condition (6). However, without prejudice to that argument, if the land that NGN acquired was in a contaminated state, it was in that state at least partly because gas was being flowed through pipes. Since both NGN and NGT, a company with a relevant connection to NGN, had flowed gas through the pipes, paragraph 12(4) was engaged for that reason alone. Moreover, corrosion of the iron pipes took place over a period of time. NGT's omission to replace those pipes during its period of ownership engaged paragraph 12(4) as did NGN's omission after it acquired the business from NGT. HMRC do not criticise either NGN or NGT for those "omissions": they acknowledge that it would not have been commercially feasible for either NGT or NGN to remedy the entire problem in any short timescale. However, the clear words of paragraph 12(4) mean that NGN should not obtain the enhanced deduction granted by Schedule 22 and should, instead, content itself with an ordinary trading deduction for costs associated with replacing or renewing iron pipes.

Condition (3)

32. In their Response to NGN's Notice of Appeal, HMRC argue that the FTT was wrong to conclude that NGN had acquired land in a "contaminated state". They reason that, in order for land to be in a contaminated state, there must be a "substance" in, on or under the land that causes harm or a possibility of harm. They argue that the pipes themselves were not a "substance" and are properly characterised instead as a piece of infrastructure. HMRC acknowledge that the iron of which the pipes are constructed is a "substance" but submit that the iron itself does not cause harm or the possibility of harm.

33. HMRC accept that the gas in the pipes is a “substance” which gives rise to a possibility of harm should it escape. As a purely literal matter, it could be said that the gas was “under” the relevant land since it was being transported in pipes passing under land. However, they argue that paragraph 3(1) of Schedule 22 should not be read in this literal way. That gas is simply a commodity being transported. It is not, therefore, present in the land in any permanent sense. Moreover, it is being transported through self-contained infrastructure which does not form part of the land. Accordingly, HMRC argue that when the statute is read purposively it can be seen that the harm, or possibility thereof, is not caused by any “substance” in, on or under the land with the result that the land in question is not in a “contaminated state” as defined by paragraph 3 of Schedule 22.

34. As we have already noted NGN argues as a procedural matter that HMRC are not entitled to raise this argument in the Upper Tribunal as it failed to seek permission to appeal from the FTT. On the substantive issue, NGN broadly supports the reasoning of the FTT arguing that both the iron pipes and the gas in them are “substances” that are plainly present “under” the land in question. The risk of harm arises because of the risk that the iron pipes will corrode or buckle and release the gas inside them. There is no requirement for the “substance” to be part of the land and, accordingly, NGN argues that on any fair reading of paragraph 3 of Schedule 22, the land was in a contaminated state.

Discussion

35. We will deal with the various issues arising in a different order from that in which they are addressed in Schedule 22 because we have reached the clear conclusion that paragraph 12(4) of Schedule 22 (which forms the basis of Condition (6)) provides a decisive answer to the issues raised in NGN’s appeal.

Condition (6)

36. As we have noted, NGN’s case is that the “contaminated state” of the relevant land arises because of the combination of iron pipes under the relevant land and the gas that is being transported within those pipes. We note that HMRC argue that the relevant land was not in a contaminated state at all. However, since we have reached the conclusion that, even on NGN’s formulation of the “contaminated state” of the land, it has no entitlement to land remediation relief, we will in this section proceed on the assumption that NGN’s formulation is correct.

37. We agree with HMRC that paragraph 12(4) of Schedule 22 sets out a broadly drawn rule. The effect of paragraph 12(4) is that if the relevant land was in a contaminated state wholly or partly as the result of acts or omissions at any time of NGN or a person with a relevant connection to NGN, then NGN is not entitled to any land remediation relief.

38. Even on NGN’s case, the land was in a contaminated state at least partly because gas was being pumped through the pipes. NGN pumped that gas through the pipes after it acquired its business from NGT. Before NGN’s acquisition NGT, which had a relevant connection with NGN, pumped the gas. The acts of both NGN and NGT counted for the purposes of paragraph 12(4) [3] . Moreover their acts contributed, at least in part, to the land being in the “contaminated state” for which NGN argues. On that reading of paragraph 12(4), NGN would not be entitled to the land remediation relief it claims.

