[2019] UKUT 0332 (TCC)

Appeal number: UT/2018/0143

CORPORATION TAX – capital allowances - eligibility of various structures of a hydroelectric power generation scheme for capital allowances - ss 11 and 21 to 23 Capital Allowances Act 2001

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

SSE GENERATION LIMITED

Respondent

TRIBUNAL: Judge Timothy Herrington
Judge Guy Brannan

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 10 and 11 September 2019

Timothy Brennan QC and Aparna Nathan QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Jonathan Peacock QC and Michael Ripley, Counsel, for the Respondent

DECISION

Introduction

1. The appellants ("HMRC") appeal against a decision by the First-tier Tribunal ("FTT") (Judge Kevin Poole) released on 31 July 2018 (the "Decision"). The FTT allowed in part the appeal of SSE Generation Limited ("SSEG") against the conclusions in various closure notices for the years ending 31 March 2006 to 31 March 2012 to the effect that SSEG's taxable profits for those years had been understated as a result of claims for capital allowances in respect of fixed asset expenditure in relation to the Glendoe Hydro Electric Power Scheme (the "Scheme"). Capital allowances had been claimed on some £260 million of expenditure on the Scheme, only some £34 million of which was originally accepted by HMRC. Approximately £200 million of expenditure remains in dispute following the Decision.

2. The Decision concerned the tax treatment of a number of assets constructed by SSEG for the purposes of the Scheme. The assets concerned were a group of long-life infrastructure assets. SSEG contends that the relevant assets are "plant" and that the relevant expenditure was expenditure "on the provision of plant" for the purposes of Part 2 of the Capital Allowances Act 2001 ("CAA 2001"). The dispute was in relation not to the generator turbine (which was accepted was eligible for allowances) but to works of civil engineering which enabled water to be taken into and from a dammed area and channelled under high pressure to the turbine to generate electricity and for the used water to be discharged into Loch Ness.

3. The FTT decided that in principle the expenditure incurred on a considerable number of the items was allowable as expenditure incurred on the provision of plant or machinery but that the expenditure on a number of the items claimed was not so allowable. HMRC have not appealed against a number of the findings made against them but pursue an appeal with the permission of the FTT against the findings in respect of the most substantial items. In their Respondent's Notice SSEG seek to challenge the FTT's findings in respect of certain expenditure on a particular structure which the FTT found not to be allowable in part.

The Facts

4. The FTT made detailed findings of fact at [7] to [18] as to the background, construction and operation of the Scheme, based on the witness evidence of Mr Jim Smith, Managing Director of SSEG, the documentary materials before it and a site visit. So far as is relevant to this appeal, we summarise those findings as follows.

5. At [11] the FTT described the various elements of the Scheme, starting from the highest point of the Scheme and working down. Shorn of the detail which is not required for the purposes of this appeal the essential elements by reference to the numbered sub-paragraphs of [11] of the Decision are:

(1) Water intakes. The Scheme uses water, collected over two discrete natural catchment areas totalling some 75 square kilometres. A network of main water intakes and minor water intakes from various different streams feeds part of that water into a network of conduits of various types which form the next part of the Scheme.

(2) Conduits. Once diverted from the natural streams, the water is channelled through a network of just under 12 km of conduits into a main reservoir. More detail about the different types of conduit was given at [15] of the decision, as set out at [8] below.

(3) Reservoir and dam. The conduits run into a main reservoir which is formed behind a concrete-faced rock-filled dam sited at the head of a gorge down which the river Tarff runs. The capacity of the reservoir is 12.7 million cubic metres. No claim has been made for plant or machinery allowances in relation to the dam and reservoir.

(4) Main intake. Beside the dam there is an intake through which water is allowed to pass into the headrace, the next element of the Scheme. The intake can be closed in order to cut off the flow of water into the headrace. There is no dispute about plant or machinery allowances in relation to the main intake.

(5) Headrace. This is the technical name for the conduit which carries the water, under increasing pressure as it moves downward, from the main intake at the reservoir to the generating equipment in the caverns referred to below. The headrace is 6.2km long and 5 metres in diameter and is entirely underground, created with a tunnel boring machine. In some similar schemes, the headrace runs along the surface of the ground and is made of concrete or steel pipes. At Glendoe, the choice to use a subterranean shaft was driven partly by engineering considerations and partly to minimise the environmental impact of the Scheme. At the foot of the headrace the last 85 metres contains a tapering steel lining which attaches directly to the inlet valve adjacent to the turbine, and the 220 metres above that was constructed with a reinforced concrete lining inside the shaft. The main section of the headrace above that 220 metre section was partly stabilised with rock bolts and lined with shotcrete (concrete sprayed onto the rock surface at high pressure, which strengthens the rock walls), where geological conditions require it. At the foot of the headrace, the water is under a pressure of approximately 900lb/in^2 and the steel-lined and reinforced concrete-lined sections (in addition to providing a properly engineered connection to the turbine inlet valve) prevent the water pressure from bursting through the rock and flooding the power cavern.

(6) Power cavern. This is the name given to the main cavern which houses the turbine and generation equipment.

(7) Transformer cavern. A much smaller cavern, set off to the side of the power cavern adjacent to the entrance to the main access tunnel, was excavated to accommodate the transformer which "steps up" the voltage of 15.75kV produced by the generator to 132kV for transmission into the National Grid.

(8) Tailrace. After the pressurised water has served its purpose in the turbine, it runs away through the tailrace, a conduit of a little over 2 km in length which leads into Loch Ness. The tailrace was constructed by "drill and blast" for the first 340 metres of its length from Loch Ness and was bored for the remainder of its length by the same tunnel boring machine as created the headrace. The tailrace and the headrace were constructed in a single operation, essentially in line with each other. Where it emerges into Loch Ness, there is a separate reinforced concrete structure which can be closed off to isolate the tailrace from the loch (so it can be "dewatered" for maintenance).

(9) Access tunnels. There are a number of tunnels which comprise different parts of the underground works. The "main access tunnel" (approximately 1.2 km long) provides the main means of personal and vehicular access to the power cavern.

6. At [120] and [122] the FTT described two further structures in respect of which allowances were claimed. The first of these was the turbine outflow tunnel, a short stretch of conduit that joins the outflow of the turbine to the tailrace. The second of these were the drainage and dewatering tunnels which joined the headrace to the tailrace, by-passing the turbine. Those assets served as a dewatering arrangement, should it be necessary to dewater the headrace without passing water in it through the turbine. For convenience, we deal with those assets when considering the tailrace.

7. An illustration of the assets described above was helpfully attached to Mr Peacock's skeleton argument and is attached to this decision as an appendix.

8. At [15] the FTT described the different types of conduit as follows:

> "There are a number of different types of conduit taking the water from the water intakes to the reservoir (or to watercourses which feed naturally into it by gravity). There are 4km of single or double buried pipes (mainly single or double glass-reinforced plastic pipes, but some pre-fabricated in concrete); there are 6km of drilled and blasted underground conduit, lined with shotcrete; there is 1km of "cut and cover" concrete conduit (built on-site with reinforced concrete in a large trench which was then backfilled) and there are 800m of uncovered channels lined with rocks and/or concrete set into the ground surface. From the photographs in the bundles, it is apparent that the pipes range in size from approximately 400mm to 2 metres in diameter. The underground conduit and the cut and cover concrete conduit into which it feeds have an internal diameter of between 2 and 3 metres (the concrete conduit having a flat base, vertical walls up to about 1.5 metres and a semi-circular "roof"). They are involved in bringing the water collected from the water intakes in the adjacent catchment area into the catchment area of the main reservoir."

Relevant legislation

9. Although capital expenditure is not deductible from trading profits for the purposes of corporation tax (see s 53 Corporation Tax Act 2009 ("CTA 2009")), capital allowances can be claimed for certain capital expenditure which fulfils specific statutory conditions. Capital allowances are given effect in calculating the profits of

the company's trade for corporation tax: see s 49 CTA 2009 and s 2 (1) (b) CAA 2001.

10. Section 11 CAA 2001 sets out the general conditions as to the availability of capital allowances for plant and machinery. At the relevant time it provided as follows:

> "(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."

11. It was common ground that the expenditure in dispute in this case was "qualifying expenditure" unless excluded by Chapter 3 of Part 2 CAA 2001. It was also common ground that the expenditure was "on the provision of plant". The issues that arise on this appeal were therefore confined to a consideration as to whether the expenditure concerned was excluded by any of the provisions contained in Chapter 3 of Part 2 CAA 2001.

12. The provisions of Chapter 3 of Part 2 CAA 2001 which are relevant to this appeal and which were in force at the relevant time are set out as follows:

> "**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.

22 Structures, assets and works

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

(a) the provision of a structure or other asset in list B, or

(b) any works involving the alteration of land.

List B

Excluded structures and other assets

1. A tunnel, bridge, viaduct, aqueduct, embankment or cutting.

2. A way, hard standing (such as a pavement), road, railway, tramway, a park for vehicles or containers, or an airstrip or runway.

3. An inland navigation, including a canal or basin or a navigable river.

4. A dam, reservoir or barrage, including any sluices, gates, generators and other equipment associated with the dam, reservoir or barrage.

5. A dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped.

6. A dike, sea wall, weir or drainage ditch.

7. Any structure not within items 1 to 6 other than –

(a) a structure (but not a building) within Chapter 2 of Part 3 (meaning of 'industrial building'),

(b) a structure in use for the purposes of an undertaking for the extraction, production, processing or distribution of gas, and

(c) a structure in use for the purposes of a trade which consists in the provision of telecommunication, television or radio services.

(2) The provision of a structure or other asset includes its construction or acquisition.

(3) In this section –

(a) 'structure' means a fixed structure of any kind, other than a building (as defined by section 21(3)), and

(b) 'land' does not include buildings or other structures, but otherwise has the meaning given in Schedule 1 to the Interpretation Act 1978.

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.

(2) The provisions are –

…

(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.

…

8. Computer, telecommunications and surveillance systems (including their wiring or other links).

9. Refrigeration or cooling equipment.

…

15. Advertising hoardings; signs, displays and similar assets.

16. Swimming pools (including diving boards, slides and structures on which such boards or slides are mounted).

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

23. The provision of dry docks.

…

25. The provision of pipelines or underground ducts or tunnels with a primary purpose of carrying utility conduits.

…

31. The provision of rails, sleepers and ballast for a railway or tramway.

…

24 Interests in land

(1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the acquisition of an interest in land.

