**[2011] UKUT 257 (TCC)**

**Appeal number: FTC/49/2010**

***PROFITS – capital or revenue expenditure – costs of planning inquiry – taxpayer claiming conditions in planning permission invalid or seeking relaxation of the conditions – part capital, part revenue – remitted to the First-tier Tribunal for an apportionment***

**UPPER TRIBUNAL**

**TAX AND CHANCERY**

**MARKETS SOUTH WEST (HOLDINGS) LIMITED** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE JOHN F AVERY JONES CBE**

**Sitting in public at 45 Bedford Square, London WC1 on 7 March 2011**

**Rupert Baldry QC, instructed by Steve Russell and Associates for the Appellant**

**Jonathan Davey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal by Market South West (Holdings) Limited against a decision of the First-tier Tribunal (Rachel Short, Chair, and David Batten, member) issued on 17 March 2010. The Appellant was represented by Mr Rupert Baldry QC, and the Respondents ("HMRC") by Mr Jonathan Davey.

2. The appeal concerns the deductibility in computing profits of the costs of a planning dispute in the Appellant's year ended 31 March 2004. In summary, the Appellant, which operated a market, had various planning permissions that purported to restrict its right to trade to certain days of the week. The Appellant traded on other days and the local authority issued an enforcement notice. The fees in question relate to the Appellant's appeal against the enforcement notice. The First-tier Tribunal identified the issue at [17] of their decision as follows: were the fees capital expenditure incurred in order to enhance and modify an intangible capital asset or were they revenue expenses incurred to clarify and defend the existence of an original right to trade, in order to earn more profits for the [Appellant]?

3. The First-tier Tribunal found the facts as follows, the numbering following the paragraphs of their decision:

> (3) "The [Appellant's] principal activity was the promotion of open air markets and associated activities.
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> (4) The [Appellant] operates Cornish Market World, an indoor market comprising 300 stalls let to stallholders in St Austell.
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> (5) Outline planning permission (the "OPP") was granted by Restormel Council ("the Council") to the [Appellant] on 21 June 1991 for an 85,000 sq ft building for non-food retail. The OPP contained no conditions limiting the days on which the market could operate.
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> (6) The building was constructed in accordance with the OPP and a Reserved Matters Planning Approval (the "RMA") was granted on 9 September 1991. This did contain restrictions on the days on which the market could operate; trading could only occur on Saturdays and Sundays.
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> (7) Trading commenced at the site in November 1991.
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> (8) In October 1994 a further planning application was made and permission was given for an extension to "square off" the original building. This permission also restricted trading days to Saturdays and Sundays. (The "1994 Extension")
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> (9) The market operated on other weekdays and by 1996 it was operating on Bank Holidays and for three days leading up to Christmas.
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> (10) The Council considered that there had been a breach of the original planning permission due to the weekday opening and invited a further planning application from the [Appellant] to regularise trading on 11 October 1996.

(11) On 6 February 1997 planning permission was granted to allow the [Appellant] to trade at the site on Saturdays, Sundays and any additional 10 days in the year. ( the "1997 Planning Permission")

(12) During the summer of 2001 the market traded on 18 Wednesdays. It also opened on every Wednesday from 3 April 2002.

(13) The Council issued an enforcement notice (the "Enforcement Notice") on 29 January 2003 and the [Appellant] appealed against it.

(14) The appeal was heard by the planning inspector and dismissed in a decision on 24 October [2003] [2004 in the decision is obviously a typographical error].

(15) The [Appellant] appealed the decision to the High Court which was dismissed on 4 August 2004. An application for leave to appeal to the Court of Appeal was rejected.

(16) The fees which are the subject of this hearing were incurred in taking these legal actions with an intention to benefit the trade of the [Appellant]."