39. NGN argues that the analysis we have just outlined would produce an unduly harsh outcome. Paragraph 12(4) is intended to produce a result analogous with that of the “polluter pays” principle in environmental law by removing entitlement to the enhanced deduction provided by Schedule 22 from

a person who caused the land to be in a contaminated state. It would, NGN submits, be contrary to that principle for NGN to be denied entitlement to land remediation relief when neither it nor any person having a relevant connection with it was responsible for the original laying of the iron pipes.

40. The problem with that submission, however, is that when giving effect to the "polluter pays" principle in Schedule 22 specifically, Parliament has specified that a company is denied relief where the land is in a contaminated state wholly or partly as a result of that company's actions (or of the actions of a person with a relevant connection). Therefore, the fact that neither NGN nor NGT laid the iron pipes originally does not alter the conclusion that, on NGN's formulation, the "contaminated state" arose partly as a result of gas that NGN and NGT were pumping through the pipes. Nor is the conclusion altered by the fact that pumping the gas did not cause the iron pipes to corrode.

41. Next NGN argues that neither it nor NGT had any realistic choice as to whether to flow gas through the pipes. They would have been in breach of their statutory and regulatory obligations had they stopped pumping gas until all problems with iron pipes had been resolved satisfactorily. We accept that as a statement of commercial reality. However, paragraph 12(4) is not concerned with the reason why NGN or NGT acted as they did. It is simply concerned with the question whether the land is in a contaminated state wholly or partly as a result of those actions.

42. Finally, NGN argues that the approach set out in paragraphs [37] and [38] above would introduce an inconsistency and anomaly in the legislation. By paragraph 2(3) of Schedule 22, expenditure on "relevant land remediation" qualifies for relief (provided that all other relevant requirements are met). By paragraph 4(3) of Schedule 22, activities undertaken for the purposes of "preventing, or minimising or remedying or mitigating" the effects of any harm are capable of amounting to "relevant land remediation" so that a company effecting an imperfect or partial solution is capable of obtaining land remediation relief. NGN argues that the approach set out in paragraphs [37] and [38] above produces a self-defeating result as the company's "omission" to implement a perfect solution would, by paragraph 12(4) operate as a bar to any relief even though the policy behind paragraph 4(3) is that partial solutions are still capable of attracting relief.

43. We quite accept that imperfect or partial land remediation is capable of attracting relief. However, we think it is a quite different issue from that which confronts us. The question before us is whether paragraph 12(4) is engaged in NGN's factual situation. Paragraph 12(4) is concerned to ensure that a company should not obtain enhanced relief where the harm or risk of harm results, wholly or partly, from the actions of the company or a person with a relevant connection. In this case, NGN is seeking enhanced relief for expenditure incurred on remedying a "harm" that results quite clearly in part from its activity, and the activity of NGT before it, of distributing gas. NGT is entitled to an ordinary trading deduction for that expenditure. However, both the policy behind the legislation and the clear words of paragraph 12(4) disqualify it from entitlement to the enhanced deduction. There is no anomaly in a company having no responsibility for the contaminated state of land obtaining enhanced relief for imperfect remediation, while a company which had at least partial responsibility for the contamination obtains no such enhanced relief.

44. We do not accept that this interpretation involves NGN being impermissibly penalised for taking time to solve the difficult problem of iron pipes. There is no "penalty" because, since NGN's acts and those of NGT before it contributed, at least in part, to the "harm" which NGN argues to be present, paragraph 12(4) means that NGN was not entitled to land remediation relief at all. We dismiss NGN's appeal in relation to Condition (6).

Condition (4)

45. Our conclusion in relation to Condition (6) means that NGN's appeal must fail. It also means that we do not need to consider NGN's application to rely on further witness evidence since that witness evidence was not directed at its arguments on Condition (6). We will, however, make some brief remarks on Condition (4).