(2) In this section "land" does not include –

(a) buildings or other structures, or

(b) any asset which is so installed or otherwise fixed to any description of land so as to become, in law, part of the land,

but otherwise has the meaning given in Schedule 1 to the Interpretation Act 1978 (c.30).

(3) ….."

13. It was common ground that List C in s 23 above ("List C") is predominantly a list which constitutes a statutory preservation of the outcomes of many appeals about the meaning of "plant" which occurred before the provisions of what are now ss 21-23

CAA 2001 were introduced by the Finance Act 1994 as amendments to the Capital Allowances Act 1990, the predecessor legislation to CAA 2001.

14. It is to be noted that Item 7 (a) in List B in s 22 above ("List B") preserves as plant qualifying for capital allowances a structure (but not a building) which is an "industrial building". An "industrial building" includes any "building or structure" which is or is to be "in use for the purposes of a qualifying trade": see s 271 (1) (b) CAA 2001. A "qualifying trade" includes "an undertaking for the generation, transformation, conversion, transmission or distribution of electrical energy": see Table B contained in s 274 CAA 2001. It was therefore common ground that the activities carried on by SSEG constituted a "qualifying trade" at the relevant time.

15. Finally, for completeness we mention that s 22 (4) CAA 2001 was amended by the Finance Act 2019 by the addition of the following words at the end of the sub-section:

> "(but any reference in list C in subsection (4) of that section to "plant" does not include anything where expenditure on its provision is excluded by this section)."

It was provided by the Finance Act 2019 that this insertion was deemed always to have had effect except in relation to claims for capital allowances made before 29 October 2018. As we shall see, one of the arguments on this appeal is that certain of the expenditure was eligible for capital allowances by the saving in Item 22 in List C on the grounds that it involved the alteration of land "for the purpose only of installing plant…". The effect of the amendment to s 22 (4) is to prevent the claiming of a capital allowance for expenditure on plant otherwise excluded by the operation of s 22 (1) on the basis of the saving in Item 22, but because the change does not apply to claims made before 29 October 2018, it does not affect the claims which are the subject of this appeal.

The Decision

16. Before turning to the specific categories of plant as described at [11] of the Decision (as set out at [5] above) the FTT dealt with some general points at [26] to [43]. Two of those points are of relevance to the issues which we have to decide as follows.

17. First, at [39] and [40] the FTT considered the question of the correct approach to interpreting s 22 (1) (b) CAA 2001. In essence, the question was whether, as argued by HMRC, anything which involved alteration of land fell within the scope of that provision regardless of whether the relevant item was a structure or asset also falling within List B or, as argued by SSEG, the provision applies to civil engineering works involving the alteration of land with a result that does not fall into List B. The FTT held that ss 22 (1) (a) and (b) CAA 2001 were alternatives, not largely overlapping, and that the "works" referred to in s 22 (1) (b) must be works where the alteration of land is the objective in its own right, not including works whose objective is a creation of some other asset or structure identified in List B.

18. Secondly, the FTT recorded at [43] the agreement between the parties that none of the "structures" involved in this case fell within List B by virtue of Item 7 in that list, because all of them fell into the exception in Item 7 (a). That was on the basis that the expenditure on all of those structures was incurred on their construction for use in SSEG's "qualifying trade" so that the structures concerned counted as "industrial buildings": see [14] above.

19. In relation to the various categories of item described at [11] of the Decision, only those falling within category (2) (Conduits[1]), category (5) (Headrace) and category (8) (Tailrace and the associated assets referred to at [6] above) form the subject matter of this appeal. HMRC were unsuccessful in relation to the expenditure claimed in respect of items falling within category (1) (Water Intakes) and the FTT's findings in in relation to that category have not been appealed. HMRC were successful in relation to the expenditure on category (6) (the creation of the Power Cavern), category 7 (the creation of the Transformer Cavern) and category (9) (Access Tunnels) and SSEG does not challenge the FTT's finding in those regards. In relation to the categories which are the subject of this appeal the FTT made the following findings.

Conduits

20. At [56] the FTT identified six categories of conduits, namely buried single plastic pipes, buried double plastic pipes, buried prefabricated concrete pipes, a drilled and blasted conduit lined with shotcrete, a buried conduit built in situ from reinforced concrete, and open channels lined with rocks. It proceeded to deal with each of those categories separately.

Buried pipes – single or double, plastic or prefabricated concrete

21. At [60] the FTT held that those pipes performed a plant-like function by assisting in the transfer of water from the various water intakes to the main reservoir. It recorded at [61] HMRC's argument that the pipes were aqueducts, thus falling within the exclusions in item 1 of List B. The FTT also recorded HMRC's acceptance that it was open to the FTT find that they were "pipelines" because they were made up of individual lengths of pipe joined together and accordingly saved by item 25 in List C.

22. At [62] the FTT accepted HMRC's submission that a crucial feature of a pipeline is that it should be made up of individual lengths of pipe joined together. The FTT rejected the suggestion that the pipes were "aqueducts", which it did not regard as an apt description of an item which is properly considered to be either an individual pipe or a pipeline made up of such pipes joined together, especially when considering the context in which the word "aqueduct" appears in item 1 of List B. Accordingly, at [63] the FTT found that the expenditure incurred on the provision of the buried pipes

[1] The FTT's findings in relation to the buried pipes are not in dispute. HMRC were unsuccessful in relation to the expenditure claimed in respect of those items and those items are not the subject of HMRC's appeal.

was wholly allowable, that is both the cost of the pipes themselves and the costs of installing them. Because of the approach the FTT took to the interpretation of s 22 CAA 2001, the FTT did not consider the provision of the pipelines to be "works involving the alteration of land", holding therefore that none of the expenditure would be disallowed by s 22 CAA 2001, but even if it were, such expenditure would be saved by s 23 CAA 2001 and item 25 in List C.

Drilled and blasted underground conduit, lined with shotcrete

23. At [66] the FTT considered whether this conduit fell within Item 1 of List B. It said:

> "Item 1 in List B comprises "a tunnel, bridge, viaduct, aqueduct, embankment or cutting." The words "bridge" and "viaduct" generally refer to an elevated structure created to carry a road, path or railway across a valley or river (in the case of a bridge) or across a wider piece of low ground (in the case of a viaduct). The word "tunnel" in the Oxford English Dictionary ("OED") is defined (most relevantly) as "a subterranean passage; a road-way excavated under ground, esp. under a hill or mountain, or beneath the bed of a river: now most commonly on a railway; also in earliest use on a canal, in a mine, etc. (The chief current sense.)". I would add that in common parlance, the word "tunnel" would normally refer to a passage bored through ground which permits people or forms of transport to pass to and fro. "Embankment" is defined in the OED as "a mound, bank, or other structure for confining a river, etc. within fixed limits" or, more familiarly, as "a long earthen bank or mound, esp. one raised for the purpose of carrying a road or a railway across a valley.". "Cutting" is relevantly defined as "an open, trench-like excavation through a piece of ground that rises above the level of a canal, railway, or road which has to be taken across it". On this basis, there does seem to be a clear theme emerging in Item 1 of structures related to transportation infrastructure."

24. At [67] the FTT acknowledged that a "tunnel" might have other purposes than transportation but then said:

> "…I still consider that one essential, though not necessarily primary, purpose of a tunnel is to facilitate access from one end to the other, either of persons or of means of transport. I therefore do not consider this conduit to comprise a tunnel within the ordinary meaning of that word or, therefore, for the purposes of Item 1 in List B; although it is of course large enough to allow a person to enter it (as was clearly done during the work of excavation) and pass from one end to the other, that was not its intended purpose."

25. The FTT then considered whether this conduit was an "aqueduct" falling within List B. At [68] the FTT referred to the fact that the term has two potentially relevant definitions, that is either an artificial channel for the conveyance of water from place to place or a structure by which a canal is carried over a river et cetera, which had a more obvious transportation infrastructure flavour.

26. At [69] the FTT held that the better view was that in the context of List B the word "aqueduct" was apt to describe this conduit which it described as "an artificial

underground conduit whose function is solely to transport water from one place to another through the ground under the force of gravity." It went on to say:

> "…I consider the transportation of water itself is enough to be consistent with the overall "transportation" theme of Item 1, rather than requiring the water to be the means of transportation of other things (as in the case of a canal)."

27. The FTT said at [71] that if it had not considered the conduit to be an "aqueduct" it would have found it to be "works involving the alteration of land" within s 22 (1) (b) CAA 2001.

28. The FTT then considered whether this conduit fell within the scope of Item 25 in List C. Based on its reasoning at [62] that a pipeline had to be made up of individual lengths of pipe joined together and also, as it found at [75], that it was not an "underground duct" because its primary purpose was not to carry utility conduits, it decided that Item 25 did not apply to this conduit.

29. The FTT then considered whether Item 22 in List C applied so as to leave the expenditure unaffected by the excluding provisions of s 22 CAA 2001. The question was therefore whether the expenditure on the creation of the conduit can properly be regarded as being expenditure on "the alteration of land" and whether any such alteration can fairly be regarded as "for the purpose only of installing plant or machinery", it being remembered that the relevant plant is the conduit itself.

30. At [77] the FTT found that where the drill and blast process was undertaken in order to create a subterranean conduit, it must follow logically that the expenditure incurred on that process was incurred on the alteration of land because the essence of the process was to alter the land in order to form the conduit. The FTT also found that the exclusion in s 22 (1) (b) CAA 2001 was not relevant, on the basis of its interpretation of that provision, as summarised at [16] above.

31. The FTT then considered the question as to whether the alteration to land caused by the drill and blast process was "for the purpose only of installing plant or machinery". It then went on to say this at [78] and [79]:

> "78…. the key issue is whether it can fairly be said that the drilling, blasting and lining process which actually created the conduit was done "for the purpose only of installing" the conduit itself. In this context, I consider the completed conduit must be considered as a single item, made up of the drilled and blasted void together with the associated shotcrete lining (and any associated rock bolt stabilisation, though no evidence of such was drawn to my attention). As I see it, the answer to the question revolves around the meaning of the word "installing", and in particular whether it extends to include installation by the creation in situ of the asset in question, in addition to installation by putting in place something which previously existed, albeit perhaps only in component form (as in the case of installation of a pipeline).
>
> 79. The OED relevantly defines "install" as "to place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use". This does not take matters much further. I consider the matter finely

> balanced, but standing back and looking at the matter realistically, the end result of the appellant's operations was to create in the appropriate place an item of plant (the aqueduct) which was an important element of the overall Scheme where previously there had only been solid rock. Looked at in that way, I consider the alteration of land involved in the creation of the aqueduct to have been carried out for the purpose only of installing the aqueduct.

