[2022] UKUT 00022 (TCC)

Appeal number: UT/2019/0142

CORPORATION TAX – capital allowances – expenditure on construction of a tails management facility at a nuclear site –whether items functioned as plant—application of functionality test in relevant business—whether expenditure on certain items was "on the provision of" plant—whether items which were otherwise plant were ineligible for allowances because they were buildings—whether any items which were buildings were saved by List C in section 23 Capital Allowances Act 2001

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

URENCO CHEMPLANTS LIMITED

Appe

URENCO UK LIMITED

- and -

THE COMMISSIONERS FOR HER MAJESTY'S

Respo

REVENUE AND CUSTOMS

TRIBUNAL: **MR JUSTICE MELLOR**

JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 14 and 15 July 2021

Jonathan Peacock QC and Michael Ripley, instructed by Enyo Law LLP, for the Appellants

Jonathan Bremner QC and Edward Waldegrave, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1.
This appeal concerns entitlement to capital allowances in respect of expenditure on a major construction project. The First-tier Tribunal ("FTT") held that allowances were not available in respect of certain disputed expenditure of approximately £192m incurred on the construction of a substantial nuclear deconversion facility at Capenhurst in Cheshire. The Appellants appeal against that decision with permission of the FTT.

2.

The allowances in dispute are those available for expenditure on the provision of plant and machinery. There are no procedural issues in dispute. The various issues relate to three questions. First, was the item in question plant? Second, if so, was the relevant expenditure nevertheless ineligible for allowances because the item was a building? Third, if the building exclusion would otherwise apply, was the item in question saved by one of the specific carve-outs in the legislation?

Background

3.
The Appellants, Urenco Chemplants Limited and Urenco UK Limited (together "Urenco"), are members of the Urenco corporate group. The group provides approximately 30% of the global enriched uranium supply for the civil nuclear industry and has uranium enrichment plants in the UK, Germany, the Netherlands and the USA. The UK facility is located at Capenhurst in Cheshire.

4.
Depleted uranium hexafluoride, or "Tails", is a radioactive and highly toxic by-product of uranium enrichment. The disputed expenditure relates to a facility known as the Tails Management Facility ("TMF") which was constructed to process Tails safely by way of "deconversion".

5.
Construction of the TMF was substantially completed in 2018, at a total cost of £1bn. The treatment for capital allowances of most of that expenditure was agreed. The dispute relates to some £192m of expenditure which HMRC did not accept was eligible (the "Disputed Expenditure"). The only issue in this appeal is whether Urenco is entitled to capital allowances in respect of the Disputed Expenditure, which relates to particular items within the facilities summarised below.

6.
Tails are radioactive, unstable, highly corrosive and toxic. The deconversion process carried out in the TMF involves removing the fluorine content of the Tails in the form of hydrofluoric acid, leaving a stable but still radioactive uranium oxide compound which can be stored more easily. The hydrofluoric acid which is produced can be sold for industrial use, unless it has any radioactive contamination, in which case it is safely destroyed. The uranium oxide will be stored at the TMF.

7.
The TMF processes Tails from Urenco's facilities in the UK, Germany and the Netherlands. The TMF has 8-10 operators on shift at any one time. Certain areas are designed to be unoccupied save for necessary inspection and maintenance purposes.

8.
The key five facilities at the TMF operate as follows:

(1)
The Cylinder Handling Facility ("**CHF**"): Tails arrive at the TMF in large cylinders transported by lorry. Once at the "receipt and dispatch" area of the CHF, the cylinders are placed on cradles before being transported via an internal rail system to the vaporisation facility. Once emptied, the cylinders remain radioactive and are returned to the CHF to "cool down" for a period of 90-100 days.

(2)
The **Vaporisation Facility**: in the vaporisation facility, full cylinders are heated in autoclaves and the Tails, in gaseous form, are extracted and transferred through a network of pipes to the kiln facility.

(3)
The **Kiln Facility**: this contains two kilns which carry out the deconversion process, producing uranium oxide in powder form and hydrofluoric acid.

(4)
The **Condenser Facility**: the hydrofluoric acid generated by the deconversion process is transferred to this facility, where it is refined to a liquid state in which it can be sold.

(5)
The Uranium Oxide Store ("**UOS**"): the uranium oxide generated by deconversion is loaded in powder form into steel storage containers knowns as DV70s. These are transferred to the UOS and stored for up to 100 years.

9.
We discuss below the stringent regulatory and health and safety requirements imposed on Urenco in respect of the design, construction and operation of the TMF.

10.
The Annex to this decision contains some simplified block diagrams, taken from the Decision, which show the various facilities and components. They are colour-coded and identify the elements of each structure and the main equipment and machinery in that structure. Items in dispute are separately identified.

Legislative framework and issues in Appeal

11.
Unless specified otherwise, references below are to the Capital Allowances Act 2001 ("CAA").

12.
Plant and machinery allowances are provided for by section 11, which states as follows:

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.

13.
In this appeal, there is no dispute that the relevant expenditure by Urenco was capital or that it was incurred for the purposes of a qualifying activity. The only issues are (1) whether that expenditure was

incurred “on the provision of plant or machinery” and (2) if so, whether it is nevertheless disallowed by the provisions of Chapter 3 of Part 2.

14.
The two provisions of Chapter 3 which are relevant are sections 21 and 23. Section 22 contains other exclusions from eligibility for plant and machinery allowances, but it was common ground before the FTT, and not challenged in this appeal, that section 22 did not apply [1] .

15.
In broad terms, expenditure which is on plant may be disqualified by section 21 if the plant is a building, but with savings from that exclusion for items described in section 23. At the relevant time and so far as material, sections 21 and 23 provided as follows:

Buildings, structures and land

21 Buildings

(1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the provision of a building.

(2) The provision of a building includes its construction or acquisition.

(3) In this section, “building” includes an asset which—

(a) is incorporated in the building,

(b) although not incorporated in the building (whether because the asset is moveable or for any other reason), is in the building and is of a kind normally incorporated in a building, or

(c) is in, or connected with, the building and is in list A.

LIST A

ASSETS TREATED AS BUILDINGS

1 Walls, floors, ceilings, doors, gates, shutters, windows and stairs.

2 Mains services, and systems, for water, electricity and gas.

3 Waste disposal systems.

4 Sewerage and drainage systems.

5 Shafts or other structures in which lifts, hoists, escalators and moving walkways are installed.

6 Fire safety systems.

(4) This section is subject to section 23.

…

23 Expenditure unaffected by sections 21 and 22

(1) Sections 21 and 22 do not apply to any expenditure to which any of the provisions listed in subsection (2) applies.

…

(3) Sections 21 and 22 also do not affect the question whether expenditure on any item described in list C is, for the purposes of this Act, expenditure on the provision of plant or machinery.

(4) But items 1 to 16 of list C do not include any asset whose principal purpose is to insulate or enclose the interior of a building or to provide an interior wall, floor or ceiling which (in each case) is intended to remain permanently in place.

LIST C

EXPENDITURE UNAFFECTED BY SECTIONS 21 AND 22

1 Machinery (including devices for providing motive power) not within any other item in this list.

…

4 Manufacturing or processing equipment; storage equipment (including cold rooms); display equipment; and counters, checkouts and similar equipment.

…

22 The alteration of land for the purpose only of installing plant or machinery.

16.
The FTT decided that while some of the disputed items were plant, all of the disputed structures were buildings which were excluded by section 21 and not saved by Items 1, 4 or 22 of List C in section 23 [2] .

The FTT's conclusions

17.
References below to paragraphs are to paragraphs of the Decision unless stated otherwise.

18.
The FTT broke down the issues to be resolved as follows, at [22]:

(1) How assets should be identified for the purpose of identifying whether they satisfy the common law meaning of "plant" and whether they are affected by ss21 and 23 CAA 2001. Urenco submit that [the FTT] should consider the disputed components separately. HMRC submit that each structure should be considered as a whole.

(2) Whether the assets function as plant according to common law principles.

(3) Whether the assets are excluded from capital allowances by virtue of s21 (buildings).

(4) Even if s21 would apply to exclude the expenditure, is the expenditure saved by s23 List C Items 1, 4 and/or 22?

19.
The parties disagreed as to the order in which those issues should be addressed, though they agreed that, whichever approach was adopted, the end result should be the same. The FTT considered the issues in the following order [3] :

(1) The identity of the assets.

(2) Whether the assets function as plant.

(3) Whether any of the expenditure is on the provision of a building.

(4) If so, whether any of the expenditure falls within Items 1, 4 and/or 22 List C.

Identity of the assets

20.
The parties proposed different approaches to the identification of the relevant assets for the purposes of determining their eligibility for capital allowances. Urenco argued that entitlement should be assessed by reference to each component of each facility in the TMF summarised above. HMRC contended for a “single entity” approach which considered each facility structure separately.

21.
The FTT in effect adopted a “single entity” approach, but with numerous exceptions for separately identifiable elements of each facility structure. So, at [72], the FTT determined that each of the CHF, Vaporisation Facility, Kiln Facility, Condenser Facility and UOS should be considered as separate structures in their own right, save that the following items should be considered separately:

(1)
CHF: the internal radiation shield; the raised platforms or plinths, and the stairs and access platforms servicing the crane.

(2)
Vaporisation Facility: stairs and access platforms.

(3)
Kiln Facility: stairs and access platforms; access hatches, and the concrete plinth supporting the hopper.

(4)
Condenser Facility: stairs and access platforms.

(5)
UOS: stairs and access platforms.

22.
Neither party challenges the FTT’s decision on this issue, so we must decide the capital allowance position by reference to the assets so identified.

Plant

23.
The FTT considered whether the disputed assets were plant at [73]-[99].

24.
It determined that The Kiln Facility and the Condenser Facility were plant, and that the plinths in the facilities were plant. Otherwise, it decided that the structures and disputed assets were merely part of the setting in which the plant and machinery functioned and were not themselves plant: [99].

Buildings

25.

The FTT considered whether any of the Disputed Expenditure was excluded by section 21 as being on the provision of a building at [100]-[126]. It considered that question in relation to all of the identified items, recognising that strictly it was only necessary to do so in relation to those items which it had determined to be plant.

26.
Its conclusion was that each of the structures was a building, and all of the other separately identified assets were incorporated in or connected with those buildings. As a result, none of the Disputed Expenditure qualified for plant and machinery allowances: [126].

Section 23/List C

27.
Having determined that all of the Disputed Expenditure was disqualified by section 21, the FTT considered at [127]-[153] whether any of the expenditure was saved by being within List C in section 23.

28.
It concluded that none of the expenditure was so saved.

Grounds of appeal

29.
The FTT granted Urenco permission to appeal on the following six grounds:

(1) The Decision misclassifies the safety functions of assets used in shielding, containment and seismic qualification as being merely “part of the setting”, as opposed to being assets used in the business and having plant-like functions.

(2) The Decision unduly restricts the expenditure which qualifies as being “on the provision of” plant or machinery under case law principles.

(3) The FTT took an erroneous approach to determining whether an asset is a “building” for the purposes of section 21.

(4) The Decision erroneously identifies and classifies the relevant purposes of the “alterations of land” for the purposes of List C, Item 22 in section 23.

(5) The FTT failed to identify that expenditure “on the provision of” assets falling within List C, Items 1 and 4 can qualify for allowances, even if it is not expenditure on purchasing the machinery or processing equipment.

(6) In all the circumstances, the Decision incorrectly identifies the plant and machinery allowances available as a result of expenditure on the disputed assets.

30.
In its Response to the Notice of Appeal, in addition to supporting the Decision HMRC contended that the FTT erred in determining that any of the items would qualify as plant (but for the buildings exclusion) and also in aspects of its analysis of Item 22 of List C.

The nature of Urenco’s appeal and the jurisdiction of the Tribunal

31.

Two principles are well-established.

32.
First, the jurisdiction of the Tribunal in this appeal is confined to errors of law: section 11 Tribunals, Courts and Enforcement Act 2007. An appeal lies in respect of a finding of fact by the FTT only on the basis described in Edwards v Bairstow [1956] AC 14, neatly summarised by Lord Diplock as a challenge based on "irrationality" [4] .

33.
Further, as Lewison LJ cautioned in Fage v Chobani [2014] EWCA Civ 5, "appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them" [5] . Expressed another way, where an issue calls for an evaluative judgment, the Tribunal must not simply substitute its own evaluative judgment for that of the FTT, without identifying some error of law by the FTT which was material in reaching that judgment.

34.
On the basis of these principles, Mr Bremner launched a full-frontal attack on Urenco's appeal. Mr Bremner asserted that, with the exception of some aspects of Ground 5, none of Urenco's grounds of appeal raised any point of law. As a result, they fell outside the jurisdiction of the Tribunal. To the extent that the grounds sought to attack the FTT's evaluative judgment, he said, that was not permissible. He emphasised recent statements by this Tribunal in Cheshire Cavity 1 Storage Ltd v HMRC [2021] UKUT 50 (TCC) ("Cheshire Cavity") that the question of whether an item was properly characterised as plant or premises was "a matter of fact and degree" [6] , and that "case-law consistently indicates the task of deciding whether an item is plant or premises may not be straightforward and that is a matter of evaluative judgment" [7] .

35.
In his oral submissions, Mr Bremner stated that "what the appellants are doing in a manner that is but thinly disguised is re-running a factual case that failed below, and ultimately complaining about the evaluative exercise that a tribunal carried out which directed itself impeccably in accordance with the law". He emphasised that whether or not something was plant was a question of fact and degree, citing authorities including Wimpy International Ltd v Warland [1989] STC 273, relying in particular on the following statement from Lloyd LJ (at page 286):

...in these cases the courts should be especially reluctant to upset the decisions of commissioners, unless it can be shown not only that they have erred in law but also that their error is palpable. It is not enough to show that they may have applied the wrong test, as seemed to be suggested by counsel for the taxpayer companies at one stage, or that they have not stated the test in the most precise language, or that they have omitted to refer to some factor which they ought to have taken into account. Where the judges have themselves failed to find a universal test, the commissioners are not to have their language examined too closely, or dissected line by line. So the cases will, I hope, be rare when it is held that the commissioners have, on the face of it, applied the wrong test. Still rarer should be those cases where it is held that they must have applied the wrong test, because of their findings on the facts.

36.

Mr Bremner also referred to the statement by Nugee LJ in the recent decision of the Court of Appeal in HMRC v Devon Waste Management Ltd [2021] EWCA Civ 584 at [85] as applicable to the meaning of "building" [8] :

My understanding of the law is as follows. Whether a word in a statute has its ordinary meaning or some special meaning is a question of construction of the statute and hence a question of law. But once it has been decided that such a word does have its ordinary meaning, what that ordinary meaning is is a question of fact; and it is also a question of fact, and hence a matter for the tribunal that decides the case to consider, "whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved" (per Lord Reid in Brutus v Cozens [1973] AC 854 at 861D). This was not cited to us but the principles it expresses are well-known and fundamental.