4. The First-tier Tribunal's approach was to consider what rights the Appellant had prior to the 1997 Planning Permission and it found that Mr Gorvin, the managing director of the Appellant, who had given evidence realised that there were some significant doubts about the existence of rights on the basis of the 1991 OPP. They concluded:

> "70. For these reasons the Tribunal has found it difficult to accept that the 1997 [which should presumably be 2003] litigation can be viewed as merely the maintenance or defence of an existing right. If such a right did exist, it had not been legally tested, nor, more significantly, had it been put to any use for the purposes of the business.
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> 71. If expenditure was required in respect of any rights arising under the 1991 OPP, by 2003 what was required was something more akin to resuscitation than maintenance, of a right which had been ignored and allowed to lie dormant for many years.
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> 72. It is particularly hard to treat something as a revenue payment when that payment is being made in respect of a business asset which has not been used to generate profits for the business for a substantial part of the period in question.
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> 73. In our view the idea that a payment is a deductible revenue payment because, as is suggested in cases such as *Carron*, it relates to the profit generating framework of the business is harder to apply when the business has not regularly and consistently generated profits from the item to which the expenditure is applied.
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> 74. Mr Baldry attempted to persuade us that we should take a "practical and business point of view", a suggested by Templeman LJ *Lawson v Johnson Matthey PLC* (65 TC 39). From such a perspective, this expenditure was to maintain or improve the [Appellant's] trading

potential. Mr Baldry also said that it was necessary to consider the effect which the expenditure is intended to achieve, referring to the approach of the New Zealand courts in *CIR v Wattie & Lawrence* (72 TC 639).

75. Had this been expenditure which was regularly made on the asset in question since it was first created in 1991 and had that asset been used as part of the [Appellant's] trade throughout the relevant period, the Tribunal would have found Mr Baldry's arguments more persuasive.

76. In this regard we think the reference in the *Borax* case to maintenance incurred in the ordinary course of the [Appellant's] business is instructive. We think that maintenance suggests an element of regularity of both use end expenditure which is absent from the [Appellant's] behaviour here.

77. HMRC argued that the [Appellant's] lack of use and lack of attempt to defend their rights under the 1991 OPP meant that no capital asset existed prior to the rights conferred by the 1997 Planning Permission.

78. The Tribunal would not go quite as far as to say that no asset existed prior to that date, but would agree with HMRC's proposition that the expenditure in question went beyond the mere maintenance of an existing asset.

79. If not creating a new asset, the 1997 Planning Permission was certainly an attempt to alter the state of the existing asset, by bringing back to life and regularising rights which had not been legally tested prior to that point. This represented a significant enhancement in terms of the quality of that asset.

80. On the basis of the authorities referred to by both parties, the enhancement or alteration of an existing asset should properly be treated as a capital payment. That is what we believe was being done here."

5. I read this as saying that the Tribunal agreed with HMRC's argument as recorded in [77], that as the Appellant had not asserted its right to trade on any days other than those permitted by the 1997 Planning Permission, by 2001, when it first exceeded those days, it had effectively lost the right and so more than maintenance of the right was required. I have difficulty in following how the 1997 Planning Permission enhanced the quality of the asset as stated in [79]. If one starts from the position that the restrictions in the RMA were invalid, the effect of the 1997 permission was to restrict the trading days which were previously unrestricted in respect of the existing building to Saturdays and Sundays and 10 other days in a year, and as to the extension it was merely to add 10 trading days in a year. This conclusion in [79] and [80] seems to be aimed at the change before and after 1997, possibly as a result of the slip in the date in [70], which was not in issue because the issue concerned the expenditure in 2003 in trying to establish its right to trade on all Wednesdays in the year. The Tribunal continued:

> 81. That brings us to the question, specifically raised by the [Appellant] before the Tribunal, whether the outcome of the High Court decision has any impact on the tax characterisation of the fees paid to get to the High Court. The implication here is that had the application been successful the expenditure would more readily have been viewed as revenue expenditure made in respect of a subsisting right.
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> 82. In principle we do not think that it is the outcome of the litigation which is relevant here. The relevant question is not whether the expenditure actually achieved the outcome for which the [Appellant] hoped but whether, in the words of Lord Goff of Chieveley in Johnson Matthey "on a true analysis of the transaction the payment can be characterised as a payment of a capital nature".
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> 83. In any event, while the 1997 Planning Permission was upheld despite the [Appellant's] appeal, it was accepted that the 1991 RMA was unlawful and invalid and to that extent at least the [Appellant's] position was supported by the High Court.