32. Consequently, the FTT concluded at [80] that allowances were available in full for the expenditure incurred in the creation, lining and (if relevant) stabilisation (with rock bolts) of the conduit.

"Cut and cover" conduit built on-site with reinforced concrete

33. At [82] the FTT concluded that this structure was not a "tunnel" but was an "aqueduct" within the scope of Item 1 of List B and, for the reasons given above, was not "works involving the alteration of land" within s 22 (1) (b) CAA 2001. For the reasons given in relation to the drilled and blasted underground conduit, the FTT concluded at [83] that the conduit did not fall within Item 25 of List C as a pipeline or within the other parts of that Item.

34. The FTT then considered whether Item 22 in List C applied and concluded that provision only applied so as to allow the expenditure in respect of the excavation of the base of the structure and its subsequent covering over rather than on the structure itself. Its reasoning was set out at [84] and [85] as follows:

> "84. …. The difficulty for the appellant here is that the reinforced concrete structure which was actually built but then covered over must, on any sensible view, be regarded as the "aqueduct"; it had a separate existence as such entirely independent of the prior excavation and subsequent covering over. In that important respect, it is different from the "drill and blast" aqueduct, which only became viable as such once it had been excavated and lined. The erection of the concrete aqueduct structure could not, in my view, fairly be said to be an "alteration of land", and the costs of that erection are not therefore saved by Item 22. However, it is equally clear that the costs of excavating its base and subsequently covering it over were incurred on the alteration of land for the purpose only of installing the aqueduct structure itself, and are accordingly allowable.
>
> 85. It follows that no allowances are available for the expenditure on the fabrication in situ of the concrete conduit itself (excluded as an "aqueduct" by Item 1 in List B), but the expenditure incurred on the preparatory excavations and the subsequent re-covering of the conduit after it had been built is allowable. Whilst it might appear a somewhat counter-intuitive result that the method of construction should make a difference to the CAA treatment in this way, intuition is rarely a reliable guide to statutory interpretation, and the difference in treatment flows logically, in my view, from the terms of the legislation."

Uncovered rock and concrete lined channels

35. Applying the same reasoning as it had in relation to the other conduits, the FTT concluded at [88] that the expenditure incurred in the provision of these channels was allowable. It said at [87] that the channels were created through a process of excavation of the channels, which were then lined with either rocks or concrete. The only purpose in doing so was to install the resulting aqueducts as part of the overall water gathering system.

The headrace

36. The FTT considered the functions of each section of the headrace to be very different from the conduits and did not consider any part of it to be an "aqueduct" in the sense used in Item 1 of List B. It said this at [91]:

> "…its function is far more complex than simply transporting water from one place to another; it is designed to deliver the required 18.6 cubic metres per second of water at a pressure of 60 atmospheres to the turbine without allowing it to escape and dissipate or cause catastrophic damage to the power cavern and the equipment in it."

37. At [92] the FTT concluded that the headrace was not a "tunnel" within Item 1 of List B, based on its observations on the meaning of "tunnel" in that context, summarised at [23] above.

38. At [94] the FTT concluded that the expenditure on drilling the headrace and in reinforcing and lining it was incurred on "works involving the alteration of land" within the meaning of s 22 (1) (b) CAA 2001. On the basis of its views on the correct interpretation of Item 25 in List C, the FTT held at [96] that Item 25 did not apply in respect of any part of the headrace.

39. As to Item 22 in List C, the FTT said at [97] that similar points arise as in relation to the underground water conduits. Having described at [98] and [99] how the headrace comprised a number of different sections it said this at [100]:

> "Whether these sections are viewed independently or (which I consider to be the better view) as elements of a single item of plant comprising the entire headrace, it is clear to me that any parallel with the "cut and cover" aqueduct section would be misconceived. The headrace was created and reinforced or lined in a single operation which brought into existence an item of plant, rather than being formed by installation of a separate structure within the setting of a prepared shaft. It is akin to the "drill and blast" section of aqueduct, and in my view the same analysis must apply to it. The expenditure that was incurred in boring and lining it was in my view incurred for the purpose only of installing the completed headrace, an item of plant at common law. Accordingly, whilst it would be excluded from allowances by section 22(1)(b) CAA, the expenditure on it is saved by Item 22 in List C and accordingly it is allowable in full."

The tailrace

40. For the reasons it gave in relation to the drilled and blasted sections of the water gathering conduits, the FTT held at [114] that the expenditure incurred on the tailrace and its lining was allowable. It also held at [115] that the expenditure incurred on a cylindrical reinforced concrete structure at the side of Loch Ness which enables the tailrace to be isolated from the Loch for dewatering and maintenance was allowable, on the basis that it did not fall within any of the Items in List B, nor was it "works involving the alteration of land".

41. At [120] and [122] the FTT applied the same analysis to the turbine outflow tunnel and the drainage and dewatering tunnels.

Summary

42. Therefore, in relation to the matters which are still in dispute the FTT made the following decisions as regards the allowances claimed:

(1) In relation to the water conduits between the water intakes and the main reservoir:

(a) Drilled and blasted underground conduit, lined with shotcrete – allowable in full;

(b) "Cut and cover" reinforced concrete built on site – costs of construction of conduit itself not allowable, but costs of excavation and subsequent re-covering allowable in full;

(c) Uncovered rock- and concrete-lined channels –allowable in full;

(2) In relation to the headrace – allowable in full; and

(3) In relation to the tailrace, including the turbine flow tunnel and the drainage and dewatering tunnels –allowable in full.

Grounds of Appeal and issues to be determined

43. HMRC have eight grounds of appeal which can be summarised as follows:

Ground 1: The FTT wrongly interpreted s 22 (1) (a) and (b) CAA 2001 by holding them to be alternative provisions with no area of overlap. HMRC contend that properly understood, s 22 (1) (a) and List B identify specific items that are excluded from allowance while s 22 (1) (b) identifies a more general category of items that are so excluded. They contend that an item which falls outside List B may still be excluded by s 22 (1) (b).

Ground 2: The FTT wrongly held that the expenditure incurred on the drilled and blasted underground conduit, lined with shotcrete should be allowed in full. HMRC contend that the FTT fell into error in holding that the drilled and blasted underground conduits were not "tunnels" and in holding that although they were aqueducts within Item 1 List B, and alternatively that they were "works involving the alteration of

land", so that expenditure on their provision was excluded the expenditure was nonetheless allowable by virtue of Item 22 of List C.

Ground 3: Although the FTT correctly held that the "cut and cover" conduit built on-site with reinforced concrete was an aqueduct, it ought also to have held that creation of this conduit constituted works involving an alteration of land. The FTT wrongly held that works preparatory to installation of the conduit, and the subsequent recovering of the conduit, qualified as works for the purpose only of installing plant.

Ground 4: The FTT wrongly held that Item 22 of List C applied to the channels, which it rightly categorised as aqueducts falling within item 1 of List B. HMRC contend that Item 22 of List C was not apt to cover the creation of plant, as opposed to the installation of plant. They contend that the creation of a void, even one lined with rocks or concrete, does not constitute the installation of any item.

Ground 5: Although the FTT correctly held that expenditure on the headrace was incurred on "works involving the alteration of land" and was therefore disallowed by s 22 (1) (b) CAA 2001, it was wrong to hold that expenditure on the provision of the headrace came within Item 22 of List C. The FTT was wrong to hold that the headrace was neither a "tunnel" nor an "aqueduct" for the purposes of Item 1 of List B. HMRC contend that the headrace was a void in the rock, created by the works of alteration of land and those works were not for the purpose only of installing the void in the rock but were in fact creating it by removing rock, that is to say, by altering land. HMRC contend that the creation of a void by alteration of land does not constitute alteration of land for the purpose only of installation of plant. They also contend that the FTT was wrong to adopt a restrictive meaning of "aqueduct" based on its perception of the function of the headrace.

Ground 6: The FTT was wrong to hold that Item 22 of List C applied to the expenditure incurred on the provision of the tailrace for the same reasons given in relation to the headrace.

Ground 7: The FTT was wrong to hold that the expenditure on the turbine outflow tunnel attracted allowances for the same reasons given in relation to the headrace.

Ground 8: the FTT was wrong to hold that the expenditure on the drainage and dewatering tunnels attracted allowances for the same reasons given in relation to the headrace.

44. In its Respondent's Notice, as well as opposing HMRC's grounds, SSEG repeated and reiterated its submissions before the FTT. As a consequence, it was repeating a number of arguments in respect of which it was unsuccessful before the FTT as follows:

> (1) As regards the shotcrete lined element of the water conduits, this is not an "aqueduct" and, in any event, is a, or a part of a "pipeline" or an asset with a primary purpose of carrying utility conduits;

(2) As regards the cut and cover element of the water conduits, this is not an "aqueduct" and, in any event, is a, or a part of a, "pipeline" or an alteration of land solely for the purposes of installing plant or machinery;

(3) As regards the uncovered element of the water conduits, this is not an "aqueduct" and, in any event, is a, or a part of a, "pipeline";

(4) As regards the headrace this is a, or a part of a, "pipeline"; and

(5) As regards the tailrace, the turbine outflow tunnel and the drainage and de-watering tunnels, these assets are not an "aqueduct" and, in any event, are in each case a, or part of a, "pipeline".

45. In relation to items (1), (3), (4) and (5) above, HMRC took no objection to those points being argued again in the Upper Tribunal on the basis that SSEG was doing no more than seeking to uphold the decision of the FTT in its favour on these matters on different grounds. They did, however, object to SSEG arguing in relation to item (2) that the FTT should have allowed the expenditure incurred in relation to the fabrication in situ of the concrete conduit, which it expressly disallowed at [85] of the Decision. HMRC contend that in order to challenge that finding, SSEG needed permission to appeal from either the FTT or the Upper Tribunal and no application for permission to appeal was ever made.