37.
Mr Peacock emphasised that Urenco was not seeking to challenge any of the FTT's findings of fact. Nor was it making any challenge based on the principles in Edwards v Bairstow as to inferences from findings of fact. Rather, he said, its grounds of appeal identified a number of errors of law, comprising either errors of legal principle or errors of statutory construction, which had resulted in incorrect decisions.

38.
We consider that Mr Bremner's assertion that the vast majority of Urenco's grounds of appeal identify no error of law, and/or simply call on the Tribunal to second-guess the FTT's various evaluative judgments, is overstated. In fact, there is little disagreement between the parties as to the applicable principles in terms of the Tribunal's jurisdiction and role. The disagreement largely relates to their application to Urenco's grounds of appeal. Mr Bremner's approach would effectively mean that any FTT which had correctly identified the applicable case law principles and statutory provisions would be immune from any challenge (by either party) other than one based on Edwards v Bairstow to any decisions as to whether a particular item was plant, whether if so it was a building, and whether any of the statutory savings applied. That goes too far, particularly in an appeal such as this where the eligibility for capital allowances of novel structures such as those in dispute has not previously been the subject of judicial consideration.

39.
While not determinative, we note that in considering permission to appeal, the FTT, having identified that an appeal could be made only on a point of law, decided that it was arguable that the Decision contained errors of law and granted permission for all grounds sought.

40.
In Wimpy, the context of Lloyd LJ's observations was the Court of Appeal's conclusion from its analysis of the main authorities at that time that there was no single test for defining plant. When Lloyd LJ said that "it is not enough to show that [the commissioners] may have applied the wrong test" (emphasis added to original), in our view he was simply making the point that it is not enough to show in this context that the tribunal "may" have applied the wrong test; as he says a few sentences later, it is necessary to show that they have or must have applied the wrong test.

41.
We do not consider that Nugee LJ's dicta in Devon Waste can mean that the term "building" in the plant and machinery code is not to be construed purposively, and that construction then applied to the facts viewed realistically [9] . That is a question of law.

42.
Mr Bremner referred us to the following statement by Lord Lowry in Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd [1982] 2 All ER 230 (“Scottish and Newcastle”) at page 234:

(1) it is a question of law what meaning is to be given to the word 'plant', and it is for the courts to interpret its meaning, having regard to the context in which it occurs; (2) the law does not supply a definition of plant or prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances, and there are cases which, on the facts found, are capable of decision either way; (3) a decision in such a case is a decision on a question of fact and degree and cannot be upset as being erroneous in point of law unless the commissioners show by some reason they give or statement they make in the case stated that they have misunderstood or misapplied the law in some relevant particular; (4) the commissioners err in point of law when they make a finding which there is no evidence to support; (5) the commissioners may also err by reaching a conclusion which is inconsistent with the facts which they have found. I would also refer to the classic statement of Lord Radcliffe in Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48 at 58, [1956] AC 14 at 36.

43.
In our opinion, several of Urenco’s grounds of appeal fall within the wording in Lord Lowry’s third principle, as being submissions that the FTT “misunderstood or misapplied the law in some relevant particular”. Nevertheless, we have carefully considered Mr Bremner’s argument in relation to each of the issues in this appeal and, where necessary, set out below whether we consider that the relevant issue is one that is properly within the jurisdiction of the Tribunal. As will be seen, on certain issues we have accepted Mr Bremner’s argument.

44.
We turn now to the grounds of appeal.

Ground 1: Were the Disputed Assets plant?

45.
We begin by summarising the most relevant case law and the principles derived from it. We then discuss the safety regime applicable to the TMF, before considering Urenco’s specific criticisms of the FTT’s decision that most of the Disputed Items were not plant.

The meaning of plant and relevant case law

46.
There is no statutory definition of “plant” for the purposes of section 11. Its meaning is determined by common law and is largely judge-made.

47.
The starting point remains the definition given by Lindley LJ in Yarmouth v France (1887) 19 QBD (“Yarmouth”) at 647:

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.

48.
So, once stock in trade is eliminated, this test involves consideration of the operation which the asset performs in the business, namely a functional test.

49.

A distinction is to be drawn between an asset used in carrying on the trade and the premises or setting in which the trade is caried on. In Jarrold v John Good & Sons Ltd [1963] 1 WLR 214 ("Jarrold"), Pearson LJ noted [10] that the Yarmouth definition of "goods and chattels" impliedly excluded the premises in which the business was carried on. He summarised the relevant question as whether the partitioning in that case was "part of the premises in which the business is carried on or part of the plant with which the business is carried on".

50.

However, plant and premises (or "setting") are not mutually exclusive. CIR v Barclay, Curle & Co. Ltd (1969) 45 TC 221 ("Barclay Curle") concerned a shipbuilder's capital expenditure on excavating a dock basin and concrete work to the walls and bottom of that basin used for the construction of a dry dock. The House of Lords held by a majority that although that capital expenditure might have appeared to relate to the premises in which the shipbuilder carried on its business, it was in fact used by them as plant. As Lord Reid said (at page 239):

As the Commissioners observed, buildings or structures and machinery and plant are not mutually exclusive, and that was recognised in Goods' case [11] . Undoubtedly this concrete dry dock is a structure, but is it also plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient…

It seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or plant with which, the operation is performed.

51.

Lord Guest's judgment emphasised the importance of function. He pointed out that something which was a structure could also be plant. The question was whether the dry dock was plant notwithstanding that the dock might be also a structure. As regards the reference to "apparatus" in the Yarmouth definition he observed [12] :

In order to decide whether a particular subject is apparatus it seems obvious that an enquiry has to be made as to what function it performs. The functional test is therefore essential, at any rate, as a preliminary. The function which the dry dock performs is that of a hydraulic lift taking ships from the water on to dry land, raising them and holding them in such position that inspection and repairs can conveniently be effected to their bottoms and sides.

52.

The Australian case of Wangaratta Woollen Mills Ltd v Federal Comr of Taxation (1969) 119 CLR 1 (" Wangaratta ") concerned a dyehouse forming part of a larger complex constructed inside external walls and including demountable wall panels designed to act as shields to prevent fibre particles drifting into different areas of the dye house. The taxpayer's business was the dyeing and spinning of worsted yarn. The dyeing process consisted of dipping wool tops in vats containing hot corrosive liquid dyes which gave off noxious fumes. The dyehouse contained pits into which the vats were set

and incorporated specially designed drains for corrosive liquids leading to an external settling pond. There were structural features in the walls and ceiling to aid ventilation of clouds of steam and poisonous gases given off whenever a vat was opened. The external walls served only to provide protection from the elements. The High Court of Australia held that except for the external walls the whole dyehouse was in the nature of a tool and was “much more than a convenient setting for the plaintiff’s operations” [13] . The ventilation system which was incorporated into the structure by design prevented the spoiling of materials and the drains removed volatile liquids which would otherwise disrupt the process.

53.

The reasoning in Wangaratta was applied in Schofield v Hall 49 TC 538 (“ Schofield ”). In that case, the Court of Appeal of Northern Ireland held that a concrete grain silo for the temporary storage and delivery of grain was plant, as it was “a tool in the trade” carried on by the taxpayer. Lowry CJ considered that the silo was a complex whole, and not in the nature of a general setting or mere shelter. Jones LJ stated that it was necessary in assessing the status of the silo to look at the company’s activities as a whole and not on a piecemeal basis.

54.

Benson v Yard Arm Club Ltd [1979] STC 266 concerned a ship that was converted into a floating restaurant. The Court of Appeal held that it was not plant because its only function was to serve as the premises of the restaurant. Buckley LJ cited Yarmouth, Jarrold and the majority views in Barclay Curle, describing the distinction in the following terms:

The building in which a business is carried on may accurately be described as being provided for the purposes of the business but again admittedly is not for that reason alone to be held to be plant… The distinction, I think, is that in the one case the structure is something by means of which the business activities are in part carried on; in the other case the structure plays no part in the carrying on of those activities, but is merely the place within which they are carried on. So, in the case at any rate of a subject-matter which is a building or some other kind of structure, regard must be paid to the way in which it is used to discover whether it can or cannot properly be described as plant. This is what has been referred to as the functional test. … Is the subject matter the apparatus, or part of the apparatus, employed in carrying on the activities of the business?

55.

In Cooke v Beach Station Caravans [1974] STC 402 (“Cooke”) the taxpayer ran a caravan site with recreational facilities including two swimming pools. The issue was whether the expenditure on terracing, construction and excavation of the pools was expenditure on plant. Megarry J referred (at page166 d-e) to Pearson LJ’s judgment in Jarrold, and concluded that the pools were part of the means whereby the trade was carried on, and not merely the place at which it was carried on. The expenditure was therefore on the provision of plant.

56.

In Wimpy International Ltd v Warland [1989] STC 273 (“Wimpy”) the Court of Appeal held that various items which a restaurant business installed when upgrading its premises (such as floor and wall tiles, floors, ballustrading and stairs) were not plant. Fox LJ considered the authorities including Jarrold, Barclay Curle, and Cooke. He considered that last case to be entirely in line with Barclay Curle, the pool not being the place where the trade was carried out but part of the means whereby the trade of a caravan park was carried on [14] . He contrasted these cases with others, including Benson, which showed that the premises in which business was carried on were not themselves to be regarded

as plant. Fox LJ considered that the critical question was what the item functioned as; if it functioned as part of the premises it was not plant.

57.
The issue in Carr v Sayer [1992] STC 396 ("Carr v Sayer") was whether immovable quarantine kennels constructed by a person carrying on a business of providing quarantine kennels and transport services for animals brought into the UK were plant. The High Court held they were premises, at which, and in which, the taxpayer's business was conducted. Sir Donald Nicholls VC identified a number of principles which are relevant in this appeal both to the plant issue and the buildings issue. We therefore set out the relevant part of his decision in full (pages 402-403):

I approach the issue before me by seeking to identify the principles, relevant to the present case, which can be deduced from the language of s 41. First, in the context in which it appears in s 41(1), plant carries with it a connotation of equipment or apparatus, either fixed or unfixed. It does not convey a meaning wide enough to include buildings in general. The premises, whether an office or a factory or a warehouse or whatever, at which or in which a business is carried on would not normally be understood as intended to be embraced by the expression 'machinery or plant'. That is the starting point in the present case. A businessman or economist might not regard the distinction as satisfactory, but it is the distinction drawn by the legislation. Tax incentives, now phased out, were available under this legislation for certain types of capital expenditure but not others, and this was the boundary line.

Second, the expression 'machinery or plant' is apt to include equipment of any size. If fixed, a large piece of equipment may readily be described as a structure, but that by itself does not take the equipment outside the range of what would normally be regarded as plant. The equipment does not cease to be plant because it is so substantial that, when fixed, it attracts the label of a structure or, even, a building. Thus a dry dock which affords the means for getting large vessels into a position where work on the outside of the hull can be done can properly be regarded as plant (see IRC v Barclay, Curle & Co Ltd [1969] 1 WLR 675, 45 TC 221). Likewise, a substantial concrete silo used as a means for loading grain into customers' lorries (see Schofield (Inspector of Taxes) v R & H Hall Ltd [1975] STC 353).

Third, and this follows from the above, equipment does not cease to be plant merely because it also discharges an additional function, such as providing the place in which the business is carried out. For example, when a ship is repaired in a dry dock, the dock also provides the place where the repair work is carried out. That is no more than the consequence of the extensive size of a piece of fixed plant.

Fourth, and conversely, buildings, which I have already noted would not normally be regarded as plant, do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity. Such a distinction would make no sense. Thus the stables of a racehorse trainer are properly to be regarded as buildings and not plant. A hotel building remains a building even when constructed to a luxury specification. I say nothing about particular fixtures within the building. Similarly with a hospital for infectious diseases. This might require special lay-out and other features but this does not convert the buildings into plant. A purpose-built building, as much as one which is not purpose-built, prima facie is no more than the premises on which the business is conducted.

Fifth, one of the functions of a building is to provide shelter and security for people using it and for goods inside it. That is a normal function of a building. A building used for those purposes is being used as a building. Thus a building does not partake of the character of plant simply, for example,

because it is used for storage by a trader carrying on a storage business. This remains so even if the building has been built as a specially secure building for use in a safe-deposit business. Or, one might add, as a prison. Again, I say nothing about particular fixtures within such a building.

58.

Bradley v London Electricity plc [1996] STC 1054 (“London Electricity”) concerned the structure for an underground electricity substation beneath Leicester Square. The structure was designed to include a system for cooling the three transformers which each had their own walled bays. The walls were designed to withstand explosions and the roof was designed to support earthing switches. Blackburne J stated as follows, at p1081:

… it can safely be said that the fact that … the substation is specially designed for London Electricity's trading activity—and cannot sensibly be used other than for the purposes of that activity—does not mean that the structure of the substation is plant. Conversely, the fact that it is a substantial fixed structure, with a roof and inner and outer walls and floors, and has in it what is accepted to be plant used for the purposes of London Electricity's business, does not mean that it must be regarded as premises rather than as plant.

The essential question is, as Nourse LJ put it in Gray v Seymours Garden Centre [15] , whether what was identified before the Special Commissioner as the structure of the substation, ie those items identified as 'the premises' in the Scott Schedule attached to the Special Commissioner's decision, as distinct from the equipment within (which, it is common ground, constituted plant used in London Electricity's business) can reasonably be called apparatus with which that business is carried on as opposed to the premises in which it is carried on.

59.

In Attwood v Anduff Car Wash Limited [1997] STC 1167 (“ Attwood ”) the Court of Appeal held that a car wash hall did not function as a whole as plant. It housed the machinery used to wash cars which were pulled through the wash hall mechanically to be washed and dried. The wash hall was the place where the car washing, drying and waxing were carried out. It retained noise and heat and provided protection from the elements. The argument that the hall had a plant function because it enabled rainwater to be collected for use in washing cars and enabled water to be recycled was rejected. Peter Gibson LJ stated as follows (at page 1176):

The question in each case is, as Fox LJ said (in Wimpy [1989] STC 273 at 280): does the item function 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 or upon which the business is conducted. Thus in Carr v Sayer there can be no doubt but that the kennels were an essential part of the business of providing quarantine kennels for dogs and cats brought into the United Kingdom and thus were part of the means by which the trading operation was carried out. Yet the premises test was not satisfied because the kennels performed a typical premises function, providing shelter.

60.

In HMRC v SSE Generation Limited [2021] EWCA Civ 105 (“SSE”), the Court of Appeal considered the eligibility for plant and machinery allowances of expenditure incurred in constructing the Glendoe Hydro Electric Power Scheme in Scotland. It was common ground in the appeal that all of the items in question were plant [16] . The case concerned in part the application of section 22, which, as we set out above, is not in issue in this appeal. It is, however, relevant, as we discuss below, in relation to the discussion of Item 22 of List C in section 23.