46. We agree with NGN that the mere fact that the pipes constituted chattels does not of itself preclude entitlement to land remediation relief. We consider that expenditure can fairly be described as being "on land all or part of which is in a contaminated state" (for the purposes of paragraph 2(2) of Schedule 22) or "in relation to land" (for the purposes of paragraph 4(1) of Schedule 22) even where expenditure is incurred in connection with a chattel. That is for the simple reason that nowhere in the closely articulated provisions of Schedule 22 is there any provision denying relief for expenditure incurred in connection with chattels. We therefore do not accept HMRC's argument that NGN is necessarily disqualified from relief because the "target" of its expenditure was a chattel.

47. As we have indicated, we took Mr Yates to be retreating somewhat from the broad proposition set out in paragraph 46 in his oral submissions. In answer to questions from the Tribunal, Mr Yates accepted that expenditure incurred on clearing landmines or unexploded bombs lying on the surface of land could in principle be said to be "on" or "in relation to" contaminated land even though the bombs or landmines were chattels. However, he drew a distinction between cases where the "object and focus" of the expenditure was the land and cases where it was a mere chattel. Where landmines or unexploded bombs are cleared or made safe, he accepted that the "object and focus" of the expenditure involved could, in appropriate cases, be regarded as the land itself since that expenditure rendered the land safe and usable. We think he accepted that a similar conclusion could follow where a company incurred expenditure in removing, or making safe, gas canisters that had been buried in the ground. However, he contrasted these situations with the circumstances of this appeal, arguing that the "object and focus" of NGN's expenditure was not land at all. Rather, it was seeking to improve and maintain a pipeline that it used for the purposes of its trade.

48. We thought that there was more force in this slightly modified submission and had it been necessary to do so, we would have accepted it and so dismissed NGN's appeal relating to Condition (4). In saying this, we should not be taken as putting a gloss on the statutory words by enquiring as to the "object and focus" of the expenditure. We do not lose sight of the fact that the statute enquires as to whether expenditure is "on land all or part of which is in a contaminated state" or "in relation to" land. However, Mr Yates' oral submissions bring out, in our judgment, the statutory requirement that the expenditure must have a sufficient real-world connection with land. Sometimes that requirement will be met even where the expenditure has a connection with a chattel. Sometimes the connection with a chattel will demonstrate that the requisite connection with land is not present. The question can only be appreciated in the light of all relevant facts and circumstances and cases at the margins may give rise to difficulties. But the test remains the relationship of the expenditure to the land.

49. In this case, we consider that the object and effect of NGN's expenditure was to provide NGN with safe, durable pipes which it could use in its trade of transporting gas, not dissimilar in nature, by analogy, to costs that a haulage company might incur in ensuring that its fleet of vehicles is roadworthy. The requisite connection with land was not present and NGN's expenditure was not "on land all or part of which is in a contaminated state" for the purposes of paragraph 2(2) of Schedule 22.

50. In arguing against the conclusion we have expressed in paragraph [49], NGN notes that paragraph 2(2) requires expenditure to be "on land all or part of which is in a contaminated state", but paragraph 2(4) requires the same expenditure to be "on" employee costs or materials. Therefore,

NGN argues that paragraph 2(2) cannot be requiring a close link between expenditure and physical land since expenditure cannot simultaneously both be “on” land in a contaminated state and “on” employee costs or materials. We reject that submission. It is quite possible for expenditure to have a close real-world connection with land in a contaminated state and also to be “on” employee costs: for example where a company instructs its employees to devote their time to removing toxic spillage from land. Similarly if a company deposits materials on land which will absorb such spillage, it would be quite appropriate to regard the expenditure on the absorbent material as being both “on” materials and land in a contaminated state.