46. In our view, SSEG did not, in the circumstances of this appeal, need permission to appeal in respect of the finding in question. In circumstances where a respondent is opposing an appeal but wishes to challenge a finding of the FTT on a point which it argued before the FTT but in respect of which it was unsuccessful, it can do so simply through the medium of the Respondent's Notice which it may (but need not) file pursuant to Rule 24 of The Tribunal Procedure (Upper Tribunal) Procedure Rules 2008. If a Respondent's Notice is filed, then Rule 24 (3) (f) requires the Respondent to set out the grounds on which the Respondent relies in the Upper Tribunal proceedings, which the rule states are to include "any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal". SSEG clearly met the requirements of that rule in its Respondent's Notice, specifying a number of arguments which it ran before the FTT and which it wished to argue again. In our view, there is nothing in the rule that indicates that the rule is limited to arguments which simply seek to uphold the FTT's decision on different grounds. Therefore, provided the argument was one that was before the FTT it is open to a respondent to argue the point again in the Upper Tribunal provided it gives notice of that in its respondent's notice without needing to apply for permission to appeal.

47. There is no conceivable prejudice to HMRC in that conclusion. The argument was squarely before the FTT and they have had adequate notice of it. Mr Brennan dealt with all of SSEG's arguments effectively both in his skeleton argument and in oral submissions before us.

48. Clearly the position would have been different had the argument concerned not been made before the FTT. In those circumstances, it would have been necessary for SSEG to have made an application to the Upper Tribunal for permission to argue the

point, and HMRC would have been entitled to make representations in opposition to the application.

49. In his oral submissions Mr Peacock helpfully summarised the questions of law that need to be determined on this appeal which arise out of the grounds of appeal and SSEG's response. We set them out as follows:

(1) Are s 22 (1) (a) and (b) CAA 2001 mutually exclusive so that a structure cannot fall within the scope of both provisions?

(2) What is the meaning of "tunnel" as that term is used in List B? In particular, is the term confined to subterranean passageways which are part of transportation infrastructure?

(3) What is the meaning of "aqueduct" as that term is used in List B? In particular, is the term confined to bridge-like structures for carrying water, such as for carrying a canal over a river or valley?

(4) What is the meaning of "installation" as that term is used in Item 22 of List C? In particular, is "installation" an apt term to describe the construction or creation of plant?

(5) Is a structure "plant" for the purpose of Item 22 of List C if it is explicitly excluded from allowances by virtue of being an item in List B? For example, if an asset was an "aqueduct" and therefore not eligible for allowances by virtue of being contained in List B, could the expenditure nevertheless be "unaffected" by the exclusions in List B because the expenditure constituted the "alteration of land for the purpose only of installing plant…"?

(6) What is the meaning of "pipeline" as that term is used in Item 25 of List C? In particular, must a pipeline be made from pre-fabricated pipes?

50. We shall proceed to determine this appeal by answering those questions and then determining whether in the light of those answers the expenditure incurred on the specific assets which are in dispute is allowable for capital allowances purposes.

Discussion

General

51. This case turns entirely upon questions of statutory interpretation and in particular the interpretation of a number of words used in CAA 2001 which are ordinary words of the English language, such as "aqueduct", "tunnel", "pipeline" and "installation". The FTT proceeded on the basis that although those terms may be used in particular ways in technical discussions between civil engineers, they were not specialist terms and were to be given their ordinary English meanings: see [38] of the Decision. There is no appeal against that finding and accordingly we proceed on the basis that the words we are to interpret are to be given their ordinary meaning.

52. Statutory interpretation is an exercise which requires the tribunal to identify the meaning borne by the words in question in the particular context in which they are used. The tribunal looks to the words in the statute which evidence the intention of

Parliament, or more correctly the intention which the tribunal reasonably imputes to Parliament in respect of the language used. As Lord Reid said in *Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenburg A G* [975] AC 591 at 613:

> "We often say that we are looking for the intention of Parliament, that is not quite accurate. We are seeking the meaning of the words which Parliament used."

53. The question of what Parliament intended a word or phrase to mean in its context within a statutory provision is a question of law, although the starting point is to consider the ordinary meaning of the word or phrase, if the law indicates that the word or phrase is to be given its ordinary meaning. If as a matter of law, a word or phrase is being used in its ordinary sense then it is for the tribunal of fact to determine and apply that meaning to the facts as found. In those circumstances, the tribunal's findings may only be interfered with if they are found to be perverse.

54. An illustration of that principle is to be found in *Clark v Perks* [2001] STC 1254. Where the issue before the Court of Appeal was whether a mobile offshore drilling unit was a "ship".

55. The Court of Appeal accepted a submission from the taxpayers that the conclusion that a particular structure is a "ship" is an inference of fact drawn from the primary facts and that the High Court could only interfere with the General Commissioners' conclusion that the unit was a "ship" if it was one which could not reasonably have been reached on the basis of the primary facts as found: see *Edwards v Bairstow* [1956] AC 14 at 36.

56. At [26] Carnwath J (as he then was) adopted the following passage from *Ransom v Higgs* [1974] STC 539 at 561 where Lord Simon of Glaisdale said:

> "The meaning of a word or phrase in an Act of Parliament is a question of law not fact; even though the law may then declare that the word or phrase has no statutory meaning beyond its common acceptance and that it is a question of fact whether the circumstances fall within such meaning (*Cozens v Brutus)*. But many words and phrases in English have many shades of meaning and are capable of embracing a great diversity of circumstance. So the interpretation of the language of an Act of Parliament often involves declaring that certain conduct must as a matter of law fall within the statutory language (as was the actual decision in *Edwards v Bairstow*); that other conduct must as a matter of law fall outside the statutory language; but that whether yet a third category of conduct falls within the statutory language or outside it depends on the evaluation of such conduct by the tribunal of fact. This last question is often appropriately described as one of 'fact and degree'."

57. He went on to say at [27] to [29]:

> "[27] That case, like *Edwards v Bairstow,* concerned the meaning (in a taxing statute) of the word "trade". A similar summary, in relation to the

word "plant" in the Taxing Acts, is found in *IRC v Scottish and Newcastle Breweries* [1982] 1WLR 322, 327, per Lord Lowry,

> "(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 mis-applied 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."
>
> [28] Applying those principles to the present case, the word "ship" is as ordinary an English word as one could imagine…. However, whether the proper view of the law is that it is to be treated as an ordinary English word *simpliciter*, or is to be given some more refined or expanded meaning, the application of that meaning to the facts of the particular case is a question of fact, not law. The decision is in the province of the Commissioners, not of the courts. That is so, whether one is speaking of the findings of primary fact or of the inferences to be drawn from those facts…
>
> [29] Once the meaning of the term "ship" had been established, the question whether the facts found brought the case within that meaning was not a question of law …but a question of fact, subject only to the conclusion falling within the limits of reasonableness as defined by *Edwards v Bairstow*."

58. We were referred to the dictionary definitions of a number of the relevant words in this case which we refer to in due course. We found those definitions to be helpful to a degree, but as is well established, we do not take the dictionary meanings to be authoritative exponents of the meanings of the relevant words.

59. There was some dispute between the parties as to the extent to which it was permissible for us to refer to Parliamentary materials in order to ascertain the purpose behind the legislative changes that were made to the statutory scheme for capital allowances in the Finance Act 1994 ("FA 1994"). At that stage, the scheme was contained in the Capital Allowances Act 1990 ("CAA 1990") so that the changes made by FA 1994 were incorporated into CAA 1990. CAA 2001 replaced CAA 1990, as part of the Tax Law Rewrite Project and did not generally in substance make any change in the law.

60. Mr Brennan sought to refer to the statements made in Parliament by Mr Dorrell, the Minister responsible for the 1994 Finance Bill, as regards the purpose behind the

legislative changes. We were referred to a number of statements made to the Standing Committee considering the Bill, as recorded in Hansard on 10 March 1994.

61. As is well known, the self-imposed judicial rule which precluded the use of Parliamentary proceedings as an external aid to interpretation of legislation was relaxed by the House of Lords in *Pepper v Hart* [1993] AC 593. At page 640 Lord Browne-Wilkinson identified three conditions that must be met before Parliamentary material may be relied upon in order to ascertain the meaning of a provision of the resulting legislation, that is (a) the provision is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill and (c) the statements relied upon are clear.

62. Neither party in this case sought to argue that recourse should be made to Parliamentary materials in order to ascertain the meaning of the words in the statute on the basis that any of the resulting provisions were ambiguous or obscure. However, Mr Brennan submitted that Hansard may be referred to, outside the rule in *Pepper v Hart*, to supply context or identify the mischief at which the legislation was aimed. He submitted that the statements made by Mr Dorrell to the Standing Committee considering the Bill assisted in that regard.

63. We accept that there has been a recent tendency in both the Supreme Court and the Privy Council to rely on Parliamentary debates on a Bill not as an indication of legislative intent on resolving an ambiguity as to the meaning of a particular word or phrase but rather to supply context or identify the nature or extent of the mischief at which the legislation is aimed.

64. In particular, in *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC 33 the Judicial Committee of the Privy Council said this at [23] and [24]:

> "[23] .... The textual changes do not therefore make clear the purpose of the amendments to s.4(7). The respondent submits that assistance can, however, be obtained as to the general background and as to the mischief which the legislation was addressing by looking at the reports of the proceedings in Parliament: see e.g. *Gopaul v Iman Bakash* [2012] UKPC 1, para 3 per Lord Walker, and *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 97 per Lord Steyn. But Lord Steyn was careful to distinguish this principle from the more radical separate principle recognised in *Pepper v Hart* [1993] AC 593. He said of the former principle that "the use of Hansard material to identify the mischief at which legislation was directed and its objective setting" was permissible, but that "trying to discover the intentions of the Government from Ministerial statements in Parliament is constitutionally unacceptable". The separate principle in *Pepper v Hart* only allows a court to have regard… to statements in Parliament where [the *Pepper v Hart* conditions are met] …
>
> [24]. It is therefore permissible as a first step to look at Hansard to try to identify the mischief at which the amendment of s.4(7) was aimed and its objective setting…"

65. Similarly, Lord Mance said this in the Supreme Court in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: reference by the Counsel General for Wales* [2015] AC 1016 at [55]:

> "To put the legislative measure in context, domestic courts may (under a rule quite distinct from that in Pepper v Hart [1993] AC 993) examine background material, including a White Paper, explanatory departmental notes, ministerial statements and statements by members of Parliament in debate: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816. But care must at the same time be taken not to question the "sufficiency" of debate in the United Kingdom Parliament, in a way which would contravene art 9 of the Bill of Rights."