6. I read this as saying that one should not use the hindsight of the High Court's decision to categorise the expenditure, but one should look at the nature of the payment. Finally the Tribunal dealt with whether the expenditure was recurring and concluded that it was not:

> 86. The Tribunal is not convinced that it is correct to treat the fees in question as a series of revenue payments. Our view is that they were paid on a "recurring basis" only as a way of spreading what were essentially one-off fees for single pieces of professional advice. Their "recurring" nature reflects only the method of payment, common to the way in which all professional fees get paid for significant cases extended over long periods, and not their true legal nature, which is a payment under a single bargain.
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> 87. Second, the nature of the payment in question is only one of the factors to be considered and in this instance, even if we thought that the payments could properly be seen as recurring in nature, the Tribunal would not have considered this, on its own, to be sufficient to overcome the weight of the other factors considered above.

7. The Tribunal's conclusion was:

> 88. This has not been an easy case to decide, but looking at the full commercial picture, the Tribunal's view is that the £179,071 of professional fees spent as part of what became known as the "Wednesday Market Appeal" are most properly treated as expenditure of a capital nature.

8. The parties approached the issue from different starting points. Mr Baldry contends that as a result of the invalidity of the conditions in the RMA, the Appellant had a right to trade at any time and so the expenditure was incurred in defending its right to do so, which is deductible expenditure. Mr Davey contends that the Appellant's only right to trade was that contained in the planning permissions, the restrictions in which were valid, and so the expenditure was incurred in trying to

9. The enforcement notice complained of a breach of the restrictions on the days of trading contained in the 1997 Planning Permission. Neither the First-tier Tribunal nor I at the hearing had a full copy of the planning inspector's decision. I asked for a full copy after the hearing as a result of which both parties made further submissions. The planning inspector's decision was first, that the restriction on the days' trading in the RMA was invalid and therefore the Appellant could trade at any time between 1991 and 1997 as to the original building; secondly, that the restriction was valid as to the 1994 Extension; and thirdly, that the restrictions in the 1997 Planning Permission were valid. That decision was upheld by Blackburne J in the High Court. It is necessary to go into the Appellant's contentions and the decisions in more detail.

10. An appeal lies against an enforcement notice under s 174 of the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991) as follows:

> "(2) An appeal may be brought on any of the following grounds—
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> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
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> (b) that those matters have not occurred;
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> (c) that those matters (if they occurred) do not constitute a breach of planning control;
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> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
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> (e) that copies of the enforcement notice were not served as required by section 172;
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> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
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> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

11. Section 177(5) of the 1990 Act provides:

> "(5) Where an appeal against an enforcement notice is brought under section 174, the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning consent."

12. Section 73A of the 1990 Act provides:

> "(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
>
> (2) Subsection (1) applies to development carried out—
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> …
>
> (c) without complying with some condition subject to which planning permission was granted."

(There are references to s 73(2)(c) in both the planning inspector's report and Blackburne J's judgment which should obviously be to s 73A(2)(c).)

13. Thus an appeal against an enforcement notice is treated as an application for the grant of planning permission, that can be retrospective and in this case can deal with varying the conditions relating to the trading days (ground (a)), as well as dealing with whether there is in fact a breach (ground (b)) or whether what occurred is not a breach (ground (c)). As recorded in Blackburne J's judgment at [12] all of these grounds (except (e)) were in issue in the planning inquiry, but ground (d) was abandoned during the inquiry. Grounds (f) and (g) relate to the consequences of the enforcement notice being found to be valid.