51. We do not consider it necessary to look at NGN’s expenditure on a more granular level in order to test the conclusion set out in paragraph [49] above, a further reason why we do not need to consider NGN’s contested application to rely on further witness evidence on the nature of expenditure it incurred. In our judgment, it does not matter that some of the costs were attributable to the digging of earth (to expose an iron pipe) and some of the costs were attributable to the HDPE used either to line or replace an existing iron pipe. All of NGN’s expenditure fulfilled the same object: to provide it with safe, durable pipes which NGN used, as effectively tools of its trade. For the reasons we have given, none of that expenditure satisfies Condition (4).

Condition (3)

52. Given our conclusion on Condition (6), NGN’s appeal must fail even if the land was in the contaminated state for which it argues. Accordingly, we do not need to consider whether HMRC are entitled, as a procedural matter, to make the arguments set out in its Response without first asking the FTT for permission to appeal. Nor do we need to consider the substantive issues raised by HMRC’s Response.

Other matters

53. The parties were agreed on some respects in which the Decision contained errors of law. We agree with the parties in this regard and set out below a summary of the parties’ agreed position for the benefit of future tribunals considering Schedule 22.

54. One of the requirements for expenditure to constitute “land remediation expenditure” is set out in paragraph 2(5) as follows:

(5) The fourth condition is that the expenditure would not have been incurred had the land not been in a contaminated state (see paragraph 7).

55. Paragraph 7 of Schedule 22 provides:

7 Expenditure incurred because of contamination

(1) Without prejudice to the generality of paragraph 2(5), this paragraph has effect for the purpose of determining whether expenditure would or would not have been incurred had not all or part of the land been in a contaminated state.

(2) If expenditure on the land is increased by reason only that the land is in a contaminated state, the amount by which such expenditure is increased shall be considered to be expenditure satisfying the condition in paragraph 2(5).

(3) If any works are done, operations are carried out or steps are taken mainly for the purpose described in paragraph 4(3), expenditure on such works, operations or steps shall be taken to satisfy the condition in paragraph 2(5).

56. The FTT approached paragraph 2(5) and paragraph 7 on the basis that it was only by satisfying either of requirements of paragraph 7(2) or 7(3) that the requirement of paragraph 2(5) could be met. The parties agree, as do we, that this is not correct. Paragraph 7(1) provides that paragraph 7 is "without prejudice to the generality of paragraph 2(5)". Accordingly, there are essentially three ways of meeting the requirement of paragraph 2(5): (i) by satisfying the general requirement in paragraph 2(5) itself that the expenditure would not have been incurred had all or part of the land not been in a contaminated state; (ii) by falling within paragraph 7(2) which is taken to satisfy paragraph 2(5); or (iii) by falling within paragraph 7(3) which is also taken to satisfy paragraph 2(5).

57. As we have noted in paragraph [23] above, the FTT concluded that the requirements of paragraph 12 needed to be tested at the time NGN acquired the land. We agree with the parties that this is not quite correct. Certainly paragraph 12(1)(b) imposes a precondition to the effect that there is no entitlement to land remediation relief unless the land was in a contaminated state at the time NGN acquired it. However, once the requirements of paragraph 12(1) are met, paragraph 12(4) can deny relief if the land is in a contaminated state wholly or partly as a result of any thing done or omitted to be done at any time by NGN or a person with a relevant connection with NGN. Therefore, paragraph 12(4) is somewhat wider in scope than the FTT considered it to be. In particular, it was not just NGT's actions before NGN acquired the distribution business that are relevant. If NGN's actions, after acquisition of the land in question result in that land being in a contaminated state, paragraph 12(4) can operate to deny relief.

Disposition

58. For the reasons we have given, NGN's appeal is dismissed.

Signed on Original

MR JUSTICE MEADE

JUDGE JONATHAN RICHARDS

RELEASE DATE: 1 July 2021

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[1] As we explain later in this decision, it is common ground that the FTT was wrong as regards its interpretation of paragraph 2(5).

[2] As we explain in more detail later in this decision, it was common ground that this approach was not quite right as a matter of law.