66. We are satisfied that it is permissible to refer to the statements of Mr Dorrell to which we were referred by Mr Brennan. Those statements explained that the boundary between buildings and structures on the one hand and plant on the other had been eroded over the years by a number of court cases which had reclassified certain expenditure on buildings and structures as being expenditure on plant. Mr Dorrell went on to say that as a result uncertainty had been created about where the boundary may lie, and the new rules would result in greater certainty for both taxpayer and Revenue. He said that they would also protect the Exchequer from future reclassification of assets currently considered to be buildings or structures. He went on to say[2]:

> "It is simply intended to draw a line in the sand in terms of the one-way development of case law, which is having the effect of pushing assets into classes of treatment that are more generous from the capital allowances point of view…. We are trying to ensure that the law does not develop further…. We are attempting to take the existing law and case law and entrench the understanding of the different classifications."

67. We shall therefore bear the statements in mind when construing the words of the relevant provisions.

68. Against that background, we now turn to the specific questions identified at [49] above.

Whether ss 22 (1)(a) and (b) CAA 2001are mutually exclusive

69. We start with some observations as to the framework of the relevant provisions of CAA 2001.

70. It appears to us from the way in which the legislation is structured, and this is supported by the Parliamentary materials which we have referred to, that the essential elements of the legislation are as follows:

(1) Unless one of the specific exceptions set out in either List B or List C in ss 22 and 23 CAA 2001 respectively applies, expenditure on assets which are

[2] Hansard Standing Committee A 10 March 1994 cols 634, 635

classified as "buildings", "structures" or other specified assets cannot qualify for capital allowances as expenditure on plant or machinery;

(2) As well as disqualifying expenditure on the acquisition of an interest in land (s 24 CAA 2001) the legislation also disqualifies expenditure on any works involving the alteration of land (s 22 (1) (b) CA 2001) other than expenditure on the alteration of land for the purpose only of installing plant or machinery (item 22 of List C);

(3) The specific relevant exception provided for in List B is for structures which are "industrial buildings". As we have said, it is common ground that if the various structures that are in dispute in this case are not otherwise disqualified for capital allowances because they fall within one or more of the specific provisions of List B they would qualify as "industrial buildings";

(4) The specific exceptions provided for in List C predominantly represent those assets which over the years prior to the coming into force of FA 1994 the courts and tribunals have held to meet the common law definition of "plant" notwithstanding the fact that they have features which indicate that they would otherwise be regarded as being "structures", such as dry docks, swimming pools and advertising hoardings.

71. Thus, it appears that the function of List B is to "draw the line in the sand" between expenditure on those assets which have the character of real estate or buildings or structures, which, subject to the exception for industrial buildings, are not to be regarded as "plant" for capital allowance purposes and on other assets which do qualify, with a further exception, as set out in List C, which preserves items which were held to be "plant" through the development of the case law prior to 1994. In that sense, the legislation was seeking to reinforce the well-established distinction, in general terms, between the premises on which a business is carried on and the plant with which the business is carried on, the premises not being plant: see *Wimpy International Limited v Warland* [1989] STC 273 at 279 per Fox LJ.

72. That leads to the question of whether the legislation also seeks to draw a strict line between expenditure which is incurred on "the provision of a structure or other asset in List B" (s 22 (1) (a)) and expenditure which is incurred on "any works involving the alteration of land" (s 22 (1) (b)).

73. Specifically, the question is whether expenditure on a "structure" which is not a structure which is excluded by the operation of List B because it is an "industrial building" saved by Item 7 (a) of List B nevertheless does not qualify for capital allowances because the expenditure which is incurred on the "provision" of the structure entailed expenditure on works "involving the alteration of land."

74. We note at this point that it is specifically stated in s 22 (2) that the term "provision of a structure" includes its construction and the term had previously been interpreted as including work undertaken on land in order to enable the structure to be built *in situ* : see *IRC v Barclay Curle* [1969] 1 All ER 732 ("*Barclay Curle*") per Lord Reid at page 741 H to 742 A and Lord Guest at page 747 E to G of their speeches in the House of Lords.

75. We also observe that it is difficult to conceive of the construction of a structure which is an "industrial building" which does not involve the alteration of land at all.

76. Mr Peacock supports the FTT's reasoning on this issue at [39] and [40] of the Decision, as summarised at [17] above, to the effect that there was no significant overlap between s 22 (1) (a) and s 22 (1) (b) CAA 2001 so that the "works" referred to in the latter provision must be works where the alteration of land is the objective in its own right, not including works whose objective is a creation of some other asset or structure identified in List B.

77. Mr Brennan contends that the FTT's analysis was wrong. He submits that the correct approach to the construction of s 22 CAA 2001 is to appreciate that s 22 (1) (a) provides for specific qualifications and s 22 (1) (b) provides the general disqualifications and is apt to sweep up items which do not already fall within s 22(1)(a). He submits that it is obvious that the two provisions are drafted as alternative routes to providing an exclusion for a structure or asset. The taxpayer cannot obtain allowances if either the expenditure on providing the structure or asset concerned by constructing it is within s 22(1)(a) or the expenditure on providing that item by constructing it is expenditure on "works involving the alteration of land" within s 22 (1) (b).

78. We reject Mr Brennan's submissions for the following reasons.

79. It seems to us that the structure of the legislation is designed to include a distinction between items which can be regarded as "structures or other assets" and those which are "works". If, as we have observed, the "provision" of a structure includes any groundworks which are necessary before it is constructed and in order to provide the "structures" which fall within the scope of List B it is necessary to undertake "works" which involve the alteration of land it is difficult to see what purpose List B serves if Mr Brennan's interpretation of the provisions is correct. Parliament must have known that the term "provision" when used in relation to a structure did, because of the way the term had been interpreted in case law, include any alterations of land which were necessary for the construction of the structure in question and because Parliament must have intended to ensure that the specific exceptions it provided in Item 7 in List B were effective. That intention would be thwarted were the structure in question to be excluded on the basis that its construction entailed works which involved the alteration of land.

80. In his submissions Mr Peacock gave us an example which illustrates this point starkly. There is a specific exception from the general exclusions of structures from the scope of allowable expenditure in Item 7 (c) of List B, for "a structure in use for the purposes of a trade which consists of the provision of telecommunication, television or radio services." That exception would clearly, for example, cover the construction of a mobile phone mast. The construction of that mast would inevitably require works involving the alteration of land, for example, to create a concrete base for the mast or otherwise to provide foundations.

81. We did not take Mr Brennan to argue that expenditure on items such as a mobile phone mast could be split, so that such part of the expenditure that was attributable to the works that involved the alteration of land would be disqualified by the operation of s 22 (1) (b) whilst the works involved in building the mast itself would be allowed pursuant to the exception provided in List B, item 7 (c). We think that such an interpretation would be precluded by the wording of s 22 (1) (b) which excludes any works "involving" the alteration of land. In our view the wording envisages that if the exclusion were to apply in the way that Mr Brennan submitted it should, then all the expenditure would have to be excluded because the end product was a mobile phone mast and constructing that mast and putting it in place necessitated works "involving" the alteration of land. List B does not in our view exclude expenditure on the alteration of land to the extent that it was required in the provision of a structure or other asset.

82. It follows that Mr Brennan's characterisation of s 22 (1) (b) as a "sweep-up" provision is misconceived. On his interpretation, it would sweep up all structures falling within the scope of List B, not just structures which for some reason escaped the wide scope of the exclusions for structures and other assets provided for in that List. In our view, the scope of s 22 (1) (b) is, as found by the FTT, to be limited to items of plant which result from works on the land without the creation of a "structure" or other similar asset (such as a dam), that is where the alteration of land is the objective in its own right.

83. This conclusion is reinforced, as Mr Peacock submitted, by the provisions of s 22 (3) (b) CAA 2001 which excludes buildings and structures from the definition of "land" and applies only for the purposes of ss 21 and 22. If Parliament had intended there to be an overlap between s 22 (1) (a) and s 22 (1) (b) then there would be no need for s 22 (3) (b). The latter provision is further demonstration of Parliament's intention to draw a clear distinction between land and structures or buildings constructed on that land.

84. Therefore, for reasons which are essentially the same as those given by the FTT, we determine that the provisions of s 22 (1) (a) and s 22 (1) (b) are mutually exclusive.

85. As a result, the correct approach when considering whether expenditure on a structure or other asset (other than land) is not qualifying expenditure is to consider first whether the structure or asset falls within the scope of any of the specified structures or assets in List B. If the structure or asset answers to the description of any of those items (for example because it is a "tunnel" or an "aqueduct") then the expenditure is disallowed unless s 22 is disapplied because the expenditure is incurred on any of the items specified in List C.

86. If expenditure on the asset is not disqualified because of the operation of any of the exceptions listed in Item 7 then that is the end of the enquiry and the expenditure is allowed. There is no separate consideration as to whether the construction of the structure or asset involved the alteration of land.

87. We note with approval that a differently constituted FTT has come to the same conclusion in a recent case: see *Cheshire Cavity Storage 1 Ltd and EDF Energy (Gas Storage Hole House) Ltd v HMRC* [2019] UKFTT 498 (TC) ("*Cavity Storage*") at [182]-[185].

The meaning of "tunnel"

88. As set out at [23] above the FTT, having considered the definition in the Oxford English Dictionary ("OED"), concluded that "in common parlance, the word "tunnel" would normally refer to a passage bored through ground which permits people or forms of transport to pass to and fro." Although the FTT accepted that a tunnel might have purposes other than transportation (the first part of the OED definition quoted by the FTT referred to a "subterranean passage" without qualification) it said that "this conduit" [3] did not "comprise a tunnel within the ordinary meaning of that word or, therefore, for the purposes of Item 1 in List B…", observing that the intended purpose was not one of transportation.

89. As is apparent from our discussion set out at [51] to [57] above, "tunnel" is a word that is to be given its ordinary meaning in this case and accordingly we should not interfere with the FTT's finding that the conduit concerned was not a "tunnel" unless either that was a finding which the FTT was not entitled to reach on the basis of the evidence before it or it proceeded on the basis of a misunderstanding of what was capable of capable of falling within the scope of the meaning of "tunnel" in the particular context in which the term is used in the relevant statutory provisions.