14. The planning inspector described the essence of the Appellant's case to be that following *Newbury District Council and International Rubber Co Ltd v Secretary of State for the Environment* [1981] AC 576 existing user rights granted by the OPP could not be taken away by the RMA or subsequent planning permissions. This was a challenge under grounds (b) and (c), which the inspector dealt with in paragraphs 7 to 24 of his report. He found that since the OPP contained no restrictions on the trading days these could not be imposed by the RMA. However, the planning permission for the 1994 Extension was separate and had been acted upon by the Appellants in building the extension and was valid as to the extension. The 1997 Planning Permission was granted as a result of a full application relating to the whole site and was valid. The Appellant had argued that since the conditions in the RMA were invalid, the 1997 Planning Permission had not been implemented, but the inspector decided that it was implemented because the market had already been trading within the terms of the restrictions on the trading days, which would immediately become effective.

15. The inspector then dealt with ground (a) in paragraphs 25 to 76 of his report. He concluded that although there was some need for additional trading the evidence did not show that it was necessary to open every Wednesday; that need would not be met in the town centre or any currently available edge-of-centre site; but any significant expansion of the Appellant's operations would have an adverse effect on sensitive trading position of the town centre and on its fledgling regeneration scheme. He considered the impact of year round Wednesday trading on the town centre and the highway safety and traffic on the local road network, and concluded that there would be an adverse effect on the latter so that the additional trading would not accord with the principles of sustainable development. He also found in relation to ground (f) that the steps required by the enforcement notice did not exceed what should reasonably

16. Standing back, the inspector's report deals at length with both whether there was a breach of planning permission (grounds (b) and (c)) and whether permission should be granted to modify the conditions about trading days (ground (a)). The latter is dealt with at greater length (52 paragraphs compared to 18 paragraphs for the former) but this may reflect that the latter was primarily a question for witness evidence, while the former was an argument of law. Both aspects were therefore dealt with to a significant extent and it cannot be said that one was subsidiary to the other.

17. On appeal to Blackburne J grounds (b) and (c) were in issue, and ground (a) arose only if the inspector's conclusions on the validity of the earlier permissions and in particular the validity and effect of the 1997 Planning Permission were wrong (see (6) below). There was no attack on the inspector's conclusion that the conditions relating to the original building by the RMA were invalid. He considered the following questions:

> (1) Did the inspector err in law in his identification of the relevant legal issues? Blackburne J held that he did not.
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> (2) Did implementation of the permission for the 1994 Extension remove the rights and restrictions applicable to the original building? The Appellant's contention was that the restrictions in the 1994 Extension Permission were not inconsistent with the absence of valid conditions about trading days relating to the original building because one could have separate restrictions for each building. Blackburne J held that the 1994 Extension permission did not affect the absence of conditions relating to the original building.
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> (3) Did the inspector err in law in concluding that the conditions relating to the trading days in the 1994 Extension permission were valid? The Appellant contended that as the original building could be used without restrictions on trading days the restrictions relating to the extension building were invalid. Blackburne J held the restrictions relating to the 1994 Extension were valid. The fact that the Council assumed that the restrictions affecting the original building were valid and that it intended to reflect them in the conditions relating to the extension did not mean that it decision to impose them was perverse.
>
> (4) Did the inspector err in law in (a) concluding that the effect of the 1997 Planning Permission, when implemented, was to preclude reliance by the Appellant on pre-existing rights as regards the original building and the extension without restrictions on trading days; (b) concluding that the 1997 Planning Permission had been implemented; and (c) failing to consider whether the condition about trading days was valid? The Appellant contended that it followed from the *Newbury* case that notwithstanding the acceptance or implementation of a later planning permission a person may continue to rely on pre-existing rights except where a new planning unit arises. It contended that the 1997 Planning Permission had not been

(5) What is the ambit of the 1997 Permission? Blackburne J held that it was the whole site.

(6) Did the inspector err in law in his approach to whether planning permission (under ground (a)) should be granted for (a) the original building and (b) the extension to enable trading on all Wednesdays? Since the issue arose only if the inspector was wrong on the validity of the 1997 Planning Permission, this was not considered. (I presume that the issue arose that if the 1997 permission had not been valid, one might have been left with the position that there were no restrictions as to the existing building, but valid restrictions as to the extension, which would have required a relaxation of the conditions on the extension. The Appellant was not, as I understand it, disputing the inspector's conclusion on this ground.)