61.
In Cheshire Cavity, the Upper Tribunal recently considered the availability of plant and machinery allowances for expenditure incurred in relation to underground cavities for gas storage in Cheshire. The decision is the subject of a pending appeal. The tribunal rejected the contention put forward by the taxpayer (also represented in that case by Mr Peacock) that the FTT had erred in basing its analysis on the predominant function of the cavities, since the authorities established that once an item had any function as plant that item was plant. The tribunal concluded as follows from its review of the case law (at [54]):

We can summarise the principles to be derived from our review of the authorities as follows:

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

(2) The question is whether the item is part of the premises in which the business is carried on or part of the plant with which the business is carried on. Even though premises are usually to be regarded as the setting in which the trade is carried out and therefore not plant, premises and plant are not mutually exclusive and each case depends on its own circumstances. There can be cases where an item is excluded from being plant on the basis that it is more part of the setting than part of the apparatus for carrying on the trade (Jarrold).

(3) 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 also be plant if it fulfils the function of plant in a trader’s operations, but not every structure which fulfils the function of plant must be regarded as plant if there is a good reason to exclude such a structure (Barclay Curle, Benson).

(4) A decision on whether or not an item is plant is a decision on a question of fact and degree and there are cases which on the facts found are capable of being decided either way. It is too stark a distinction to draw a contrast between a structure which is the means by which business activities are in part carried on with a structure which plays no part in the carrying on of those activities but is merely the place within which they are carried on (Schofield, Anduff).

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

(6) 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 as having retained a separate identity. If the item functions as part of the premises it is not plant (Wimpy, London Electricity).

(7) 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 (Carr v Sayer).

(8) 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 or upon which the business is conducted (Wimpy, Anduff).

Principles to be derived from case law

62.
In the Decision, the FTT stated (at [89]) that it derived from the case law the following propositions relevant to the appeal:

(1) Plant can comprise large structural items.

(2) There is a distinction to be made between a structure which is merely the setting in which a trade is carried on and a structure which constitutes the apparatus with which the trade is carried on.

(3) The function of plant in a trade can be active or passive. For example, moveable partitioning might be said to perform its function passively but it may still be plant.

(4) Premises do not fall to be regarded as functioning as plant simply because they have been designed to satisfy the particular requirements of the business in question.

(5) A structure which is merely the setting in which a business is carried on is not plant.

(6) If a structure is both the setting and the means by which the business is carried on then it will be plant.

(7) An item that might otherwise be described as a building is likely to be a place in which the business is carried on and not plant, but not necessarily so.

(8) It is important to be careful and precise in analysing the function of the item for the purpose of distinguishing premises from plant.

63.
The parties stated that they did not take issue with the FTT's summary of principles. We agree that it is largely uncontroversial, save that we observe that the Upper Tribunal's formulation of applicable principles in Cheshire Cavity suggests (at principles (6) and (8) of that decision set out above) that the sixth principle identified by the FTT may be unduly simplistic in describing the functionality test.

The regulatory background

64.
The FTT made extensive and detailed findings of fact, at [24]-[39], in relation to the regulatory regime governing the construction and operation of the TMF, to which neither party makes any challenge. The most material findings were as follows:

24. The design and construction of the TMF and its various components is governed by stringent health and safety requirements. The regulatory regime is "principles based" and requires safety objectives to be met rather than specifying the means by which this is to be achieved. The safety requirements focus on outcome rather than method, for example specifying maximum levels of radiation dosages. The onus is on the operator to satisfy the regulator that the safety objectives are met. The Capenhurst site is required to have a nuclear site licence issued by the Office for Nuclear Regulation.

25. All the facilities in dispute were constructed to meet the site licence conditions. In particular the site licence requires the following:

"34(1) The licensee shall ensure, so far as is reasonably practicable, that radioactive material and radioactive waste on the site is at all times adequately controlled or contained so that it cannot leak or otherwise escape from such control or containment."

26. In order to satisfy the safety objectives, it has been necessary to construct certain "safety significant structures". The purposes of safety significant structures are:

(1) To provide radiation shielding, blocking the path of radiation, and/or

(2) To provide containment, preventing the release of radioactive particles, and/or

(3) To support machinery, equipment and various structures to ensure that they will continue to perform their safety functions in the event of a 1-in-10,000 year earthquake, known as “seismic qualification”.

27. The Tails and the uranium oxide product of deconversion are both relatively low-level radiation sources but the quantity of such material on site and the processing of that material mean careful management is required to minimise the radiation risk. A level of radiation risk is unavoidable but the regulatory regime means that the risk must be reduced to “as low as reasonably practicable”, known as ALARP… Reducing risks to ALARP includes in a nuclear context making provision for external events including events such as earthquakes which have a probability of up to 1 in 10,000 years in Capenhurst… I am satisfied that the construction methods used go well beyond conventional health and safety requirements and building regulations. Seismic qualification is therefore required for safety significant structures and for machinery and equipment in the vicinity to prevent damage caused by collapse and the release of unacceptable radiation doses.

28. Processing at the TMF involves bringing full cylinders to the TMF, extracting the uranium hexafluoride, deconverting it to uranium oxide and hydrogen fluoride, packaging and storing or removing the uranium oxide and producing hydrofluoric acid for removal from the site. The original material is radioactive and toxic, and the processing of that material and dealing with the by-products involves managing radioactive and toxic hazards. In the words of Mr Nicholson “[it is]hazardous before it starts, it is hazardous when it finishes, albeit less so, and it is hazardous while we are processing it”.

…

34. The construction methods used for parts of the structures which provide radiation shielding were far from conventional…

35. The construction methods used for containment structures were more conventional, subject to seismic qualification requirements. Some of the chemical processes, for example the condenser facility, would normally be constructed in the open air. However, because of the need for containment of radioactive gases and particles this was contained within a clad structure.

36. Seismic qualification, where required, involved the use of concrete raft foundations, concrete structures and steel support structures. In some circumstances a 600mm concrete wall was required for radiation shielding purposes, but this was increased to 1,000mm together with additional steel reinforcement to ensure it was seismically qualified. The concrete elements involved highly complex and dense reinforcement bar construction. Steel support structures required much larger beams than might ordinarily be encountered, a greater number of steel braces and specialised bolts at each joint.

37. Stairs and access platforms are not cast into the facilities but were constructed on site and bolted or welded together. They are generally bolted to the relevant raft slab and walls in each structure.

38. The various structures and their components are all specifically and uniquely designed to ensure that radiation dosages to employees, visitors, members of the public and the environment are minimised.

The FTT’s classification of the Disputed Items and the arguments of the parties

65.

The FTT concluded that the Kiln Facility and Condenser Facility were plant, but that, with the exception of the various plinths, none of the other assets identified at paragraph 21 above were plant.

66.

The FTT's analysis and conclusions on the plant issue are set out at FTT [92]-[99]. It recorded Mr Peacock's [17] submission that the items all performed a function in the trade, even if the structures might also be described as the premises in which the trade was carried on. He relied in particular on Wangaratta. Mr Bremner argued that the structures were merely the setting for the deconversion process.

67.

The FTT considered that while the processing could not take place without the structures, that was not sufficient. It was not a "but for" test; rather, it was necessary to identify a specific function of the structures. The starting point was to identify the trade carried on by Urenco at the TMF, which was "the deconversion of Tails so as to produce and store uranium oxide and to produce hexafluoric acid for sale". The FTT decided that the safety functions of shielding, containment and seismic qualification were properly viewed as part of the setting in which that trade was carried out. Wangaratta was a case where the dyehouse and apparatus were a complex whole in which every element was essential for the efficient operation of the whole. The FTT stated, at [95]:

That is not the case here. The safety significant structures provide a safe setting for the processes to be carried out. Without the structures the actual processes could still be carried on efficiently, although I accept that is entirely theoretical because the regulatory environment would not permit it to happen. But the regulatory environment is not in my view relevant to whether an asset performs a function in the trade. It cannot be said that in providing shielding and/or containment the structures have any function in the actual processing of Tails which is carried out by the plant and machinery in the TMF.

68.

The FTT considered that "there must be some other function performed by the structures in the trade if they are to be treated as plant" [18] .

69.

Paragraph [99] describes the FTT's conclusions at [98] as conclusions as to whether the various items were plant. In fact, we consider it tolerably clear that the FTT's determination of the eligibility for allowances of expenditure on most of the separately identified items within the facilities was not reached by deciding whether the item was plant, but by deciding whether the expenditure was "on the provision of" another item which was (arguably) plant [19] . We therefore discuss those items below in considering Urenco's second ground of appeal, which relates to the meaning of "on the provision of".

70.

The FTT's conclusions on the plant issue were as follows:

(1)

The functions of the CHF were shielding and containment of radioactivity. These were "functions of premises and not functions in processing the Tails". It was purpose built and could not be used in any other context but "fundamentally it simply provides a safe and secure setting in which the Tails are processed".

(2)
The function of the internal radiation shield walls in the CHF was to shield operators and they had a specific safety purpose, but were merely part of the setting.

(3)
The plinths enabled the transportation of cylinders by rail. This was a function in the processing of Tails and so the plinths were plant.

(4)
The function of the Vaporisation Facility was shielding and containment and to shelter the autoclaves. Its functions were essentially premises. The walls and first-floor raft slab provided support for the pipework necessary for the processing of Tails, which was essentially a premises type function. None of the items were plant.

(5)
The stairs and access platforms in the Vaporisation Facility provided access for maintenance and inspection of equipment, and they were not plant.

(6)
The functions of the Kiln Facility were containment, support for the kiln, the hopper and associated equipment, and enabling the use of gravity to receive uranium oxide in the basement and use a hopper for packing it. The shelter which it provided to equipment and operators was incidental to these functions. It functioned in the process of deconversion and in the packing of uranium oxide. It was similar to the dyehouse in Wangaratta and was plant.

(7)
The Condenser Facility structure provided structural support for the condenser and also had a containment function in preventing the escape of hazardous hydrogen fluoride gas. This was expenditure on the provision of plant. It fulfilled a containment function, which was a function of premises, but did not function solely as premises and was therefore plant.

(8)
The functions of the UOS were shielding and containment. These functions, and providing shelter from the elements, were "functions of premises rather than functions in the processing of Tails". By analogy with Carr v Sayer, a structure did not take on the character of plant simply by being used for storage by a trader carrying on a storage business, even if that storage business was highly specialised.

71.
Mr Peacock did not accept the correctness of the approach to the functionality test approved in Cheshire Cavity of asking whether it was "more appropriate" to regard an item as premises or plant. However, he said that even on that approach the FTT had erred in law in its categorisation of "premises-type" and "plant-like" functions. The FTT had not taken into account the fact that the only purpose of most of the Disputed Assets was as "safety significant structures" which were essential to the activities at the TMF. The FTT's key reasoning was at [95] (set out at paragraph 67 above). This disregarded the regulatory framework of the nuclear industry and confined plant to assets involved, in an entirely theoretical world, in the actual processing of Tails to the exclusion of assets that provided for the only safe way of processing Tails in the real world. This was an error of law; the question of whether an item has a plant-like function must be determined in the real world, reflecting actual use in what was the only permitted operating environment. The FTT was also wrong in concluding that an

asset must actually carry on the trade processes (here of converting tails) to be plant, since plant need not have an active function but can be passive. Further, the decision in Wangaratta did not support the FTT's approach but was in fact inconsistent with it.

72.
Mr Peacock said that at [95] the FTT appeared to consider that the scope of Urenco's trading activities at the TMF was limited to the "actual processing" of Tails. That materially mischaracterised Urenco's obligations and the purpose of the TMF.

73.
For HMRC, Mr Bremner attacked this ground of appeal as "a wholly impermissible challenge" to the FTT's factual and evaluative conclusions for the reasons discussed above. Urenco did not contest the FTT's summary at [89] of legal principles derived from case law, and their detailed challenges were nothing more than criticisms of the FTT's evaluative judgment. In any event, the FTT was correct in its conclusions that most of the assets were not plant, since functions relating to containment and safety are quintessential functions of premises. Mr Bremner criticised Mr Peacock's reliance on the passage above quoted from [95] as ignoring the FTT's reasoning found in the decision as a whole.

74.
More generally, said Mr Bremner, it was not sufficient on the basis of the case law, including Cheshire Cavity, for Urenco to demonstrate that the items "perform a plant-like function". Rather it was necessary to identify the overall function of the item. In relation to the passive/active argument, the question for the FTT was whether in fact the assets functioned as plant, not whether they were capable of doing so. As to Wangaratta, the FTT was fully entitled to distinguish it.

Discussion

75.
The FTT's essential thought processes and reasoning in relation to the plant issue are in our view found within [95]-[97], which stated as follows:

95. In my view the starting point is to identify the trade carried on by Urenco at the TMF. It may be described as the deconversion of Tails so as to produce and store uranium oxide and to produce hexafluoric acid for sale as an industrial material. All the processes carried out at the TMF are directed towards those ends. I consider that the safety functions of shielding, containment and seismic qualification are properly viewed as part of the setting in which that trade is carried out. Shielding and containment are akin to preventing noxious fumes or odours escaping from a processing plant. In Wangaratta the dyehouse and the apparatus within it were treated as a complex whole in which every element including the structure was essential for the efficient operation of the whole. The structure did not just provide the setting but was part of the dyeing process, removing volatile gases and liquids which would otherwise adversely affect the dyeing process. That is not the case here. The safety significant structures provide a safe setting for the processes to be carried out. Without the structures the actual processes could still be carried on efficiently, although I accept that is entirely theoretical because the regulatory environment would not permit it to happen. But the regulatory environment is not in my view relevant to whether an asset performs a function in the trade. It cannot be said that in providing shielding and/or containment the structures have any function in the actual processing of Tails which is carried out by the plant and machinery in the TMF.

96. As far as seismic qualification is concerned, in a sense it is incidental to ensuring the integrity of the shielding and containment functions of each facility. It represents the standard and method of construction required to maintain shielding and containment in an extreme seismic event.

97. Mr Peacock submitted that the radiological hazards are a direct result of processes carried out at the TMF. All the features of the structures, namely their containment, shielding and seismic qualification are an essential and necessary part of the trade processes. They performed a trade function and not simply a premises function. Even if they were the setting in which the processes were carried out, they also enabled those processes to be carried out safely and performed a plant-like function. As such the expenditure on each structure was to make the plant and machinery usable. I do not accept that argument. In my view the expenditure cannot be regarded as part of the cost of installation of the plant and machinery within the structures merely because that plant and machinery could not safely be used without it.

76.

As the review of case law has shown, a critical issue in determining whether an item is plant is an assessment of whether it functions as plant in the carrying on of the business or merely as the premises or setting for the business. That was explicitly acknowledged by the FTT in those terms at [89(2) and (5)]. An item or structure which fulfils both functions will nevertheless be plant, because it is not merely the setting for the business: [89(6)]. In determining that issue, as the FTT said (at [89(8)]) "it is important to be careful and precise in analysing the function of the item".

77.

As we have noted, the parties agreed, as do we, that these are accurate descriptions of the applicable principles (subject possibly to the issues discussed earlier arising from Cheshire Cavity).

78.