90. However, it seems clear from what the FTT said at [66] and [67] of the Decision that it found that the ordinary meaning of the word "tunnel" was confined to subterranean passageways which are intended to be used for the transportation of people or forms of transport. That is, in our view, an error of law. First, the dictionary definition makes it clear that the term can embrace any form of subterranean passage. Secondly, as Mr Brennan submitted, that is consistent with Item 25 in List C which envisages tunnels with a primary purpose of carrying utility conduits and the subterranean passage currently being constructed under the River Thames in London to convey sewage across London to treatment plants in the East of the City is correctly described as the "Thames Tideway Tunnel".

91. That does not mean that when used in the context of List B Parliament was not intending "tunnel" to be used in a transportation sense. As we have said, the words used in a statute must be interpreted in the context in which they are used and therefore derive colour from the words which surround them.

92. As submitted by Mr Peacock, we can derive assistance as to the meaning of "tunnel" from its associated words. This criterion of interpretation is known by its

[3] At this point in the Decision the FTT was referring to the drilled and blasted underground conduit, lined with shotcrete.

Latin maxim *noscitur a sociis*. The application of that maxim is illustrated by the Court of Appeal's judgment in *Pengelly v Bell Punch Co., Ltd* [1964] 2 All ER 945. That case concerned an action for breach of statutory duty under s 28 (1) of the Factories Act 1961 which stated that "All floors, steps, stairs, passages and gangways shall, so far as is reasonably practicable, be kept free from any obstruction…". The question was whether large reels of paper kept on an area of the floor over which workmen did not normally pass constituted an obstruction for this purpose. Diplock LJ said that it did not. Having observed that "steps, stairs, passages and gangways" were places used for the purposes of passage he said at page 947 E:

> "The expression "floors" in this context and in the light of the word "obstruction", which means "blocking or being blocked, making or becoming more or less impassable", is, in my view, limited to those parts of the factory floor on which workmen are intended or likely to pass and re-pass. Where a part of the factory floor is used for storing, as in this case, and properly use for storing, it seems to me that the articles which are stored there… are not obstructions on the floor within the meaning of s 28 (1) of the Act of 1961."

Therefore, the Court of Appeal held that, by virtue of its context, the word "floors" had to be given a narrower meaning than its usual meaning.

93. Similarly, in this case, and as submitted by Mr Peacock, in our view the words immediately surrounding "tunnel" in Item 1 of List B are "bridge, viaduct, aqueduct, embankment or cutting" all of which are the product of civil engineering works related to the construction of transportation ways and routes, that is the types of ways and routes which the draftsman subsequently lists in Item 2 and 3 of List B. It follows therefore that the context requires that the word "tunnel" should be given a narrower meaning than its ordinary dictionary meaning.

94. Accordingly, we accept Mr Peacock's submission that in List B:

(1) A "tunnel" is a subterranean passageway through an obstacle for a railway, road or canal to pass through;

(2) "Bridges" and "viaducts" permit vehicles or pedestrians to travel over an obstacle;

(3) Similarly, here "aqueduct" (listed after "bridge" and "viaduct") means a bridge-like structure for carrying water (typically, where a canal is carried over a river or valley); and

(4) "Cuttings" and "embankments" are other structures resulting from clearing obstacles in constructing a road, railway or inland navigation.

95. Therefore, whilst in our view the FTT were wrong to say that the ordinary meaning of a tunnel is always a passageway used to facilitate access from one end to the other of persons or of means of transport, we conclude that in List B, taking into account the context in which the term is used, "tunnel" has that meaning.

96. This is in contrast to the meaning of the term when used in Item 25 in List C. That provision saves expenditure, inter alia, on "underground ducts or tunnels with a

primary purpose of carrying utility conduits" so that it is clear that the term "tunnel" is being used in a different sense, namely a subterranean passageway but one which does not have a transport function. As Mr Peacock submitted, the draftsman created a saving for an asset which would otherwise have been a tunnel where it has a utility rather than a transport purpose. We therefore do not accept that the term has the same meaning when used in List B as it is when it is used in List C.

The meaning of "aqueduct"

97. It follows from our discussion of the meaning of "tunnel" that in List B, taking into account the context in which the word is used, "aqueduct" means a bridge-like structure for carrying water (typically, where a canal is carried over a river or valley).

98. As summarised at [25] above, the FTT identified that "aqueduct" has two potentially relevant definitions, that is either an artificial channel for the conveyance of water from place to place or a structure by which a canal is carried over a river et cetera. It held at [69] that the transportation of water itself was enough to be consistent with the overall "transportation" theme of Item 1.

99. We agree with the FTT that the term has two potential ordinary meanings. We were shown the OED definitions, the first of which is an "artificial channel for the conveyance of water from place to place; a conduit" and the second is a "similar structure by which a canal is carried over a river et cetera".

100. It is clear that the FTT adopted the first of those definitions for the purpose of interpreting the term in the context in which it is used in List B. However, in our view, the FTT fell into error by holding that the "transportation" theme of Item 1 extended to an aqueduct which was a conduit for moving water from one place to another. As Mr Peacock submitted, the effect of extending the definition in this way was to broaden the term so as to encompass structures which are not means of creating transportation routes.

101. In our view, therefore, for the reasons that we have given in relation to our analysis of the meaning of the term "tunnel" when used in List B, the term "aqueduct" was intended to be confined to a bridge-like structure which created a transportation route, that is a canal.

The meaning of "installation"

102. In the light of our conclusions above it is not strictly necessary to consider whether the expenditure was incurred on the alteration of land for the purpose only of installing plant within the meaning of Item 22 of List C. Nonetheless, because the point was fully argued before us and because there are conflicting decisions of the FTT on this point, we set out our views as follows.

103. The FTT considered that in relation to the assets in dispute that the term "installation" extended to include installation by the creation *in situ* of the asset in question, in addition to installation by putting in place something which previously existed, albeit perhaps only in component form (such as a pipeline): see [78] of the

Decision as set out at [31] above. The FTT accepted at [79] that the matter was finely balanced but was influenced by "standing back and looking at the matter realistically" and concluding that the "end result" was to "create in the appropriate place an item of plant… which was an important element of the overall Scheme… where previously there had only been solid rock."[4]

104. We were referred to a number of cases where the meaning of the term "installation" has been considered in the context of plant and machinery.

105. In *Prestcold (Central), Limited v Minister of Labour* [1969] 1 All ER 69 ("*Prestcold*") the Court of Appeal considered the meaning of the term "installation" in the context of a business which consisted on the one hand of making low-temperature refrigeration units in the appellant's premises from component parts, the majority of which were manufactured elsewhere, and on the other hand of assembling refrigerating plant, again from component parts, at customers' premises on site. This question came to be considered in the context of the long abolished Selective Employment Tax. The question as to whether the tax was payable depended on whether the business as a whole could be categorised as "manufacturing all types of refrigerators" or whether alternatively the scope of "construction" which included "installing…. apparatus" at least included the business carried out on customers' premises.

106. The Court of Appeal held that both parts of the business fell within the scope of "manufacturing". In seeking to find any instance of the judicial use of the word "installation" Winn LJ quoted with approval the case of *City of Winnipeg v Brian Investments, Limited* [1953] 1 DLR 270 ("*City of Winnipeg*"), a case heard in the Court of Appeal in Manitoba where the court said at page 275 to 277:

> "… "installed" is not a word of art nor a word of precision. Indefiniteness gives it, as it gives any word, a chameleon-like character so that associate words show through and give their colour and meaning to it… The word "install", which in mediaeval times meant to perform a formal ceremony of induction to a position or office, has been taken in modern times for use in the mechanical and structural trades. There it means more than to bring in or merely to place an article somewhere for service…. In those trades, the word is used in respect of a system of ventilation, lighting, plumbing, heating water or electrical service, or a fireplace, etc, to be put into a building, or of an engine, steering gear or carburettor into a motorcar; or other similar use… "Install" would seem to connote the doing of something of some complexity, difficulty in importance, probably requiring some skill, involving the integration of an article or articles into the building or machine in which the installing takes place, and causing a change of some importance in the building or machine."

107. With the assistance of that judicial pronouncement, Winn LJ held at page 78 H:

[4] That finding was made in relation to the drilled and blasted underground conduit, lined with shotcrete but the FTT applied the same reasoning to the other assets in dispute.

> "… The activities which are relevant here could well be described as installation; that refrigerating machinery was installed in these premises. Nevertheless, I think it is more appropriate and apt to place those activities under "manufacturer" than under "installation" …"

108. We observe that the Court of Appeal of Manitoba was of the view that "installation" involved more than simply placing a previously manufactured item in place, the term connoting that some further more complex activity was required. However, we also note the emphasis on the "integration" of an "article" into an existing structure, such as a building or machine in which the installing takes place. Influenced by this observation, Winn LJ in *Prestcold* decided on the facts of that case that the activity of assembling an article on site for installation in premises was more aptly described as "manufacturing" rather than merely as "installation". That in our view is a strong indication that "installation" can take place as part of the wider activity of "manufacturing".

109. In *Engineering Industry Training Board v Foster Wheeler John Brown Boilers Ltd* [1970] 1 WLR 881 ("*EITB*") the Court of Appeal considered the meaning of the term the "installation… of… plant" in the context of a company's business which included the provision for electricity boards of steam-generating apparatus for thermal power stations. The procedure was for other contractors to put up a metal girder framework. The company's workmen then assembled the apparatus on the site from pre-manufactured elements, mostly of metal. The main constituent was an immense boiler which was suspended from the framework and involved piecing together 200 miles of piping, burners, conductors, the erection of furnaces, chimneys, ladders and access galleries. When that work was done, the other contractors covered the apparatus with a cladding. The question was whether the company fell to be assessed for an industrial training levy in respect of activities within the scope of the "engineering industry" or whether it was exempt on the basis that the activities constituted "civil engineering". The activities were not "civil engineering" if they constituted the "installation of plant".

110. Lord Wilberforce quoted *City of Winnipeg* with approval at page 887. He then said of the word "installed":

> "It conveys putting in place something already made so that it can be used. There may be an element of assembly required; but basically everything installed is ready to work when it is put in its place and, if necessary, connected up. Here I think it would be a complete misdescription to say that the boiler is installed in the framework or in this building. It is the other way round: the framework is there to hold and cover the boiler. They form one unit which is a thermal power station. There is not one thing installed in another: the boiler has no previous existence… What is done… is the construction – and I use the word deliberately – on the spot out of manufactured elements … Installation seems to me to be very far from the reality of the facts.. I think it is truly construction."

111. In our view, this approach is consistent with that taken in *Prestcold*; in *EITB* what was contended to be "installation" was subsumed within a process which was more properly described as "construction".