(7) Did the inspector err in law by virtue of the (lack of) reasons he gave? Blackburne J held not.

18. Mr Baldry contends that expenditure on defending the Appellant's right to trade on all Wednesdays (on the basis that the 1994 and 1997 restrictions were invalid) was deductible, and Mr Davey that expenditure on extending the Appellant's right to trade on all Wednesdays (on the basis that the 1994 and 1997 restrictions were valid) was capital, both of which seem unexceptionable propositions of law given their respective starting points.

19. Both of them naturally start with Viscount Cave's famous statement in *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

20. As Millett LJ said in *Vodafone Cellular v Shaw* [1997] STC 734, 739:

> "There is no single test or infallible criterion for distinguishing between capital and revenue payments…On the contrary, there are many factors which tend in one direction or the other, some of which are more relevant when the question arises on an acquisition and other are of particular relevance when the question arises on a disposal, as it does in the present case.
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> Two matters are of particular importance: the nature of the payment and the nature of the advantage obtained by the payment. The fact that the payment is a lump sum payment is relevant but not determinative."

21. Lord Goff said in *Lawson v Johnson Matthey plc* [1992] 2 AC 324, 341:

> "It is important to observe that the payment does not become a revenue payment simply because J.M. Plc. paid the money with the purpose of preserving its platinum trade from collapse. That was the approach of the general commissioners, which I do not feel able to accept. The question is rather whether, on a true analysis of the transaction, the payment is to be characterised as a payment of a capital nature. That characterisation does not depend upon the motive or purpose of the taxpayer. Here it depends upon the question whether the sum was paid for the disposal of a capital asset. I have come to the conclusion that, on a true analysis, the sum was not paid for the disposal of the shares. It was paid by J.M. Plc. as a contribution towards the rescue of J.M.B. which J.M. Plc. knew the Bank was going to mount immediately in the public interest. As such, it is in my opinion to be properly characterised as a revenue payment."

22. The matter should be approached from a practical and business point of view, as stated by Lord Nolan in *Commissioner of Inland Revenue v Wattie and Lawrence* (1998) 72 TC 639, 645-6:

> "It is well settled that in considering whether a particular item of receipt or expenditure is of a capital or revenue nature the approach to be adopted should be that described by Dixon J in *Hallstroms Proprietary Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 and page 648, where he said that the answer to the question:-
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> > '…depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process.'"

23. An example of capital expenditure relating to a planning permission is found in *ECC Quarries Ltd v Watkis* (1975) 51 TC 153. There expenditure was expended on unsuccessful application for planning permission to extract sand and gravel from three sites that it owned but did not have permission for such use. Brightman J said at 171:

> "On consideration of the authorities it seems to me that in the case which I have to decide the Company expended money for the purpose of securing a permanent alteration to the nature of the land it owned or occupied; that is to say, a change from land confined to its existing use and of little or no value to the Company for the purposes of its trade to land capable of being turned to account pursuant to the Company's subsequent trading activities. It was a lump sum and an enduring advantage static in nature in the sense that it was not the planning permission which would produce the profits but the subsequent operations of working and winning the minerals. It is, I think, unbusinesslike to say that if planning permission had been granted no new asset would have belonged to the Company. The asset in respect of which planning permission was granted would have been radically and enduringly changed, viewed as an asset of the Company's business. It could be written up in value in the balance sheet; it would become

> potentially profit-making; it would be something which it was not before - namely, land from which minerals could be won and worked.
>
> On common sense principles, and with the benefit of judicial guidance in the reported authorities, it seems to me that the expenditure was of a capital and not of an income nature. To use the words of Lord Wilberforce in the *Carron* case, the planning permission, if obtained, would in some sense have been an intangible asset of a capital nature. If that is right, money expended in seeking to acquire such an asset must equally be expenditure of a capital nature."