The question is whether the FTT misapplied or misunderstood those principles in a relevant respect in its reasoning and conclusions at [95]-[97]. Such a misapplication or misunderstanding was described by Lord Lowry in Scottish and Newcastle as an error of law [20].

79.

In answering that question, Mr Bremner reminded us that it was necessary to consider the FTT's decision as a whole: see, for example, HMRC v London Clubs Management Ltd [2011] EWCA Civ 1323, at [74]. That is the approach which we have adopted.

80.

We consider it to be axiomatic that the functionality test must be applied by reference to the taxpayer's business as it is actually carried on. Beginning with the reference in Yarmouth ("apparatus used by a business man in carrying on his business") all of the cases we discuss above turn on an analysis of the item in the context of the business actually carried on. It was the highly unusual nature of the businesses in fact carried on in Wangaratta and Barclay Curle which informed the conclusions in those cases. Therefore, we consider that the FTT misunderstood or misapplied the functionality test at [95] when it concluded in setting out its reasoning that (1) without the safety significant structures the actual processes carried on at the TMF could still be carried on efficiently, although that was entirely theoretical because the regulatory environment would not permit it to happen, and (2) the regulatory environment was not relevant to whether an asset performed a function in the trade.

81.

Mr Bremner argued that it would be wrong for us to look at any part of [95] in isolation. The FTT had recognised elsewhere in its decision the importance of the regulatory regime and had acknowledged (at [94]) that “the processing could not take place without the safety significant structures in place”. The relevant legal question, he said, was simply whether the assets functioned as plant or premises, and the FTT had permissibly formed the judgment that the fact that they fulfilled an essential safety function did not determine that question.

82.
We agree that the FTT recognised the applicable regulatory regime. We accept that the weight to be given to that factor in making the functionality assessment was a matter for the FTT. We also think that the FTT were right to observe that performance of a safety function cannot convert an item which is merely premises into plant. However, we think that the error into which the FTT fell was essentially to confuse the relevance of the regulatory/safety aspects in assessing the functionality of the Disputed Items with their relevance to the nature of the business in which functionality was to be assessed. That was what led it to state that without the safety structures the relevant processes “could still be carried out efficiently”, when in fact the effect of the regulatory constraints was that those processes —and therefore the relevant business which Urenco in fact carried on—could not permissibly be carried out at all. The relevance of the regulatory constraints set out at [24]-[39] was not confined to the functions performed by the assets, because those constraints necessarily determined what business Urenco could permissibly carry on at the TMF in the first place.

83.
The same confusion lies behind the FTT’s assertion that “the regulatory environment is not…relevant to whether an asset performs a function in the trade”. We observe that here the FTT is going much further than Mr Bremner’s assertion (with which we agree) that a safety function cannot convert premises into plant; it is saying that the safety function is simply not relevant, and so presumably should be given no weight. In any event, the critical point is that if the trade is itself shaped and determined by the regulatory environment, then that environment must necessarily be relevant to assessing functionality “in the trade”.

84.
We also accept the force of Mr Peacock’s argument that in its essential reasoning the FTT appears to concentrate unduly in determining functionality on the “actual processing” carried out at the TMF. Mr Bremner states in his skeleton argument that this ignores the findings elsewhere in the Decision as to the breadth of the activities carried on by Urenco at the TMF. However, we consider that the reasoning at [94]-[97] read as a whole does show that the FTT placed considerable weight on whether an item played a part in the “actual processing” of Tails. While [95] begins with a broad description of the ends towards which “the processes” at the TMF are directed, it appears to regard shielding and containment, and (at [96]) seismic qualification, as standing in contrast to “the actual processing” of Tails. It distinguishes Wangaratta on the basis that in that case the structures were part of “the dyeing process”. It then refers to “the actual processes” and “the actual processing of Tails”, which, it concludes, could be carried on without the structures in this appeal. In its detailed conclusions as to the status of the separate structures and items at [98], it describes the functions of the CHF as “not functions in processing the Tails” and of the Vaporisation Facility as “essentially the functions of premises rather than functions in the processing of Tails”. The analysis of the UOS uses the same language. The FTT concludes that those structures are therefore not plant. By contrast, the plinths are found to be plant because they enable the transportation of cylinders which is “a function in the

processing of Tails", and the Kiln Facility is plant because it also carries out functions "in the process of deconversion and in the packing of uranium oxide".

85.
It is not clear whether the FTT's focus on processing and "actual processing" amounts to, or stems from, a failure to apply the principle established by case law, (explicitly recognised by the FTT at [89(3)]) that the function of plant may be active or passive. If so, that would be an error of law. We think it is more likely that it results from the drawing of a false dichotomy between items used in activities which might be said to be "actively" involved in processing Tails at the TMF and those which enable the carrying on of the entire range of activities in compliance with regulatory requirements. We consider that the FTT was correct to observe [21] that an item is not plant simply because the business could not be carried on "but for" that item. However, in our opinion it does not follow from this that an item which performs a more passive function in the business activities, and/or the main function of which is to enable those activities to be carried out safely in compliance with applicable laws and regulations, is as a result less like plant and more like premises or setting. Reading the FTT's critical reasoning in the context of the decision as a whole, we consider that the FTT did adopt an approach to functionality which assumed that an item falling within the latter category was indeed as a result less plant-like and more like premises. Particularly given the nature of Urenco's business activities at the TMF, we consider that this was an error, as it misunderstood or misapplied the relevant principles as applicable to those business activities as actually carried on.

86.
The approach by the FTT which we have described also informed its conclusion that, contrary to Mr Peacock's submissions, Wangaratta actually supported its decision that most of the items were not plant. If the FTT had adopted the correct approach, a much closer comparison to the "complex whole" in that case would in our view have been called for. Even if Mr Bremner is correct that in principle containment and safety are typical functions of premises, these were not typical premises and this was not a typical trade.

87.
We conclude that, for the reasons set out above, the FTT erred in law in its application of the functionality test to the Disputed Items. Given the iteration between the various grounds of appeal, it is appropriate to consider what this means for the disposition of the appeal only after we have considered the remaining grounds.

Ground 2: Was there eligible expenditure "on the provision of" plant and machinery?

88.
Urenco's second ground of appeal is that the FTT's decision unduly restricted expenditure which qualified as being "on the provision of" plant and machinery.

89.
Mr Peacock argued that case law establishes that expenditure on the delivery and installation of plant or which is necessary to make plant usable qualifies for allowances as being expenditure "on the provision of" plant. The FTT erred in not accepting that (save for the plinths) expenditure on various items was not on the provision of plant.

90.
Mr Bremner submitted that the FTT's conclusion that the vast majority of the items were mere premises rather than plant was simply not capable of challenge when, as here, no error of law was

made out. Moreover, if particular premises were required in order for plant to be usable, expenditure on those premises was, as the FTT found, on the provision of premises, not plant. He stated that the FTT had focussed on expenditure on stairs, access platforms and access hatches, and “concluded that such expenditure was too remote from the relevant items of plant”.

“On the provision of”

91.
There is no statutory definition of the meaning of expenditure “on the provision of” plant and machinery. A helpful review of the leading authorities was recently provided by the Upper Tribunal in Inmarsat Global Limited v HMRC [2021] UKUT 59 (TCC), which we gratefully adopt. One of the issues in that case was whether expenditure by Inmarsat on the cost of launching six satellites was expenditure “on the provision” of plant and machinery, and another was the relevance of whether the satellites “belonged” to Inmarsat.

92.
The relevant passages from the Tribunal’s analysis of the authorities are as follows:

[66] We have already referred to the judgment of the House of Lords in Barclay Curle. In that case, the taxpayer carried on a trade of shipbuilding and repairs. For the purposes of that trade, the taxpayer (i) excavated a large quantity of earth and rock, (ii) lined the resulting hole with concrete and (iii) installed a dock gate and pumps to form a dry dock. The House of Lords held, by a majority of 3 to 2, that the dry dock was 'plant'. That meant that the taxpayer was entitled to capital allowances on expenditure incurred on the 'provision of' the dry dock under the provisions of s 279 of the Income Tax Act 1952 which at the time governed entitlement to allowances and the question arose whether this extended to the costs of 'making room' for that dry dock.

[67] Lord Reid said ([1969] 1 All ER 732 at 741–742, [1969] 1 WLR 675 at 680):

'So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of plant for the purposes 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.'

[68] Lord Guest said ([1969] 1 All ER 732 at 747, [1969] 1 WLR 675 at 686):

'The commissioners upheld the contention of the Crown … 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 s 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.'

[69] Lord Donovan also agreed that the expenditure on excavation was 'on the provision of … plant'. Lord Upjohn and Lord Hodson expressed no view on the matter since they were in the minority who did not consider that the dry dock was 'plant' at all.

[70] In Ben-Odeco Ltd v Powlson (Inspector of Taxes) [1978] STC 460, [1978] 1 WLR 1093, the House of Lords held by a majority of 4 to 1 that financing costs that the taxpayer paid under loans taken out to fund the acquisition of an oil rig did not amount to capital expenditure on the provision of plant and machinery for the purposes of s 41 of the Finance Act 1971.

[71] In the course of argument, their Lordships were taken to provisions of Canadian statute law under which allowances were available on the 'capital cost to the taxpayer of property' and it had been held that this extended to financing costs. Lord Wilberforce (in the majority), however, concluded that the Canadian and UK statutes had a different scope saying ([1978] STC 460 at 464, [1978] 1 WLR 1093 at 1097):

'The expression “capital cost to the taxpayer” makes it easier to include within deductible expenditure costs which the particular taxpayer incurs, whereas the United Kingdom words, more objectively, focus on expenditure directly related to the plant. The one draws a line around the taxpayer and the plant; the other confines the limiting curve to the plant itself.'

[72] Lord Wilberforce expanded on the scope of the UK statute ([1978] STC 460 at 464, [1978] 1 WLR 1093 at 1098). He observed that it would be undesirable for a taxpayer who finances an acquisition of plant and machinery out of its own resources to obtain a different measure of allowances from a taxpayer who borrows money. Accordingly, an interpretation of the statute that introduces a large element of subjectivity by reference to a taxpayer's individual circumstances was to be avoided. He said:

'The words “expenditure on the provision of” do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant, not limiting it necessarily to the bare purchase price, but including such items as transport and installation, and in any event not extending to expenditure more remote in purpose.'

[73] Lord Russell, also in the majority, phrased the test as follows ([1978] STC 460 at 472, [1978] 1 WLR 1093 at 1106):

'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.'

[74] Pausing there, if IMSO had been the owner, rather than merely a lessee of the Satellites, we do not consider that there could be much doubt that the launch costs it incurred would have been 'expenditure on the provision of' the Satellites given the FTT's finding that the Satellites were of no use whatsoever until they were launched into orbit.

93.
We consider that the following principles apply in relation to the meaning of expenditure “on the provision of” plant and machinery:

(1)

where there is an item of plant or machinery, expenditure may qualify as being “on the provision of” that plant or machinery if it is incurred in acquiring title to it, delivering or transporting it to its place of use, installing it or setting it up in working order. In ordinary language, such expenditure would be incurred in providing the plant or machinery.

(2)
In all cases, the expenditure must not be too remote from the plant or machinery, as the financing costs were held to be in Ben-Odeco. The test is an objective one.

(3)
While the product of the expenditure in issue may be a physical item it is not relevant whether that is so, or whether that physical item itself performs the function of plant or premises. Expenditure which qualifies as being on the provision of plant is parasitic on an item which is itself plant; the question was not whether the hole in the ground in Barclay Curle was plant, because the plant was the dry dock.

The FTT’s decision on the issue

94.
The FTT discusses the meaning of “on the provision of” fairly briefly. It refers at [90] to Ben-Odeco, and at [91] to the fact that in JD Wetherspoon plc v HM Revenue & Customs [2012] UKUT 42 it was said to be common ground that expenditure on the provision of plant extended to expenditure to ensure the plant could actually be operated [22] .

95.
At [97] (set out at paragraph 75 above) the FTT rejected Mr Peacock’s argument that because all of the Disputed Expenditure enabled the processes at the TMF to be carried out safely, “the expenditure on each structure was to make the plant and machinery usable”. It considered that such expenditure was not part of the installation cost of the plant and machinery within the structures merely because the plant and machinery could not safely be used without it. Although it is not clear, we think that this is, at least in part, a decision in relation to the breadth of the words “on the provision of”.

96.
At [99], the FTT summarises its conclusion as being that the Kiln Facility, Condenser Facility and plinths are plant, but the other disputed assets are not. However, the terms in which the various identified items are analysed at [98] indicate that while the FTT’s decision is in some cases based on whether an item is plant, in most cases it is apparently based on whether the expenditure was “on the provision of” plant. In some cases, it is not entirely clear on which basis the decision is reached. This is not a criticism of the FTT’s decision, since the issue before it was whether the expenditure was on the provision of plant or machinery, which encompasses both Grounds 1 and 2. Unpacking the decision for the purposes of dealing with Ground 2, the basis on which the eligibility for allowances of the fifteen items dealt with in [98] was determined was apparently as follows (by reference to sub-paragraphs of [98]):

(a)
Eligible

(1)
The Kiln Facility was plant: (7).

(2)

The Condenser Facility was eligible because the structural support which it provided was "expenditure on the provision of plant. It is necessary for the installation of the condenser and to make it usable": (12).

(3)

The raised platforms or plinths were plant, but even if they were not themselves plant "expenditure on the plinths is fairly described as part of the cost of installing the rail system in the sense of making it usable". The alternative finding must in our view mean that the expenditure would be on the provision of the rail system: (3).

(4)

The air sealed crane access hatch in the roof of the Kiln Facility was on the provision of plant, namely the hydrolysis chamber: (9) [23] .

(5)

The plinth supporting the hopper in the Kiln Facility was on the provision of plant, namely the hopper: (11).

(b)

Not eligible

(6)

The CHF was not plant: (1).

(7)

The internal radiation shield walls in the CHF were not plant: (2).

(8)

The stairs and access platforms servicing the crane in the CHF were not on the provision of plant, as they were part of the setting and were "too remote from the cost of installation or making the crane usable": (4).

(9)

The Vaporisation Facility (excluding certain items) was not plant. The walls and first-floor raft slab supporting the pipework necessary for the processing of tails was not "expenditure to make the plant in the facility usable"; we think this must be a finding that it was not on the provision of plant: (5).

(10)

The stairs and access platforms in the Vaporisation Facility were not on the provision of plant: (6).

(11)

The stairs and access platforms in the Kiln Facility were not on the provision of plant: (8).

(12)

The access hatches in the Kiln Facility were not on the provision of plant: (10).

(13)

The stairs and access platforms in the Condenser Facility were not on the provision of plant: (13).

(14)

The UOS was not plant: (14).

(15)

The stairs and access platforms in the UOS were not on the provision of plant: (15).

97.
So, for the purposes of Urenco’s second ground of appeal, we consider that this is a challenge to the FTT’s decisions as we have described them at (8)-(13) and (15) of the preceding paragraph.