112. In *Barclay Curle*, which we have referred to briefly at [74] above, the question was whether a dry dock was "plant" so as to qualify for an initial allowance of 30% of the expenditure involved in its construction or whether it was a "structure" and thus qualified for an initial allowance at the lower rate of 15%.

113. The facts were that the dock had to be made at the right level adjacent to the river Clyde and a large amount of earth had to be removed to make room for it. A large amount of concrete was then used in the construction of the dry dock which, when completed, acted like an hydraulic chamber in which a volume of water, variable at will, could be used to lower and raise a ship. The dry dock could not have fulfilled its purpose unless there been an excavation of sufficient depth to enable the ships of the contemplated draft to enter and leave it and the valves, the machinery the provision of electricity and the pumps were an integral part of the dock as a functioning entity. The cost had been divided into three parts, preliminary excavation, concreting, and ancillary plant.

114. Lord Reid began his speech at page 738C by referring to the taxpayer having "installed a new dry dock" at their shipyard. He identified the question to be answered as being whether the cost of excavation necessary to make room for plant is part of the cost of the plant. He said this at page 741H to 742 A:

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

115. Lord Guest said at Page 746G to H:

> "In order to decide whether a particular subject is [plant] it seems obvious that an enquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary. The function which the dry dock performs is that of an hydraulic lift taking ships from the water on to dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides. It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates valves and pumps. To effect this purpose excavation and concrete work were necessary."

116. Mr Peacock submits that careful reading of these passages indicates that the House of Lords thought that the provision of plant included its installation, which included the necessary excavation of the land and the concrete work from which the dry dock was constructed.

117. In our view, however, the House of Lords did not go that far. The question to be determined in that case was whether the work involved in excavating the land to make room for the dock and the concrete work was to be regarded as expenditure on the "provision" of the dry dock. It is clear from the passages of the House of Lords that the House of Lords held that the "provision" of the dry dock involved three stages, namely the excavation works, the concreting and the installation of the valves, pumps and other equipment to make the dock work. The House of Lords did not need to determine specifically what was meant by the term "installed" and in our view Lord Reid used the word "installed" at the beginning of his speech as a convenient way of describing the construction process as a whole without drawing a distinction between the preparatory excavation work, the concreting and the installation of the operating equipment. However, it seems to us that in the passage quoted at [113] above, Lord Reid was using the term "installed" solely in relation to the third stage of the process. Lord Guest clearly drew a distinction between the excavation and concrete work and, although he did not use the word, the installation of the dock gates valves and pumps. The latter could not take place until the necessary excavation and concrete work had been undertaken so that the costs of the excavation and concrete work could not be considered in isolation. We can see nothing in what their Lordships said which gives authority for the proposition that creating an asset through the excavation of land alone is to be regarded as "installation".

118. Finally, in *Cheshire Cavity*, a case which we have referred to briefly at [87] above, the FTT disagreed with the analysis of the FTT in this case, as set out at [78] and [79] of the Decision. The FTT in *Cheshire Cavity* said at [222] that "installed" carries the implication that something pre-existing is put in position and that creating a space where previously there was none does not install the space; it creates it, but it does not install it. The FTT specifically said that the dry dock which was the subject of *Barclay Curle* was not installed but was created in situ. At [223] the FTT quoted with approval the passage in *EITB* set out at [109] above in support of its analysis.

119. In this case, HMRC support the proposition that "installation" is limited to putting in place something which already exists as plant. Likewise, HMRC contend that "installation" connotes "setting something in place", which is said to be inconsistent with the creation of it.

120. Mr Peacock submits that the correct definition turns on the purpose of CAA 2001 because, as Lord Wilberforce noted in *EITB*, "installation" is a chameleon-like word, not a word of precision. He accepts that the Court of Appeal took a narrow approach to the meaning of installation in that case, but submits that that was in order to make sense of the particular statutory provision which was the subject matter of that case.

121. Mr Peacock submits that different considerations apply to CAA 2001, which must be construed according to its own purpose and then applied to the facts viewed realistically. The FTT in the present case was right to "stand back" and look at the matter realistically.

122. There is, he submits, a clear distinction between the alteration of land and the plant which is installed as a result. The former is part of the process of installation and the latter is the product of the installation. On the facts in the present case the structures involved setting in place components which were not previously part of the land (such as steel, shotcrete, rockbolts or reinforced concrete).

123. Moreover, in Mr Peacock's submission, unlike the statutory provision considered in *EITB*, there is no principled reason why Parliament might have wanted to differentiate between plant assembled or constructed as part of the installation process (i.e. *in situ*) and items which are fully pre-manufactured before being brought to site. In essence, the distinction drawn by HMRC was, according to Mr Peacock, merely a question of timing or (perhaps) process: if an item is first manufactured and then added to the land, HMRC would be compelled to accept that allowances may be available. It should not (and did not) matter whether the components of a particular item of plant, A, B and C, are bolted together offsite and then "installed" on the land or whether components A and B are bolted together offsite and then bolted to component C in situ. In each case the plant is being "installed" and Item 22 covers the expenditure incurred in altering land solely for the purpose of doing so. Furthermore, he submits, a conduit which is created by the installation of a pre-fabricated pipe performs exactly the same function and achieves the same result as a conduit produced by drilling a void in the rock and spraying the void with rough concrete so there is no reason to suppose that the two assets should be treated differently for capital allowance purposes.

124. Further, Mr Peacock submits, the word "only" in Item 22 lends no support to HMRC's case. HMRC contend that "only" when applied to installing means that it cannot encompass "construction". However, the word "only" describes the "purpose" and if the draftsman of CAA 2001 used "installing" to include cases where plant is set in place by way of assembly or construction (and not merely where a pre-assembled asset is fixed in place) as the FTT found, then the word "only" takes HMRC's case no further.

125. Mr Peacock observes that the FTT drew a distinction between an alteration of land to create a setting as opposed to an alteration of the land only for the purpose of installing plant.

126. Despite the force of Mr Peacock's submissions, we have concluded that HMRC are right on this point. Again, the terms "install" "installing" or "installation" are to be given their ordinary meaning and that meaning derives colour from the words in the statute that surround them.

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] 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.[5] 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.

130. It follows that in our view the FTT erred in law when it held that the alteration of land involved in the creation of an asset or structure was carried out for the purpose only of installing the asset or structure. We therefore approve the analysis of the FTT in *Cheshire Cavity* on this point, as summarised at [117] above.

Whether an asset is "plant" for the purposes of Item 22 of List C if it is explicitly excluded from allowances by List B

131. In view of our conclusion on the correct interpretation of the term "installation" as used in Item 22 of List C it is not strictly necessary for us to address this point, so we can deal with it relatively briefly.

132. HMRC contend that the correct approach is to determine as a first step whether the relevant expenditure was excluded by s 22 or s 23 CAA 2001 from qualifying as

[5] Though not directly relevant to this appeal, in setting out the text of List C at [12] above we have left in examples of plant within List C which illustrate this point, such as refrigeration or cooling equipment and computer systems.

expenditure on the provision of plant rather than start by considering whether, as a matter of common law, ignoring the statute, there was expenditure incurred on the provision of plant. Mr Brennan submits that the FTT erred because the result of ignoring the statutory disallowance was that the FTT held that elements of expenditure on the provision of an aqueduct were allowable when the expenditure was expressly excluded by Item 1 of List B. HMRC submit that this reasoning undermines the disallowance set out in item 1 of List B and the integrity of the legislation.

133. We reject that submission. As Mr Peacock submitted, List B does not say that any of the items contained in that list are not items of "plant". Whether or not an item qualifies as "plant" is to be determined according to the principles laid down in case law. List B simply says in terms that expenditure on the provision of certain items of "plant" does not qualify for expenditure. As Mr Peacock submitted, the purpose of s 23 and List C is to save from disqualification expenditure on items of "plant" (as established through the case law) which might otherwise have been disqualified by being comprised in List B.

134. HMRC's argument is also inconsistent with the amendment made by s 35 Finance Act 2019 which, as mentioned at [15] above, has the effect of preventing the claiming of a capital allowance for expenditure on plant otherwise excluded by the operation of s 22 (1) CAA 2001 on the basis of the saving in item 22 of List C in respect of claims made after 29 October 2018. As Mr Peacock submitted, on HMRC's case, Parliament has misunderstood the meaning of the legislation in force prior to that date and the amendment is therefore wholly otiose.

The meaning of "pipeline"

135. It was common ground that Item 25 in List C includes all pipelines and it is not confined to those which have a primary purpose of carrying utility conduits. Although the legislation in force before the rewrite of the legislation in 2001 had a comma after "pipeline" and that comma was removed in the corresponding provision in CAA 2001, it was accepted that no change in the law was intended as a result.

136. SSEG contends that each of the disputed assets are aptly described as part of a pipeline for the conveyance of water so that even if it is unsuccessful in its argument that the assets concerned fell outside the specific exclusions in Items 1 to 6 of List B or its argument that the expenditure is saved by the application of Item 22 in List C, the assets would nevertheless be saved by Item 25 of List C.

137. Although none of the expenditure remaining in dispute relates to pre-fabricated pipes, Mr Peacock submits that Item 25 does not specify that a pipeline must be made from pre-fabricated pipes. He submits that an approach which relies solely on how a pipe is constructed (as opposed to its inherent characteristics and function) is arbitrary and contrary to the case law summarised and preserved by List C and there is no sensible rationale for Parliament incentivising particular types of construction technique.

138. Thus, Mr Peacock submits that a pipeline is nothing more than a cylindrical tube functioning as an asset to convey liquid or gas and designed as such regardless as to how that asset is constructed and regardless of the material out of which it is constructed.

139. As mentioned at [22] above, the FTT accepted at [62] of the Decision that a crucial feature of a "pipeline" is that should be made up of individual lengths of pipe joined together. The FTT referred to the OED definition of the term as "a continuous line of joined pipes, especially one use for conveying oil, gas etc, long distances."

140. Although, as is the case with Mr Peacock's submissions on the meaning of "installation", there is some force in the argument that the focus should be on the function of an asset rather than how it is constructed, in our view it would be stretching the ordinary meaning of "pipeline" too far to embrace all of the conduits that Mr Peacock contends can be properly described as "pipelines", namely the drilled and blasted conduit lined with shotcrete, a buried conduit built in situ from reinforced concrete as well as the headrace, the tailrace and the other outflow, drainage and dewatering tunnels. We can see nothing in the surrounding words of the legislation which indicate that the term "pipeline" is to be given anything other than its ordinary meaning, as identified by the FTT at [62] of the Decision. We therefore detect no error of law on the part of the FTT in relation to the meaning of "pipeline" as used in Item 25 of List C.