24. On the other side of the line Mr Baldry points to *Southern v Borax Consolidated Ltd* (1940) 23 TC 597 in which the taxpayer through a subsidiary that was treated as a branch acquired land in California on which it erected wharves and buildings used in connection with its business of mining and shipment of borax. The City of Los Angeles disputed the taxpayer's title to the foreshore contending that a grant of foreshore was invalid with the result that the taxpayer would become liable to payment of tolls for the use of the wharves. The litigation had been continuing for six years and a new trial had been ordered, so that in the year in question the outcome of the litigation was unknown. The issue was the deductibility of the costs of the litigation. Lawrence J held that the legal expenses did not create any new asset but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title and not the value of the company's business did not make it any different.

25. In seeking to apply these principles to the facts of this appeal Mr Davey relies on Lord Goff's statement that the purpose of the taxpayer in incurring the expenditure is irrelevant and the question is "whether, on a true analysis of the transaction, the payment is to be *characterised* as a payment of a capital nature." He therefore contends that it is irrelevant that the Appellant had the purpose of relying on its existing rights since the decision was that it had no existing rights and so the whole expenditure was capital. By contrast, Mr Baldry contends that ground (a) is merely a consequence of the Appellant seeking to rely on its existing rights pursuant to grounds (b) and (c) because of the deemed application under s 177(5).

26. While I accept that the Appellant's primary case was under grounds (b) and (c) which the planning inspector described the essence of the Appellant's case, I agree with Mr Davey that it would have been open to the Appellant not to rely on ground (a). It could have taken its stand under grounds (b) and (c), with the result that either the conditions were invalid, and so it could hold the market on all Wednesdays, or it would have to live with the restrictions and restrict its trading to 10 Wednesdays. In relying on ground (a) at the public inquiry it was, for example, putting forward evidence of traffic experts that would be relevant only if it was seeking planning permission for the removal of the restrictions, and wholly irrelevant to its claim that it already had the right to trade on all Wednesdays. Normally one can start with analysing whether there is an asset and whether the expenditure is on its improvement. But here the expenditure is on determining whether the Appellant already had the right to trade on all Wednesdays or whether it was acquiring a right to do so. This is an appeal relating to the year to 31 March 2004, that is the year during

27. The principle in *ECC Quarries* applies here to the extent that the Appellant was incurring expenditure contending that it should be granted planning permission to trade on all Wednesdays on the basis that it had only the rights under the 1994 and 1997 planning permissions and so that expenditure is capital. The principle in *Borax Consolidated* equally applies to the extent that the Appellant was incurring expenditure contending that it had the right to trade without restrictions, and that expenditure is deductible.

28. While I agree with the Tribunal's approach that one should look at the nature of the expenditure rather than start with the knowledge of Blackburne J's judgment, I have difficulty in following all the reasoning, as I have indicated in paragraph 5 above. As to whether the expenditure was recurring, while it is not correct to say as the Tribunal did at [86] that it was made under a single bargain because it was paid to at least four different parties (solicitors, two planning consultants, and a highways consultant), I agree with the Tribunal that it was not recurring expenditure, being expenditure on litigation against the enforcement notice.

29. I therefore consider that, in spite of Mr Davey's contention to the contrary, there should be an apportionment on the analogy of expenditure on a building that is partly an improvement and partly repairs. I consider that in deciding that the whole expenditure was capital the First-tier Tribunal made an error of law and therefore set aside their decision and remit the case to the same tribunal to determine in the light of any further evidence the extent to which the expenditure is capital or revenue. If either party considers that further procedural directions are required they have liberty to apply to this Tribunal for them.

30. After this decision was issued in draft HMRC applied for a direction to suspend the effect of the decision for one month from the date of release so that they can

consider whether to apply for permission to appeal before incurring any costs in the First-tier Tribunal. I grant such a direction.

31. No applications for costs were made at the hearing. Either party is at liberty to make such an application but my understanding is that they have until one month after this Tribunal has disposed of all the issues in the proceedings to do so, which will not be until the First-tier Tribunal's decision on the apportionment.

**JOHN F AVERY JONES**

**JUDGE OF THE UPPER TRIBUNAL**
**RELEASE DATE: 6 April 2011**