Discussion

98.
We have concluded in relation to Ground 1 that the FTT erred in law in determining whether the Disputed Items were plant. It must follow that this could in turn have led it into error in determining whether certain expenditure was on the provision of plant. If, for example, contrary to the FTT’s findings, the CHF and the UOS were properly to be regarded as functioning as plant, then that would mean that expenditure “on the provision” of those facilities would itself be eligible. We will return below to what this means in terms of the disposition of the appeal. However, for the purposes of determining Ground 2 we must consider whether the FTT in any event erred in law in determining that the expenditure on the items we have referred to was not expenditure on the provision of plant or machinery.

99.
We consider that the FTT was justified in rejecting as unduly broad Mr Peacock’s assertion that expenditure must be on the provision of plant where the plant could not be operated, or could not be operated safely, without that expenditure. The authorities establish that is not simply a “but for” test.

100.
We also consider that where the FTT determined that expenditure was not on the provision of plant because it was too remote from the plant on which it was asserted to be parasitic, that was a finding of fact, applying correct legal principles, which cannot properly be challenged in this appeal. This would apply to the explicit finding to that effect in relation to the stairs and access platforms servicing the crane in the CHF (FTT [98(4)]. Since the stairs and access platforms in the Vaporisation Facility ([98(6)]), those in the Kiln Facility ([98(8)]), those in the Condenser Facility ([98(13)]) and those in the UOS ([98(15)] were all stated not to be on the provision of plant “as with the stairs and access platforms in the CHF”, we consider that these too were findings as to remoteness which involved no error of law. We therefore reject Urenco’s appeal on this ground in respect of those items.

101.
The remaining findings of the FTT regarding whether expenditure was on the provision of plant are those regarding the walls and slab in the Vaporisation Facility ([98(5)]) and the access hatches in the Kiln Facility ([98(10)]).

102.
The FTT’s decision regarding the walls and slab was as follows:

The walls and first-floor raft slab also provide support for pipework necessary for the processing of Tails. In my view that is also essentially a premises type function. As with the CHF, I regard the vaporisation facility as part of the setting in which the Tails are processed. I do not accept that it can be regarded as expenditure to make the plant in the facility usable.

103.
The FTT held that the Vaporisation Facility itself was not plant, on the basis that it was part of the setting. It is not made explicit whether the FTT’s decision in relation to the supporting walls and slab

was reached on the basis that they were not plant, or on the basis that the expenditure was not on the provision of plant. However, the rejection of Mr Peacock's argument that the expenditure qualified as it was to make plant usable strongly indicates that it was reached on the latter basis. On that basis, we consider that the FTT's reasoning indicates that it misdirected itself as to the law, because the fact that the walls and slab themselves performed a premises type function was not material to whether expenditure on those items was on the provision of plant. If the expenditure fell within the principles we describe above, then the fact that the expenditure happened to result in physical items which performed a premises function would not render it ineligible. Of course, because the FTT did not consider that the Vaporisation Facility was itself plant, it would follow that no expenditure on its provision would itself qualify (unless it could be shown to be on the provision of some other item of plant). Nevertheless, we consider that the FTT made an error of law within Ground 2 in reaching its decision in relation to the walls and slab.

104.
As regards the access hatches in the Kiln Facility, the FTT stated that these were not for the purposes of installing plant and nor was the expenditure to make the kiln usable. The FTT found that the purpose of the hatches was to enable kiln filters to be changed. This was a finding of fact, which was not challenged by Urenco. On the basis of the principles derived from the case law which we set out above, in light of this finding of fact we consider that the FTT was entitled to reach the conclusion which it did, for the reasons it gave. It made no error of law.

105.
In conclusion, we dismiss Urenco's appeal on Ground 2, except as regards the FTT's conclusion in relation to the walls and slab in the Vaporisation Facility. We set out below our decision as to the disposition of the appeal.

Ground 3: Was the Disputed Expenditure on the provision of a building?

106.
Subject to section 23, expenditure on the provision of an item which may be plant will not qualify for plant and machinery allowances if it is expenditure on the provision of a building. This includes expenditure on its construction. Section 21 provides that for these purposes, "building" includes an asset which is:

(1)
incorporated in the building,

(2)
is in the building and is of a kind normally incorporated in a building, or

(3)
is in or connected with the building and is contained in List A.

107.
In this appeal, the relevant items in List A are walls, floors and stairs.

108.
Helpfully in this appeal, the FTT considered this issue in relation to each item of Disputed Expenditure, and not only those which it had determined to qualify as being on the provision of plant. The FTT decided that each of the structures was a building, and every other identified asset was

incorporated in or connected with those buildings. On that basis, none of the items qualified, regardless of whether the relevant expenditure was on the provision of plant: [126].

109.
Urenco appeals against that decision.

The FTT's decision

110.
The FTT noted that there was no statutory definition of "building", and no binding authorities on its meaning for the purposes of section 21. Having discussed the submissions of the parties, the FTT stated as follows:

107. I accept that the word "building" is to be given a meaning consistent with its ordinary everyday usage. However, I do not consider that function is irrelevant. I agree with Mr Peacock that the function of a structure will be a factor, but is not determinative. The inherent characteristics of a structure must be seen in the context of the function of the structure. Those functions might include providing shelter and security. The common law test for plant considers the function of the asset, in particular its function in the trade. Section 21 in my view requires consideration of the nature and characteristics of a structure including whether or not the functions it is intended to perform are typical functions of a building.

…

110. On Mr Peacock's case, the question of whether a structure is a building only arises once it has been determined that it satisfies the common law definition of plant. As such it must be treated as having a plant-like function in the trade and one then looks to see whether it also functions as a building. However, in my view it is not solely a question of how the structure functions. It is also a question of the characteristics of the structure. For example, does it have the form of a building? A structure which has four walls and a roof might naturally be described as a building, whatever specialist function it might have in a trade.

111.
The FTT determined that all of the £192m of Disputed Expenditure would be disqualified by section 21. Mr Peacock stated that Urenco accepts that if the five facilities at the TMF are themselves "buildings", then expenditure on the other separately identified assets would, as the FTT found, be disqualified because those assets would be incorporated in those buildings or found in List A. If, on the other hand, the five facilities were not themselves buildings and none of the other assets was itself a building, then none of the expenditure would be prevented from being plant by section 21. That is because the extension of section 21 by section 21(3) to assets which are in, incorporated in or connected with a building applies only where there is a building in the first place, as shown by the references throughout section 21(3) to "the" building.

112.
The issue under Ground 3 is therefore whether the FTT erred in law in deciding that each of the five facilities was a building for the purposes of section 21. The FTT's reasons for concluding that they were, at [112]-[125], can be summarised as follows:

(1)
As regards the **CHF**, its "predominant purpose…is to protect the public offsite and employees onsite by providing radiation shielding, containment and seismic qualification so as to keep harmful things

inside and not to provide shelter or security from the outside". However, radiation shielding and containment "can also be a function of a building". The fact that the CHF reflected specific nuclear safety requirements did not mean it was not a building. The cladding of part of the CHF was for planning or aesthetic reasons, but the roofs were not. The roof cladding protected the shield roof from the elements, but otherwise the roof and walls were not intended to provide shelter to people or things. The CHF "does have the inherent characteristics of a building, namely it has walls and a roof. It also functions as a building in containing things". Looking at the CHF, "with or without the cladding, it looks like a building…in everyday terminology it is naturally described as a building".

(2)
As regards the **Vaporisation Facility**, its upper storey provided shelter for equipment and "the concrete box which is the ground floor" provided shelter for the autoclaves, though that was not its primary function. It had four walls, a roof and an internal concrete first floor. The principal function of the ground floor concrete box was "containment, which is a typical function of a building". As a whole it was "naturally described as a building".

(3)
The **Kiln Facility** was "effectively 3 concrete boxes in the basement, the ground floor and the first-floor". The concrete walls and floors were required for seismic qualification of the structure and the equipment it supported. They also provided a containment function to prevent escape of loose uranium oxide powder. The kiln facility "has the inherent characteristics of a building, namely it has walls, a roof and internal floors". It was intended to provide containment "which is a typical function of a building". Looking at the kiln facility, "with or without the cladding, it looks like a building…in everyday terminology it is naturally described as a building".

(4)
The **Condenser Facility** was a structure which seismically qualified the condenser and other items of equipment. The cladding provided containment in relation to fumes which were potentially radiologically contaminated, but "if one removes the cladding, then one is left with steel frame external walls and concrete floors". The structure was "very much at the margin as to whether it would naturally be described as a building". One of its functions was to contain hazardous fumes, and "[a]s such, it does fulfil one of the functions of a building and with four walls, a roof and internal floors it gives the appearance of a building". On balance it was "properly described as a building".

(5)
The **UOS** was "most clearly a building". It had four walls and a roof. Not only did it provide containment, but the walls and roof protected the interior from the element and enabled the space to be dehumidified. From the exterior "it is indistinguishable from a large warehouse building…in everyday terminology it is naturally described as a building".

Submissions of the parties

113.
Mr Peacock argues that the FTT made the following errors of law in reaching its decision:

(1)
The term "building" in section 21 must be defined within its particular context and as such is not to be given a wide meaning or simply its meaning in ordinary usage.

(2)

The appearance of a structure is not determinative. Additionally, for most of the facilities their appearance with cladding was irrelevant.

(3)
Function is more important than characteristics.

(4)
Whether or not a structure "can" perform a function of a typical building is not the test; rather, it is the actual function or purpose which must be determined, and whether that it typical of a building.

(5)
The main function of a building is shelter, and the FTT found as a fact that that was not the main function of the facilities.

114.
Mr Bremner submits that Urenco has not identified any misdirection in law by the FTT as to the meaning of "building", and instead is simply criticising its evaluative exercise of judgment, which is not a valid ground of appeal. Referring to Devon Waste [24] , he says that where statutory language takes its normal meaning, which it should here and as Urenco conceded before the FTT, the application of that language is entirely a question of fact. In any event, the FTT reached the correct conclusion on the issue. Parliament must be taken to have intended the term "building" to be understood in a manner consistent with ordinary usage. The authorities in which the term has been considered show that a practical and common-sense approach is to be adopted. Carr v Sayer establishes that a building does not become plant simply because it is purpose-built for a particular activity.

115.
Further, argues Mr Bremner, the FTT was right to have regard to the form or inherent characteristics of a structure in deciding whether the facilities were buildings. Something more than function (such as inherent characteristics) must inform the question of whether an asset is a building, or section 21 would otherwise effectively repeat the common law test for plant. This would also defeat the purpose of section 21, which was to "draw a line in the sand" under the common law tests.

116.
Mr Bremner said that having had the benefit of a site visit, witness evidence and photographs, the FTT was clearly entitled to find that the facilities had the appearance of a building. Indeed, he argued, "having regard to the scale, construction and appearance of the buildings, the FTT could not reasonably have come to any other conclusion".

Discussion

117.
Section 21 must be construed purposively, in its context, and applied to the facts, viewed realistically. As to purpose, at [102] the FTT helpfully stated as follows:

Both parties accept that the introduction of what are now ss21-23 by the Finance Act 1994 was intended to draw a line under burgeoning case law which had been extending the meaning of "plant". Both parties were content for me to refer to Hansard where parliamentary debate indicates the rationale behind the introduction of the lists was to draw a line indicating which assets were and which were not excluded from allowances (Hansard Debate 10 March 1994 Finance Bill Standing Committee A column 601-602 clause 110 (Stephen Dorrell)):

“Clause 110 introduces a schedule containing new rules which provide that buildings, structures or land, with certain exceptions, cannot qualify for capital allowances as plant and machinery. These new rules are not intended to change the treatment of assets that qualify as plant at present, as a result of court rulings. The intention behind the legislation is to clarify and strengthen the boundary between buildings and structures on the one hand, and plant on the other. The boundary has been eroded over the years by a number of court cases which have reclassified certain expenditure on buildings and structures as being expenditure on plant. That has affected Exchequer receipts and has created uncertainty about where the boundary lies.

The new rules will result in greater certainty for both taxpayer and Revenue. They will also protect the Exchequer from future reclassifications of assets currently considered to be buildings or structures. Where that happens, machinery and plant allowances become available at a higher rate than would otherwise be the case, writing off most of the cost of an asset over the first seven to eight years. That is clearly not an appropriate rate of write off for buildings or structures which have, on average, a very much longer life.”

118.
In SSE, the Court of Appeal approved the Upper Tribunal’s description of the intention of the code in section 21 to 23 as being “‘to draw a line in the sand’ and entrench the understanding of the different classifications” in common law of buildings and structures on the one hand and plant on the other [25] .

119.
The subsequent legislation in this area highlights the difficulty of drawing such a line. Sands shift, not only because issues will arise which had not been specifically dealt with by case law at the time the line was drawn (in 1994) but because assets such as those in this appeal were not contemplated at that time. Further, at the time of the expenditure in this appeal, it was not the case that buildings attracted a more “appropriate rate of write off”; they attracted no write off at all [26] . While the background to the code in sections 21 to 23 is in principle of assistance to us in construing the meaning of “building”, in that case law guidance prior to 1994 would help to inform that construction, in practice there is almost no specific guidance available on that issue, and in any event we must determine it in relation to novel and unusual assets. This is not a situation in which, in Mr Dorrell’s words, we should guard against a “future reclassification” of assets, because assets such as these have not previously been classified.

120.
Turning to the meaning of “building” in section 21, we can see the allure of simply giving the word its “natural” or “everyday” meaning. The FTT explicitly stated (at [107]) that it accepted that the word was “to be given a meaning consistent with its ordinary everyday usage”.

121.
However, the essential limitation of that approach is that in the context of sections 21 to 23 it begs a critical question. That question is: to what extent does the everyday meaning of “building” depend on appearance or characteristics on the one hand and to what extent on purpose or function on the other?

122.
We do not accept Mr Bremner’s argument that Urenco simply has no basis (other than an Edwards v Bairstow challenge) to appeal to this tribunal against the FTT’s decision on this issue, because, like the word “waste” in Devon Waste, the word “building” has its ordinary meaning, and that is a question

of fact. That assumes the answer to the question we must decide. As Nugee LJ said in the passage on which Mr Bremner relied:

Whether a word in a statute has its ordinary meaning or some special meaning is a question of construction of the statute and hence a question of law.

123.
The term “ordinary meaning” is itself lacking precision. In SSE, the Court of Appeal had to construe the meanings of “tunnel” and “aqueduct” [27] in List B of section 22. Rose LJ (as she then was) commented on the FTT’s discussion of the “ordinary meaning” of the word tunnel as follows, at [39]:

I agree with Judge Poole's comment at [38] that some of the words used in List B have an elastic meaning and that they can take on the colour of the words surrounding them. Determining the scope of such a chameleon word is not simply a binary choice between the widest possible dictionary meaning on the one hand and a narrowed meaning, specific to a particular statutory provision derived from the noscitur a sociis interpretative tool on the other - it is a more nuanced exercise than that. Many English words have a number of ordinary meanings in common usage and the statutory meaning is not necessarily the broadest one.