Errors of law and the exercise of the Tribunal's powers

141. In our discussion set out above we have identified the following errors of law on the part of the FTT:

(1) In holding that the ordinary meaning of a "tunnel" is always a passageway used to facilitate access from one end to the other of persons or of means of transport: see [95] above;

(2) In holding that the term "aqueduct" in the context in which it is used in List B extended to an aqueduct which was a conduit for moving water from one place to another: see [100] above; and

(3) In holding that the alteration of land involved in the creation of an asset or structure was carried out for the purpose only of installing the asset or structure: see [129] above.

142. Having found that there were errors of law on the FTT's part we have to consider whether to exercise the powers in s 12(2) of the Tribunals, Courts and Enforcement Act 2007 (" TCEA") which provide that in this situation we may (but need not) set aside the decision of the FTT and, if we do, either remit the case to the FTT for reconsideration or remake the decision.

143. As set out in more detail below, we have decided that the FTT's errors of law have not affected the overall result of the Decision or the individual findings made in relation to each of the matters still in dispute, except in one respect referred to below. In relation to each of the matters determined in favour of SSEG we have found that

the FTT's findings can be upheld for reasons different from those given by the FTT so that we do not need to exercise our discretion to set aside the Decision or any part of it. As discussed below, however, we do need to remake the Decision in respect of one aspect of the expenditure on the "cut and cover" conduit.

Conclusions on the specific matters in dispute

144. We can now turn to the particular assets in dispute in the light of our conclusions on the points of law discussed above. In essence, save for one exception, we have decided in relation to each of those assets that by reference to the findings of fact already made by the FTT the FTT's findings can be upheld but for reasons different from those given by the FTT.

145. Although the FTT did not say so in terms, in our view it is implicit in the Decision that the FTT proceeded on the basis that it had found that all the assets in dispute were "structures": see [43] of the Decision where the FTT referred to it being common ground that none of the "structures" involved in this case fall into List B by virtue of Item 7 because of the exception for industrial buildings referred to below. Alternatively, in so far as it is necessary to make an express finding of fact to that effect, we do so by the exercise of our powers under s 12 (4) (b) TCEA on the basis of the evidence that we were shown as to the features of the various assets and their method of construction.

Conduits

Drilled and blasted underground conduit, lined with shotcrete

146. It follows from our analysis of the meaning of "tunnel" and "aqueduct" when used in the context of List B, that whilst the FTT's finding at [67] that this structure was not a "tunnel" was correct, its finding that the conduit was an "aqueduct" was wrong.

147. In the light of our finding, for the reasons given at [69] to [87] above, that s 21 (1) (a) and (b) CAA 2001 were mutually exclusive, it was not necessary for the FTT to consider (as it did at [71] of the Decision) whether this structure was "works involving the alteration of land" within s 21 (1) (b) CAA 2001. That it did so is inconsistent with the FTT's own analysis of those provisions.

148. Consequently, because the structure is neither a tunnel nor an aqueduct and s 21 (1)(b) is not relevant, expenditure on the structure does qualify for capital allowances on the basis that the structure is an "industrial building". The exception provided for by Item 7 (a) of List B applies: see our conclusion at [86] above.

149. As a result of this conclusion, it is not necessary to consider whether the expenditure could be regarded as being on "the alteration of land for the purpose only of installing plant or machinery" as provided for in Item 22 in List C. The FTT held that the expenditure could be so regarded: see [78] and [79] of the Decision, but for the reasons that we have given at [126] to [130] above that conclusion cannot be supported.

150. It is also not necessary to consider whether the expenditure is to be regarded as being on a "pipeline" and therefore within the saving provided for by Item 25 of List C. However, for the reasons we have given at [140] above, the structure cannot be regarded as being a "pipeline" and we agree with the FTT's conclusions at [75] on this point.

"*Cut and cover" conduit built on-site with reinforced concrete*

151. The same analysis applies in relation to this structure as that in relation to the drilled and blasted underground conduit. In summary:

(1) The structure is neither a tunnel nor an aqueduct excluded by Item 1 of List B and is not within another part of Items 1 to 6 of List B.

(2) There is no need to consider whether in the alternative the structure was "works involving the alteration of land".

(3) The structure falls within the definition of "industrial building" and therefore the expenditure on its construction qualifies for capital allowances because of the exception provided for by Item 7 (a) of List B.

(4) There is no need to consider whether any of the expenditure could be regarded as being on "the alteration of land for the purpose only of installing plant or machinery" or whether the structure could be regarded as a "pipeline", but the FTT was wrong to conclude that the expenditure on the base for the structure was allowable on the basis of Item 22 of List C and also correct to conclude that the structure was not a "pipeline".

152. It follows from those conclusions that we disagree with the FTT's findings at [84] and [85] of the Decision, as set out at [34] above. It appears to us from the findings of fact made by the FTT that the process of excavating the land, building the concrete structure on the land that had been excavated and subsequently covering it over amounted to the creation of the structure. On the basis of our conclusions on the proper interpretation of Item 22 of List C, that process could not fairly be described as the alteration of land only for the purpose of installing the structure. The FTT were also wrong to disallow the costs of the fabrication in situ of the concrete conduit itself on the basis that it was an "aqueduct".

153. It follows from our reasoning that all of the expenditure in relation to the structure is allowable on the basis that the expenditure was on the provision of an industrial building falling within the scope of the exception in Item 7 (a) of List B. As we have already said, "provision" of a structure will include all of the costs of construction, which in this case will include the necessary preparatory work in excavating the land before the structure was built, its building in situ and its subsequent covering over.

154. On that basis, we set aside the finding of the FTT that no allowances are available for the expenditure in relation to the erection of the concrete structure in situ and remake it on the basis that the expenditure incurred on the erection of the structure does qualify for capital allowances.

Uncovered rock and concrete lined channels

155. The same analysis that we undertook in relation to the other conduits applies to these structures. In summary:

(1) The structures are neither tunnels nor aqueducts excluded by Item 1 of List B.

(2) There is no need to consider whether in the alternative the structures were "works involving the alteration of land".

(3) The structures fall within the definition of "industrial building" and therefore the expenditure on their construction qualifies for capital allowances because of the exception provided for by Item 7 (a) of List B.

(4) There is no need to consider whether any of the expenditure could be regarded as being on "the alteration of land for the purpose only of installing plant or machinery" or whether the structure could be regarded as a "pipeline", but the FTT was wrong to conclude that the expenditure incurred in creating the structures by excavating rough channels was allowable on the basis of Item 22 of List C and also correct to conclude that the structure was not a "pipeline". Indeed, on the latter point Mr Peacock accepted that because the structures were uncovered, they could not qualify as "pipelines".

The headrace

156. The same analysis applies in relation to this structure as that in relation to the various conduits. In summary:

(1) The structure is neither a tunnel nor an aqueduct excluded by Item 1 of List B.

(2) There is no need to consider whether in the alternative the structure was "works involving the alteration of land and the FTT was wrong to do so at [94] of the Decision".

(3) The structure falls within the definition of "industrial building" and therefore the expenditure on its construction qualifies for capital allowances because of the exception provided for by Item 7 (a) of List B.

(4) There is no need to consider whether any of the expenditure could be regarded as being on "the alteration of land for the purpose only of installing plant or machinery" or whether the structure could be regarded as a "pipeline", but the FTT was wrong to conclude that the expenditure on the creation of structure was allowable on the basis of Item 22 of List C and also correct to conclude that the structure was not a "pipeline".

157. As indicated in the summary above, at [94] of the Decision the FTT found that the expenditure was incurred on "works involving the alteration of land" within the meaning of s 22 (1) (b) CAA 2001. It is not clear why the FTT felt it necessary to consider that point, bearing in mind its conclusions at [39] and [40] that s 22 (1) (a)

and s 22 (1) (b) were mutually exclusive. On the basis of that finding, and its correct finding that the structure was neither a tunnel nor an aqueduct, in the light of its observation at [43] of the Decision, it should have gone on to consider whether the structure was an "industrial building" within the scope of the exception in Item 7 (a) in List B and conclude that it did fall within that exception.

158. For the reasons that we have already given in relation to the other assets, the FTT was wrong to conclude at [100] that the expenditure on the creation, reinforcement and lining of this structure in a single operation which brought into existence an item of plant could properly be regarded as expenditure on the alteration of land for the purpose only of installing the completed headrace.

The tailrace

159. As appears from the FTT's findings of fact, the tailrace is a conduit which transports water (in this case, the spent water from the turbine) from one place to another (the turbine outlet to Loch Ness) under gravity. On that basis, the analysis that we have applied to the other conduits, as set out above, applies equally to the tailrace and the associated structure mentioned at [40] above. Therefore, the expenditure incurred in the provision of these structures is allowable for capital allowance purposes.

The turbine outflow tunnel and the drainage and dewatering tunnels

160. As also appears from the FTT's findings of fact, as summarised at [6] above, the structures are also conduits for the transport of water so that the analysis we have applied to the other conduits and the tailrace as set out above applies equally to these assets. Therefore, the expenditure incurred in the provision of the structures is allowable for capital allowances purposes.

Summary of overall conclusions

161. In relation to the matters which are still in dispute on this appeal it follows as regards the allowances claimed:

(1) In relation to the water conduits between the water intakes and the main reservoir:

(a) Drilled and blasted underground conduit, lined with shotcrete – allowable in full;

(b) "Cut and cover" reinforced concrete built on site - allowable in full;

(c) Uncovered rock- and concrete-lined channels – allowable in full;

(2) In relation to the headrace – allowable in full; and

(3) In relation to the tailrace, including the turbine flow tunnel and the drainage and dewatering tunnels –allowable in full.

Disposition

162. The appeal is dismissed.

Costs

163. Any application for an order for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and, unless both parties agree that the costs should be the subject of detailed assessment, be accompanied by a schedule of the costs claimed sufficient to allow summary assessment of such costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE TIMOTHY HERRINGTON **JUDGE GUY BRANNAN**

UPPER TRIBUNAL JUDGES
RELEASE DATE 4 NOVEMBER 2019

Appendix: Overview of the Glendoe Hydro Electric Station