124.
In this appeal, we do not have to decide whether “building” is itself a “chameleon word”. The point of more general application being made by Rose LJ, with which we respectfully agree and which we consider particularly pertinent in this case, is that many words have a number of ordinary (or “everyday”) meanings, and the statutory meaning is not necessarily the widest one.

125.
An analysis which takes as its starting point that “building” bears its ordinary everyday usage has the superficial attraction of simplicity but may lead to a flawed conclusion. It assumes that when the word is construed purposively and in context, that remains the correct approach to interpretation. Second, because there may be a number of “everyday” meanings, it provides no safeguard against an analysis which adopts the widest of those meanings. That widest meaning may be one which places much more emphasis on appearance than function. Third, in a situation where the analysis is unclear, it can easily become a form of tie-breaker; if it looks like a building it must be a building.

126.
We consider that in its reasoning, the FTT unfortunately failed to avoid these risks.

127.
In construing “building” in section 21, the FTT was in our view correct in deciding, at [107], that both the characteristics and functions of the asset are relevant. However, we have concluded that in its application of that principle to the five facilities at the TMF the FTT erred in law in certain respects.

128.
The context in which sections 21 to 23 were enacted is described above. We agree with Mr Peacock that it follows from the way in which the provisions interact that there is a difference between a “building” and a “structure”, such that not every structure is necessarily a building. That is made clear by section 22(3) [28] . This has the result that most of the leading authorities [29] do not offer direct guidance, because they discuss the difference between plant and a “building or structure”.

129.

So, it is necessary to consider what would make a particular structure a building within section 21. A spectrum of everyday meanings is possible. One everyday meaning of building would simply be anything which has four walls and a roof and/or looks like a building, regardless of its function or purpose. Slightly further along the spectrum would be a structure with four walls and a roof which is capable of performing any of the functions which a building might be said in everyday usage to perform. Those functions might include shelter, containment or enclosure, privacy, storage or protection. Further along the spectrum again would be a structure which is not only capable of performing such a function but was designed for that purpose. Further along again would be a structure with four walls and a roof the predominant function of which was one of the central functions of a building, such as shelter.

130.

In our opinion, the context and purpose of section 21 supports a construction of "building" in which function is particularly important, and in which appearance or physical characteristics should not be the primary determinant of the line in the sand which sections 21 to 23 were intended to draw. As discussed above, the authorities make clear that the function actually performed by an asset in the trade carries very considerable weight in determining whether it is plant. We consider that section 21 does not have the purpose or effect that in then determining whether an asset is disqualified from being plant because it is a building an approach should be adopted in which appearance or physical characteristics are predominant and the actual and predominant functions of the asset are subsidiary.

131.

We therefore consider that the FTT erred in law in several inter-related respects in its approach to the issue of whether or not the five facilities were buildings. First, in taking as its starting point the "ordinary everyday" meaning of building, the FTT failed to acknowledge or discuss the various potential everyday meanings of that term and to consider which of them might best accord with a purposive construction of section 21. Second, in placing emphasis in its reasoning for each of the facilities on their physical appearance or characteristics and how they would be "naturally described", the FTT failed to guard against the pitfalls we set out at paragraph 125 above. In particular, its approach resulted in a focus on appearance or characteristics rather than on function. Third, in considering the functions of the facilities, the FTT placed weight not on what it had found as a fact to be the predominant functions of those facilities [30] but instead on actual or potential functions which it considered were consistent with the functions of a building. That approach is seen most clearly in relation to the FTT's conclusions regarding the Condenser Facility:

121. The condenser facility is a structure which seismically qualifies the condenser and other items of equipment. The cladding attaches to the steel structure to provide containment in relation to hazardous fumes which if released could be radiologically contaminated. If one removes the cladding, then one is left with steel frame external walls and concrete floors. Were it not necessary to contain the potential release of hazardous fumes then it would not be necessary to have the cladding.

122. In my view this structure is very much at the margin as to whether it would naturally be described as a building. In other industrial locations condensers could be outside and there would be no need to contain hazardous fumes. However, one of the functions of this structure is to contain hazardous fumes. As such, it does fulfil one of the functions of a building and with four walls, a roof and internal floors it gives the appearance of a building. On balance I am satisfied that it is properly described as a building.

132.

We discuss below the consequences of the errors of law which we have found for the disposition of the appeal.

Ground 4: Was expenditure on buildings saved by Item 22 of List C?

133.
Expenditure on buildings which section 21 would otherwise prevent from being eligible for plant and machinery allowances may be saved by List C in section 23. List C includes at Item 22 expenditure on “the alteration of land for the purpose only of installing plant or machinery”.

134.
Urenco argued before the FTT that any of the Disputed Expenditure which was found to be disqualified by section 21 would be saved by Item 22.

The FTT’s decision

135.
The FTT dealt with this issue at [145]-152]. Urenco argued that in Item 22 “land” included buildings and other structures, so that constructing a building on land amounted to an alteration of the land. The argument was based on the definition of “land” in the Interpretation Act 1978 (the “Interpretation Act”). HMRC argued that that definition did not apply as there was a “contrary intention”.

136.
The FTT decided as follows:

151. It is not necessary for me to determine what is a pure question of law and I prefer not to do so. Even if Urenco are right, they must still satisfy me that the structures were constructed solely for the purpose of installing plant or machinery. That is clearly not the case here. Mr Peacock submitted that each of the disputed assets was designed and constructed solely with a view to enabling the installation and safe operation of the TMF. Expenditure incurred because it is necessary to create a location for the plant and machinery to be used safely is part of the installation purpose. I do not accept that submission. They were constructed in part at least to protect operatives, the public and the environment and to provide premises which house the plant and machinery. Not for the purposes of installation.

Urenco’s appeal

137.
Urenco repeats its argument before the FTT as to the meaning of “land”. In relation to the FTT’s finding that there was (in any event) a purpose other than installation, Urenco appeals on the basis that:

(1)
That finding was plainly not apt to describe the reasons for the various stairs, platforms, plinths or access hatches as found by the FTT.

(2)
In any event, the FTT erred by failing to recognise that in each case the purposes which it identified at [151], in particular protecting operatives, the public and the environment and housing the plant and machinery, were simply part of the installation purpose under Item 22.

Discussion

138.

As explained below, we have concluded that the FTT made no error of law in its decision regarding the "for the purpose only" requirement in Item 22. It is therefore unnecessary for us to determine the issue before the FTT relating to meaning of "land" in Item 22. Like the FTT, we consider it appropriate for that question to be dealt with in an appeal where it is dispositive [31] .

139.

The FTT decided that Urenco failed the sole purpose requirement in Item 22. Mr Bremner's first argument for HMRC was that no appeal against that decision was possible other than one based on Edwards v Bairstow, because purpose was a paradigm question of fact. While we would accept that as a general proposition, Mr Peacock has framed his appeal in this case (at least in part) as alleging an error of law, namely as to the meaning of "the purpose…of installing". On that basis, we consider that we do have jurisdiction to determine the issue.

140.

Having said that, Mr Peacock's first submission was that the FTT's findings at [151] were inconsistent with its findings elsewhere in the decision in relation to the reasons for the stairs, platforms, plinths and access hatches. Taken separately from his second submission, we consider that this would, in substance, be a challenge as to the rationality of a finding of fact, for which Urenco has no permission. In any event, we agree with Mr Bremner that it would not follow from any other findings by the FTT as to the reasons for those items that those reasons must necessarily have been the only purpose of the expenditure on those items. We therefore reject this argument.

141.

Mr Peacock's main submission was that the purposes categorised by the FTT as non-installation purposes were in fact a necessary part of the installation, so that on the proper construction of Item 22 they were for the purpose of installing the plant or machinery.

142.

Some guidance as to the meaning of "installing" in Item 22 can be found in SSE. The Upper Tribunal in that case set out its views obiter: [102] of the decision. The particular issue before the Upper Tribunal, whether that term extended to the creation of an asset in situ, does not arise in this appeal. However, the Tribunal's comments are of some relevance to Ground 4. Having reviewed the authorities, the Tribunal stated as follows:

127.The OED defines "install" as "place (an apparatus, system, etc.) in position for service or use." We accept that the case law does not limit the term to simply taking a prefabricated asset and placing it in position. As Mr Peacock submitted, the words that surround it in the statute provision and the purpose of the statute in question give colour to the term. However, in the case law which we have reviewed, the common theme is the process which involves the integration, often with a degree of complexity of an article or articles which have already been made into another article, structure, building or even the land itself. In none of the cases that we have been referred to has a term been held to include the creation of an item of plant in situ.

128.In our view, there is nothing in CAA 2001 which can lead to the conclusion that the term is intended to go wider than what we have described at [126] [32] above. In our view there is a clear distinction drawn in the statute between the "provision" of a structure or asset, which as we have seen, includes its construction and may embrace as part of the construction process the "installation" of plant, and those items of plant which by their nature are constructed separately and then need to be "installed." It seems to us that Item 22 in List C is confined to items which need to be installed

separately from the process of manufacture or construction. Therefore, contrary to Mr Peacock's submissions, we place some importance on the use of the word "only" in Item 22; the saving applies in circumstances where "installation" occurs in circumstances where it is necessary to make alterations of the land only to enable "installation" of the plant to take place, not in circumstances where the alteration is made in order to build or construct the asset in question. Thus, the use of the word "only" makes it clear that the saving to the general exclusion from capital allowances of works involving the alteration of land was intended to be a limited one.

129.Therefore, whilst we accept, as in Barclay Curle, that the alteration of land can be part of the process of construction and therefore the "provision" of an asset, in our view it would be stretching the meaning of ordinary words too far to describe that, as Mr Peacock seeks to do, as part of the process of installation. Whilst we have some sympathy with the argument that the focus should be on the function of an asset rather than how it is constructed, we do not think that the wording of Item 22 in List C permits such a broadbrush approach to be taken. If Parliament had intended a wide meaning to be given to the term "installation" it could easily have said that the term includes the construction of an asset, in the same way as it makes it clear that the "provision" of an asset includes its construction.

143.
In the Court of Appeal, Rose LJ commented as follows on the Upper Tribunal's analysis (at [69]):

Although I see the force of the Upper Tribunal's reasoning and do not dissent from it, it is undesirable given the elastic nature of the words used in these provisions to come to a concluded view of their scope effectively in the abstract.

144.
While the Upper Tribunal's reasoning relating to the meaning of "install" is not binding on us, like the Court of Appeal we see its force and do not dissent from it.

145.
The FTT regarded the purposes described in the final two sentences of [151] as not being "for the purpose only of installing" plant and machinery. We consider that they were justified in doing so. Mr Peacock's proposed construction of "installing" would give an extremely wide meaning to the term, and afford little weight to the word "only". No case was put forward why a purposive construction would or should lead to such a result. We agree with the Upper Tribunal in SSE that "installation" is apt to describe a process of integrating one thing into another, and not the construction or manufacture of an asset before it is installed. We also agree that the use of the word "only" makes clear that the saving in Item 22 was intended to be a limited one.

146.
The FTT accepted that Urenco's purposes in incurring the expenditure included the installation of plant and machinery. They were entitled to find that Urenco also had other purposes, and the expenditure therefore fell outside the saving in Item 22 (even if it was on the alteration of land). Whether or not those purposes could properly be described, in Mr Peacock's words, as "a necessary part of the installation", we do not agree that Item 22 should be construed to treat such purposes as the purpose only of installing plant or machinery.

147.
We therefore dismiss Urenco's appeal under Ground 4.

Ground 5: Was expenditure on buildings saved by Items 1 or 4 of List C?

148.
Where expenditure would otherwise be disqualified by section 21 as being on a building, Item 1 of List C in section 23 saves from section 21 expenditure on machinery, and Item 4 saves expenditure on “manufacturing or processing equipment”. Urenco argues that the saving extends to expenditure “on the provision of” those items.

The FTT’s decision

149.
The argument that Items 1 and 4 could apply to expenditure “on the provision of” the relevant items was raised by Urenco at a late stage in the proceedings before the FTT. The FTT decided that Urenco could amend its grounds of appeal and rely on the issue. Its decision was as follows:

141. I shall deal first with Items 1 and 4 of List C. Urenco’s argument is that expenditure on the provision of plant or machinery includes the cost of installing the plant or machinery. Certain expenditure will therefore pass the common law test but might then fall foul of s21 because it is on assets which are incorporated in or connected with a building. Mr Peacock submitted that Items 1 and 4 are designed to retain capital allowances for expenditure on the provision of machinery and manufacturing or processing equipment. He submitted that this applied to the concrete plinths in the CHF for the raised transfer rails, a plinth in the kiln facility for the hopper, access hatches in the kiln facility, stairs and access platforms in all the facilities, and the hammerhead crane supports in the UOS.

142. Mr Bremner submitted that Items 1 and 4 do not save expenditure which is “on the provision of” machinery or equipment, but only expenditure on the machinery or equipment itself. Section 11 provides the general rule that expenditure is qualifying expenditure if it is “on the provision of plant”. In contrast s23(3) refers to expenditure “on” any item in List C. In particular it provides that “expenditure on any item described in list C is … expenditure on the provision of plant or machinery”. Items 1 and 4 then simply refer to machinery and equipment with no reference to expenditure “on the provision of” machinery or equipment. This, he submitted, contrasted with other Items in List C, namely Items 23-33 which refer to expenditure “on the provision of” certain assets. He submitted that those words are necessary for assets in List C if qualifying expenditure is to be expanded beyond expenditure on the equipment itself so as to incorporate the cost of installation.

143. Mr Bremner’s construction would therefore save expenditure on machinery and equipment which is incorporated in or connected with a building but not on the costs of installing such machinery and equipment. In effect, such installation costs would remain as costs of the building.

144. Whilst it is a fine distinction, I accept Mr Bremner’s submission on this point. In List C Parliament has carefully chosen to distinguish between expenditure on certain assets, and expenditure on the provision of certain assets. I accept Mr Bremner’s submission that the effect of the distinction is that the installation costs of Items 1 and 4 are not saved from the operation of s21. If a piece of machinery or equipment is incorporated in a building or connected with a building then the cost of installation remains part of the expenditure on the provision of the building.

Urenco’s appeal

150.

The issue arising under Ground 5 is a question of law, namely whether Items 1 and 4 apply to expenditure “on the provision of” machinery and manufacturing and processing equipment.

151.
Mr Peacock submits that even though Items 1 and 4 do not refer explicitly to expenditure “on the provision of” those items, a careful reading of the precursor legislation shows that Parliament intended those words to be incorporated, and their omission is “a clear and obvious drafting slip”. He also argues that the legislation must in any event be interpreted purposively by correcting any obvious drafting error and incorporating those words.

152.
Mr Bremner broadly submits that the FTT was correct in its reasons and conclusion.

153.
There was a lack of clarity before the FTT in relation to which of the Disputed Assets would potentially be saved if Mr Peacock’s argument was correct. Indeed, some of the items described by the FTT at the end of [141] as so put forward by Mr Peacock had not been held by the FTT to be separately identified assets for the purposes of the appeal. The confusion was further compounded by the fact that the FTT granted Urenco permission to appeal under this ground not only in relation to the assets described at the end of [141] but also further assets, namely the Kiln Facility and the Condenser Facility. We asked Mr Peacock during the hearing to clarify which assets he was now suggesting would be relevant for the purposes of this ground and the list was longer still, including in particular the UOS.

154.
In the circumstances, we can understand Mr Bremner’s objections that Urenco should not be able to extend the scope of its appeal to issues which might involve findings of fact but which were not argued before the FTT, even if the FTT granted permission to appeal in respect of them. Mr Bremner also points out that section 23(4) would require consideration; this provides that Items 1 and 2 exclude “any asset whose principal purpose is to insulate or enclose the interior of a building or to provide an interior wall, floor or ceiling…intended to remain permanently in place”. The position is further complicated by the dependency, accepted by Mr Peacock, between Ground 5 and whether (under Ground 2) expenditure is in any event “on the provision of” plant or machinery. As we have set out above, with one exception we have dismissed Urenco’s appeal under Ground 2.

155.
For the reasons below, we have concluded that the FTT did not err in law in rejecting Mr Peacock’s construction of Items 1 and 4. Therefore, we do not need to determine which expenditure could have been saved by those Items on that construction, and we do not do so.

Discussion

156.
Mr Peacock’s case is essentially that (1) the predecessor legislation to section 23 saved expenditure “on the provision” of the relevant items, (2) section 23 is a product of the Tax Law Rewrite project, (3) save for identified changes (of which this was not one) that exercise was intended to enact the previous law without material change, and so (4) the omission of the words “on the provision of” in section 23 is an obvious drafting error, which we can correct, if necessary through a purposive construction.

157.
The predecessor legislation was in the Capital Allowances Act 1990 (as amended by the Finance Act 1994) ("CAA 1990"). The relevant provisions were organised differently to the CAA, being set out in two tables with two columns. The list of "saved" items in the first column of Table 1 was rewritten into section 21. The list of saved items in the first column of Table 2 was rewritten into section 22. The second column of Table 1 was rewritten into Items 1 to 16 in List C. The second column of Table 2 was rewritten into Items 22 to 33 of List C.

158.
In the CAA 1990, expenditure "on the provision of" machinery and manufacturing or processing equipment was expressly saved, but in different ways for items in Table 1 and Table 2. For Table 1 it was done by generally applicable opening words in paragraphs1(3)(a) and 2(3)(b) of Schedule AA1 CAA 1990. For Table 2, by contrast, the words "on the provision of" were inserted in relation to each specific item (save, for some reason, the first one [33]).

159.
When the CAA 1990 was rewritten into the CAA, the words "on the provision of" were not expressed to apply to the items in List C which were carried over from the first column in Table 1 CAA 1990, either by general wording or by specific incorporation in each item. Section 23(3) now provides that section 21 does not "affect the question whether expenditure on any item described in List C is, for the purposes of this Act, expenditure on the provision of plant or machinery". Items 1 to 16 contain no general or specific reference to expenditure "on the provision of" those items. By contrast, Items 23 to 33 all contain language referring specifically to "the provision" of those items.

160.
Mr Peacock submits that the failure to include expenditure "on the provision of" Items 1 to 16 is a clear and obvious drafting slip. He referred in support to a Memorandum submitted by the Inland Revenue to Parliament dated 22 January 2001 on the Tax Law Rewrite project which stated that section 23(3) "simplifies some complex provisions identifying what can be treated as plant or machinery. If anything, the simplification extends the scope for obtaining plant and machinery allowances". He also referred to the Explanatory Notes to the CAA published by the Inland Revenue, which contain an Annex identifying some 66 minor changes to CAA 1990 made in the rewrite, which does not mention the removal from Items 1 to 16 of expenditure "on the provision" of those items. He further argued that if those words were not read into Items 1 to 16 then that would undermine Parliament's stated intention in 1990 in introducing the predecessor rules to preserve the then existing case law, which saved such expenditure.

161.
The leading authority on the approach to statutory construction to be adopted in relation to provisions affected by the Tax Law Rewrite project is Derry (R) v HMRC [2019] UKSC 19 ("Derry"), in which Lord Carnwath stated as follows:

The Tax Law Rewrite project

[7] As noted above, the relevant provisions are contained in the ITA and the TMA. In considering the interpretation of the ITA it is necessary in my view to have in mind its genesis as part of the Tax Law Rewrite project. The main purpose of that project, as stated in the ITA Explanatory Notes (paras 5 and 7) was:

‘… to rewrite the income tax legislation that has not so far been rewritten so as to make it clearer and easier to use …

The Act does not generally change the meaning of the law when rewriting it. The minor changes which it does make are within the remit of the Tax Law Rewrite project and the Parliamentary process for the Act. In the main, such minor changes are intended to clarify existing provisions, make them consistent or bring the law into line with established practice.’

…

[9] In Eclipse Film Partners (No 35) LLP v Revenue and Customs Comrs [2013] UKUT 639 (TCC), [2014] STC 1114, Sales J likened the correct approach to statutory interpretation to that appropriate to a consolidation statute (as explained by the House of Lords in Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59):

‘When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions. … An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them …’ (para [97])

[10] I would respectfully endorse this guidance, which should be read with Lady Arden’s comments (paras [84]–[90]) on the relevance of prior case law. At the same time I would emphasise that the task should be approached from the standpoint that the resulting statutes are intended to be relatively easy to use, not just by professionals but also by the reasonably informed taxpayer, and that the signposts are there for a purpose, in particular to give clear pointers to each stage of the taxpayer’s journey to fiscal enlightenment.

162.
Lady Arden added the following observations:

[85] In deciding how the court should interpret a statute, the type of statute as set out in the statute’s preamble is a relevant consideration. In the case of the Income Tax Act 2007 (‘ITA’), the preamble provides that the Act is ‘to restate, with minor changes, certain enactments relating to income tax; and for connected purposes.’

[86] So, ITA is not a pure or ‘straight’ consolidation Act. However, as the Explanatory Notes cited by Lord Carnwath confirm, it is not (except for the minor changes) intended to change the law. That is a matter which the courts must in my judgment respect when interpreting the new legislation. In this regard it is of some significance in interpreting consolidation statutes that they receive less Parliamentary scrutiny than other primary legislation. The respect to which I have referred for giving effect to Parliament’s intention where it is possible to do so is often expressed in terms of a presumption, in relation to consolidating statutes, that Parliament did not intend to change the law.

[87] It would often be laborious for a court to investigate what provisions had been consolidated in any particular provision of a consolidating statute. It would be wrong in general for it to do so. The process of drafting a consolidation statute requires specialist techniques and skills and can be very complex.

163.

Mr Peacock submitted that we should read "on any item" in section 23(3) as "on the provision of any item". In the alternative, we should simply correct the obvious drafting error, relying on Pollen Estate Trustee Company Ltd v HMRC [2013] 3 All ER 742 ("Pollen Estate").

164.

The Court of Appeal in Pollen Estate described the "considerable caution" which must be exercised in such an approach as follows, at [25]:

In Inco Europe Ltd v First Choice Distribution (a firm) [2000] 2 All ER 109 at 115, [2000] 1 WLR 586 at 592 Lord Nicholls of Birkenhead said:

'It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words … This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …'

165.

The removal of the "provision" language from Items 1 to 16 by the CAA should properly have been included in the Annex of minor changes to the CAA 1990 contained in the Inland Revenue's Explanatory Notes to the CAA. We also have in mind Lady Arden's comment in Derry that we should respect the fact that, but for minor changes, the Tax Law Rewrite was not intended to change the law. Additionally, we take into account that we were not presented with any extra-statutory material which indicated that the draftsman intended such a change.

166.

However, we agree with the FTT that on balance Mr Bremner has the better of the argument. Most importantly, the wording of section 23 is plain. Items 1 to 16 do not include, either by general or specific wording, the reference to "provision" which is specifically inserted into Items 23 to 33. Parliament must be assumed in enacting section 23 to have been aware of the then existing case law concerning expenditure "on the provision of" plant or machinery: HMRC v Empaminondas Embiricos [2020] UKUT 370 (TCC) at [63]. As emphasised in Derry, the correct approach to statutory interpretation in a situation such as this is undermined by a need to refer back to the predecessor provisions and, in general, there should be no need to investigate the consolidated provisions. As explained by the FTT, a literal construction of Items 1 and 4, without having to read in words referring to provision, produces a result which is not illogical or absurd. The structure of the savings changed in the rewrite process, and the fact that the drafter was aware of the distinction between expenditure "on" an item and expenditure "on the provision of" an item is evidenced by section 23(3), in which

both are used within the same subsection. We are not persuaded that Parliament made a clear and obvious error in relation to the first sixteen Items in List C.

167.
Urenco's appeal under Ground 5 is for these reasons dismissed.

Ground 6

168.
Ground 6 of Urenco's appeal in substance brings together the first five grounds. It was not the subject of separate oral submissions by Mr Peacock, and in so far as it needs to be dealt with separately we do so in what follows.

Disposition

169.
In summary, we have decided as follows:

(1)
The FTT erred in law in its application of the functionality test in determining whether the Disputed Items were plant or machinery.

(2)
The FTT did not err in law in deciding whether expenditure was "on the provision of" plant or machinery, save in its decision as to the walls and slab in the Vaporisation Facility.

(3)
The FTT erred in law in deciding that section 21 applied to prevent all of the Disputed Items from being eligible for plant and machinery allowances.

(4)
The FTT did not err in law in deciding that none of Items 1, 4 or 22 of List C in section 23 would apply to save expenditure otherwise within section 21.

170.
Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that where the Tribunal finds that the FTT's decision involves the making of an error on a point of law, it may (but need not) set the decision aside. If the Tribunal sets it aside, it must either remit the case to the FTT with directions for its reconsideration, or remake the decision.

171.
We must first decide whether to set the decision aside. Mr Bremner argued that if we did find any error of law, we should conclude that we did not need to set the FTT's decision aside because the error was not material. In this context, we bear in mind the following guidance offered by the Court of Appeal in Patrick Degorce v HMRC [2017] EWCA Civ 1427 ("Degorce") at [95]:

I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words "may (but need not) set aside", and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970. TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said,

however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial, there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand. Similarly, if we were to take the view that the Upper Tribunal erred in law in the task which it had to perform, but that the errors could have made no difference to its decision to dismiss Mr Degorce's appeal, there would again be no injustice if his appeal to this court were in turn dismissed.

172.

The approach set out in Degorce is sometimes described as a test of materiality. That is something of an oversimplification. If we find an error of law, as we have done, then we should only decline to set the FTT’s decision aside if we are satisfied that the error could have made no difference to the decision. Here, we consider that the FTT’s decisions on those issues where we have found errors of law might have been different but for the errors. So, we should exercise our discretion to set aside the decision, and we do so.

173.

We have considered whether we should remit the decision or remake it. We have taken into account that the errors we have found will require the application of the relevant legal principles as we have described them to the particular facts of the case. We are also mindful that the parties may wish to present additional arguments and evidence in addressing afresh the issues where we have identified errors of law. Although we have all the fact-finding powers of the FTT if we decide to remake a decision [34], we have concluded that the more appropriate course taking these points into account is for the case to be remitted.

174.

We see no need for a differently constituted FTT to hear the remitted case.

175.

We therefore set aside the FTT’s decisions that:

(1)

With the exceptions found by the FTT, the Disputed Expenditure was not on the provision of plant or machinery.

(2)

Expenditure on the walls and slab in the Vaporisation Facility was not “on the provision” of plant or machinery.

(3)

All of the Disputed Expenditure was prevented from being eligible for plant and machinery allowances by section 21.

176.

The FTT shall remake these decisions. Since the FTT's decision at [98] does not clearly distinguish between decisions that the expenditure was not "on" plant or machinery and decisions that it was not "on the provision of" plant or machinery, we direct that in remaking its decision at [98], the FTT should consider all of the separately identified assets which it decided at [98] were not eligible.

177.

In remaking the decisions which we have set aside, the FTT shall take into account the reasoning and conclusions as set out in this decision in relation to the errors of law we have identified.

Signed on Original

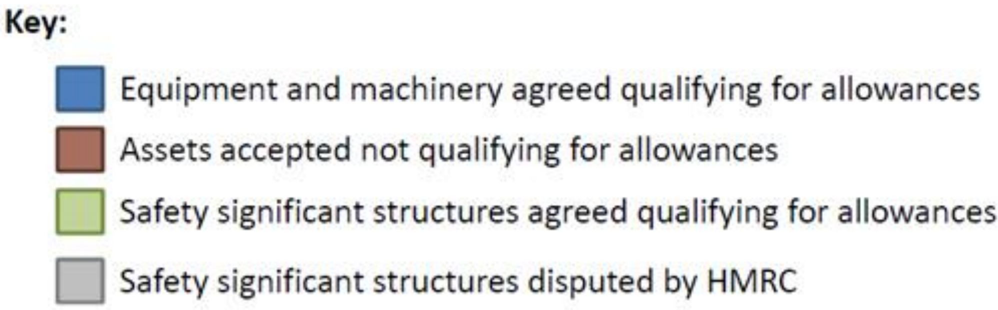
MR JUSTICE MELLOR

JUDGE THOMAS SCOTT

RELEASE DATE: 28 January 2022

TMF Structures – Block Diagrams

The following diagrams are not to scale, and are simplified for the purpose of illustrating the disputed assets.



Note: The reference to "Safety significant structures agreed qualifying for allowances" is to a block diagram identifying the outside storage rafts. The outside storage rafts are not subject to this appeal and in fact the respondents did not enquire into whether the outside storage rafts qualified for capital allowances. The block diagram for the outside storage rafts (described as UUK Storage Rafts 13/14) is reproduced here to illustrate the description of the outside storage rafts given in the main body of this decision.

UUK Storage Rafts 13/14

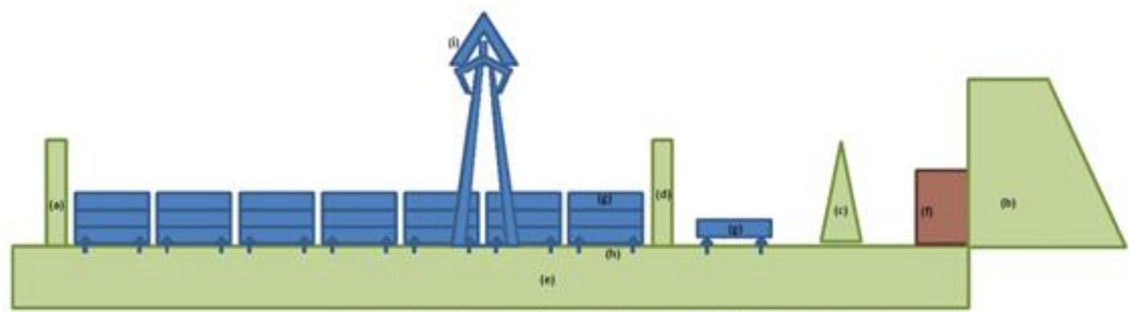


Figure 1: Rafts 13/14 cross section (looking West with East shield wall removed

Component key

a) Permanent reinforced concrete external shield walls (South and East)
b) Radiation shield crib walls and earth mounds (North and West)
c) Movable Allfa Bloc radiation shielding
d) Internal radiation shield walls
e) Raft slab
f) Controller hut
g) Cylinders
h) Cylinder cradles
i) Crane

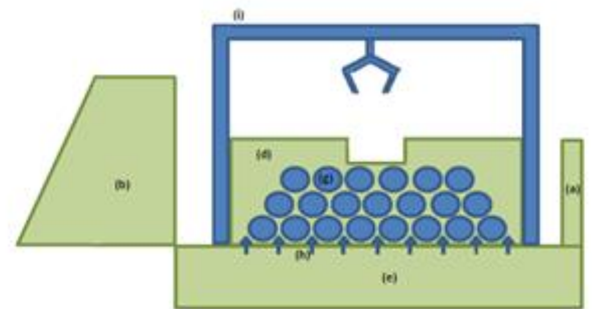


Figure 2: Rafts 13/14 cross section (looking North, with South shield wall removed)

Uranium Oxide Store (UOS)

Figure 5: UOS cross section (looking North, with South Shield walls removed)

Component key

a) External shield walls
b) "Hammerhead" crane support section
c) Internal radiation shield walls
d) Internal diaphragm walls
e) Raft slab
f) Steel portal frame
g) Steel roof cladding
h) Stairs and access platforms for equipment inspection/service
i) Utilities structure
j) Dehumidifier structure
k) Controller hut
l) Dehumidifier ducting
m) DV70 Containers
n) Shield caps
o) Crane

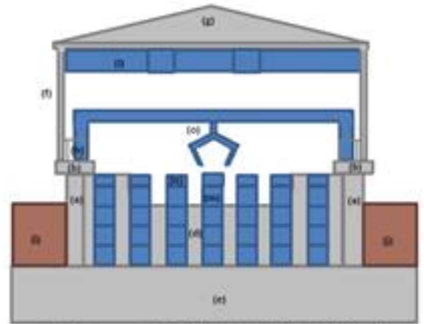


Figure 6: UOS cross section (looking West, with East Shield walls removed)

Vaporisation Facility

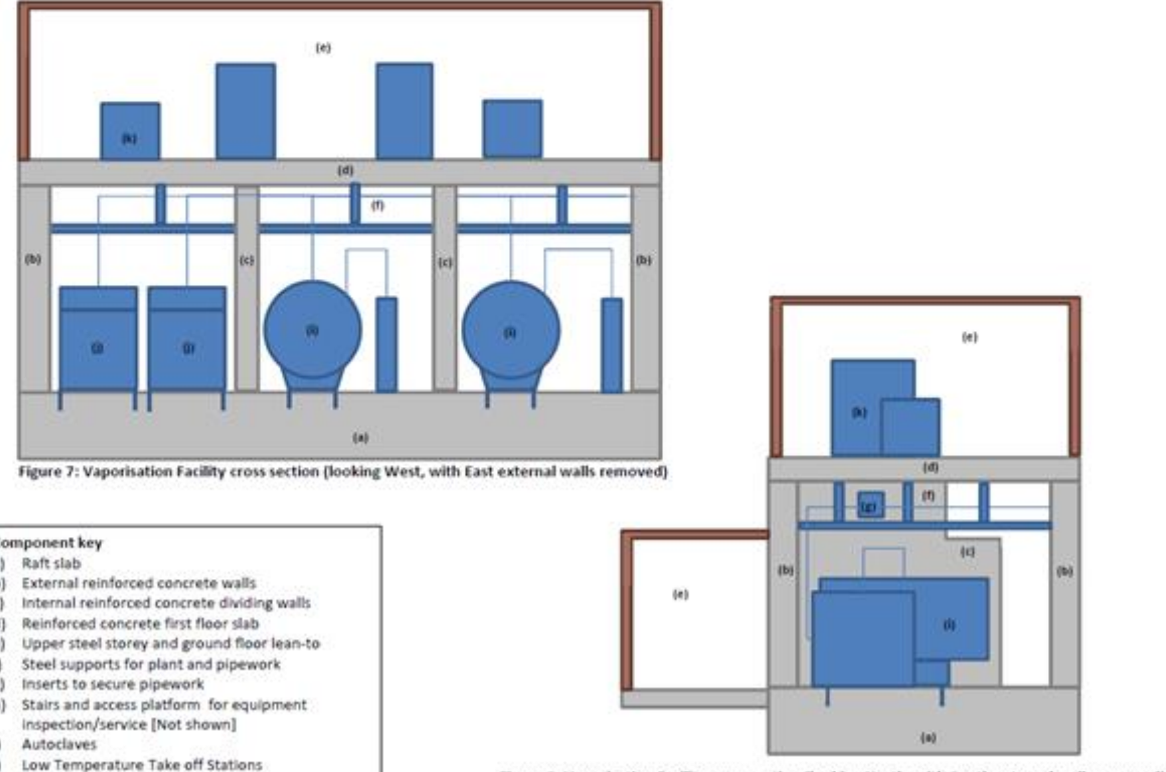


Figure 7: Vaporisation Facility cross section (looking West, with East external walls removed)

Component key

a) Raft slab
b) External reinforced concrete walls
c) Internal reinforced concrete dividing walls
d) Reinforced concrete first floor slab
e) Upper steel storey and ground floor lean-to
f) Steel supports for plant and pipework
g) Inserts to secure pipework
h) Stairs and access platform for equipment inspection/service [Not shown]
i) Autoclaves
j) Low Temperature Take off Stations
k) Other process equipment

Figure 8: Vaporisation Facility cross section (looking North, with South external walls removed)

Cylinder Handling Facility (CHF)

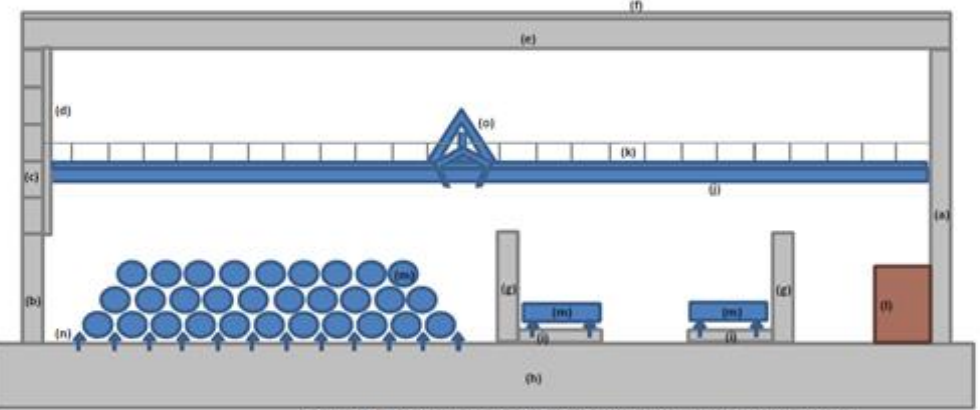


Figure 3: CHF cross section (looking North, with South Shield wall removed)

Component key

a) Permanent external radiation shield walls (North, East and South)
b) Permanent external shield wall (West)
c) Removable radiation shielding (West)
d) Steel frame support structure (West)
e) Reinforced concrete radiation shield roof
f) Roof cladding
g) Internal radiation shield walls
h) Raft slab
i) Raised reinforced concrete platforms for Vaporisation Transfer Stations
j) Cantilevered reinforced concrete crane beam and concrete plinths
k) Stairs and access platforms for equipment inspection/service
l) Controller hut
m) Cylinders
n) Cylinder cradles
o) Crane

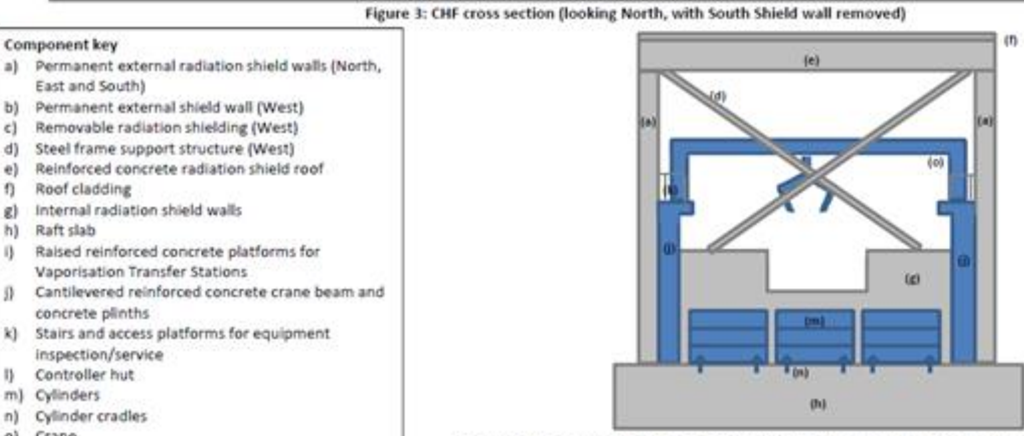
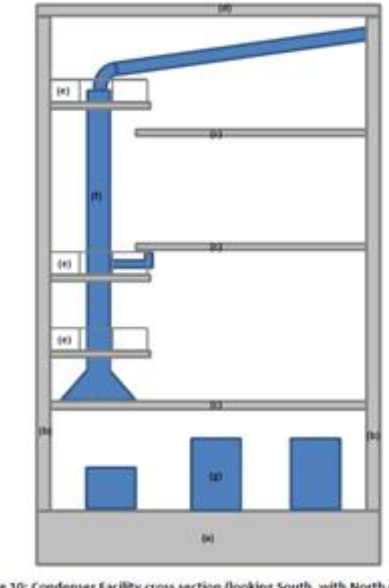


Figure 4: CHF cross section (looking East, with West permanent and temporary shielding removed)

Condenser Facility



Component key
a) Raft slab
b) Steel frame external walls
c) Reinforced concrete support structure upper floors
d) Roof cladding
e) Stairs and access platforms for equipment inspection/service
f) Condenser
g) Other process equipment

Figure 10: Condenser Facility cross section (looking South, with North external walls removed)

Kiln Facility

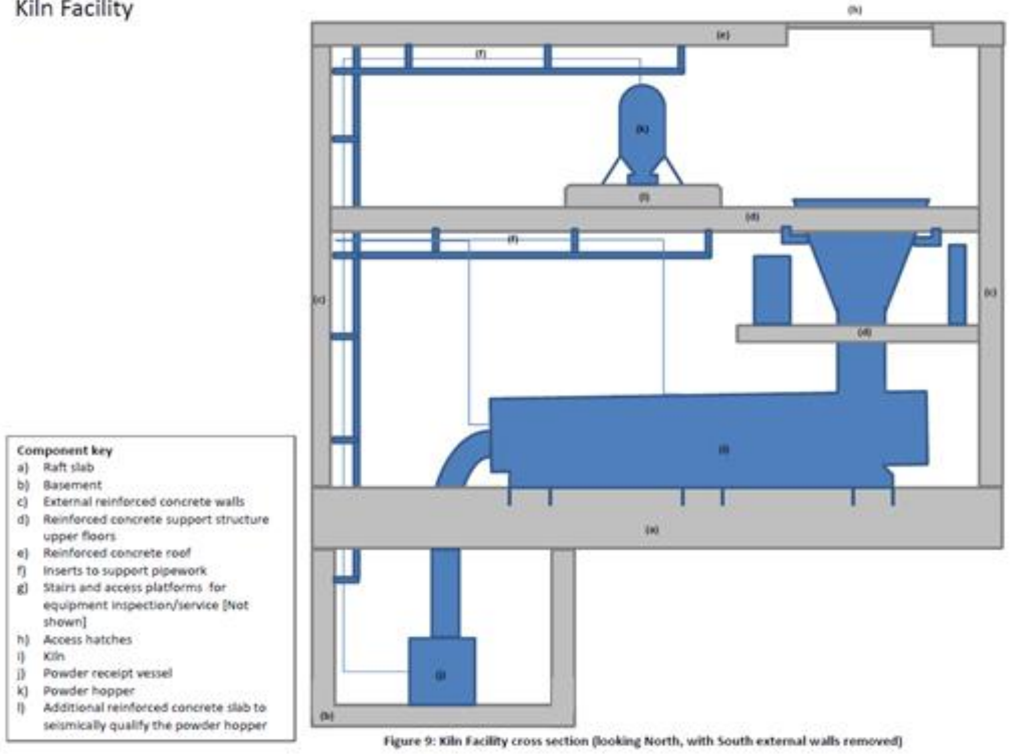


Figure 9: Kiln Facility cross section (looking North, with South external walls removed)

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[1] FTT [21].

[2] These were the only Items in List C argued by Urenco to be potentially applicable.

[3] FTT [63].

[4] Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 410F.

[5] At [114].

[6] [54] of that decision.

[7] [75] of that decision.

[8] Mr Bremner acknowledged in oral submissions that this passage does not apply in relation to "plant", since that word has a judge-made meaning.

[9] As formulated by Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46 at [35].

[10] Page 224.

[11] This refers to Jarrold.

[12] At page 244.

[13] McTierney J at page 10.

[14] At page 277f.

[15] [1995] STC 706.

[16] See [4] of the decision.

[17] The parties were represented by the same counsel before the FTT.

[18] At [98].

[19] It is not entirely clear, but this appears to be the basis, in whole or part, for the decisions on the items described at sub-paragraphs (4), (6), (8), (9), (10), (11), (13) and (15) of [98]. This is discussed further in relation to Ground 2 of the appeal.

[20] See paragraph 42 above.

[21] At [94].

[22] [40] of Wetherspoon. The case concerned different provisions of the CAA.

[23] The eligibility of this item is omitted from the summary at [99].

[24] See paragraph 36 above.

[25] SSE at [19].

[26] Various tax reliefs have at times been available in relation to certain types of expenditure relating to buildings, such as Industrial Buildings Allowances (phased out by 2011) and Structures and Building Allowances for qualifying expenditure after October 2018.

[27] "Aqueduct" was found to have a materially narrower meaning than in everyday usage, applying the rule of construction that the meaning of a word may be influenced by the words with which it is associated.

[28] Section 22(3) provides that ""structure" means a fixed structure of any kind, other than a building (as defined by section 21(3))".

[29] Including Carr v Sayer, relied on by Mr Bremner.

[30] In addition to such findings within [112]-[124] see, for instance, [43], [47], [52], [55] and the detailed findings at [98].

[31] The parties disagreed as to whether Urenco had permission to appeal this issue. In light of our decision that debate is moot.

[32] This must be a reference in error to [127].

[33] This became Item 22 of List C, the subject of SSE.

[34] Tribunals, Courts and Enforcement Act 2007 section 12(4).