Neutral citation number: **[2026] UKUT 00105 (TCC)**

UT (Tax & Chancery) Case Number: UT/2024/000149

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Hearing venue: The Rolls Building
London EC4A 1NL

INCOME TAX – Enterprise Investment Scheme — whether trades of taxpayers "begun to be carried on" on or before 4 April 2018 - FTT erred in its approach but decision remade to lead to the same conclusion as the FTT

Heard on 27-28 January 2026
Judgment given on 5 March 2026

Between

PUTNEY POWER LIMITED
PISTON HEATING SERVICES LIMITED

Appellants

-and-

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Before

MR JUSTICE RICHARDS
JUDGE RUPERT JONES

David Ewart KC and Sam Brodsky of counsel, instructed by Reynolds Porter Chamberlain for the Appellants

Christopher Stone KC and Thomas Westwell of counsel, instructed by The General Counsel and Solicitor for His Majesty's Revenue and Customs for the Respondents

DECISION

1. The Appellants appeal against a decision of the First-tier Tribunal (**FTT**) published with neutral citation [2024] UKFTT 870 (TC) (the **Decision**). The central issue before the FTT was whether each of the Appellants (**Putney** and **Piston** respectively) had begun to carry on trades on or before 4 April 2018. The FTT concluded that neither company had done so. The Appellants appeal on the sole ground that the FTT erred in principle in reaching its conclusion.

2. References in the remainder of this decision to numbers in square brackets are to paragraphs of the Decision unless the context indicates otherwise.

The enterprise investment scheme

3. The question as to when the Appellants began to carry on their trades arose because individuals who acquired shares in the Appellants sought relief under the enterprise investment scheme (**EIS**) contained in Part 5 of the Income Tax Act 2007 (**ITA 2007**). Obtaining EIS relief requires a number of statutory conditions to be satisfied. One such condition, imposed by s175 of ITA 2007, is that the money raised by the Appellants from the issue of shares is employed wholly for the purposes of a "qualifying business activity". The Appellants asserted that they met that condition by reference to an aspect of "Activity A" specified in s179(2)(b) of ITA 2007 namely:

> (b) the activity of preparing to carry on (or preparing to carry on and then carrying on) a qualifying trade–
>
> (i) which, on that date, is intended to be carried on by the company or such a subsidiary, and
>
> (ii) which is begun to be carried on by the company or such a subsidiary within two years after that date.

4. It can be seen from this extract that an activity of "preparing to carry on" a qualifying trade could be a qualifying business activity only if the qualifying trade itself is "begun to be carried on" by a particular deadline. In this case the parties are agreed that the relevant deadline was 4 April 2018 and so the question before the FTT was whether the Appellants had indeed begun to carry on their trades by then. For completeness, s179(2)(a) of ITA 2007 would have been on point if, at appropriate times, the Appellants (or a 90% subsidiary) were actually carrying on a qualifying trade. However, the Appellants do not argue that the requirements of s179(2)(a) of ITA 2007 were satisfied in this case.

5. There are a number of conditions that had to be met for investors' subscription for shares in the Appellants to attract EIS relief. Those conditions are not relevant to this appeal and so we do not set them out. It suffices to say that, if all the conditions are satisfied, an investor subscribing for shares in the Appellants would obtain relief equal to 30% of the amount subscribed with that relief being available to reduce tax that would otherwise be payable on other taxable income.

6. The parties were agreed, at a very high level of generality, that Parliament affords that relief in order to incentivise investment in the kind of smaller trading companies with which Part 5 of ITA 2007 is concerned. They are also agreed that, at a high level, the reason why s179(2)(b) imposes a deadline on the trade beginning is so that the Exchequer does not give the 30% relief too far in advance of the point at which investee company's trade commences since the EIS relief is intended to incentivise the provision of capital in companies to finance trading activities. However, the parties were not agreed on what, if anything, that high-level articulation of statutory purpose says about the issues raised in this appeal.

7. It was common ground that the statutory provisions give no more guidance on the meaning of "trade" than is set out in s189(2) of ITA 2007 which means that a trade is not to include a "venture in the nature of trade". Neither party suggests that the distinction between "trade" and "venture in the nature of trade" is relevant to this appeal.

8. The parties were agreed that the statutory provisions give no guidance on when a trade is "begun to be carried on" beyond the indication in s179(2) of ITA 2007 itself that the activity of "preparing to carry on" a trade is conducted before the trade is "begun to be carried on".

9. It was also common ground that the activity that both Appellants ultimately carried on was a "qualifying" trade ([164]). The issue before the FTT was therefore circumscribed and reduced to a consideration of whether each Appellant had begun to carry on its trade on or before 4 April 2018.

The FTT's factual findings

10. None of the FTT's factual findings is challenged. Given the way this appeal is brought it is appropriate to start by summarising the FTT's conclusions as to the nature of the Appellants' trades and what they had, or had not, done on or before 4 April 2018.

Findings as to Putney

11. Putney proposed to carry on a trade that consisted of generating electricity from gas. A benefit of generating electricity in this way is that generation can be turned on and off, by contrast with for example coal and nuclear generators, which are "always on". Putney therefore hoped to be able to operate flexibly and sell electricity at periods of particularly high demand when the price would be higher ([28] and [29]), an activity known as "gas-peaking".

12. Putney was one of a number of companies advised and assisted by an entity called **Triple Point**. The nature of Triple Point's involvement was summarised at [18]. Broadly, Triple Point had expertise in EIS matters and used that expertise to attract investors in companies under their "aegis". In return, Triple Point would receive a fee of 2.25% of net asset value from the companies whom Triple Point successfully assisted in raising capital.

13. At [27] the FTT identified revenue streams that Putney hoped to earn. Those revenue streams obviously included income from the actual sale of electricity in the "day ahead" market. They also included "capacity market income". Earning that income would involve Putney entering the capacity market for electricity. On entering that market, Putney would receive payments for agreeing to make a certain amount of electricity generation capacity available in particular periods, even if it was not actually called upon to generate electricity. Penalties would be imposed on providers who agreed to provide capacity but failed to do so when called upon. To enter that market, Putney had to "pre-qualify" by demonstrating a serious intention to provide capacity and provide financial credit cover as security for its potential exposure to penalties ([51]).

14. It is clear from the FTT's findings at [27] that Putney's trade would involve it taking in gas, using that to generate electricity and selling the electricity as soon as it had been generated. That was the whole point of "gas-peaking" as it enabled Putney to sell electricity, as soon as it was generated, at times of particularly high demand. Putney would not, for example, be generating electricity, storing it in some way and selling it forward to purchasers. We therefore agree with HMRC that the FTT found this aspect of Putney's trade to be analogous to that of a manufacturer: it was proposing to take in raw materials (gas) which it subjected to a process to create an immediately saleable product (electricity).

15. In 2016 Putney identified a site (**Copse Road**) that it considered suitable for construction of a gas-peaking plant. Putney signed Heads of Terms (the **HoT**) with AGR Peak Power Limited (**AGR**), a developer, on 14 October 2016. The HoT did not impose a contractual obligation on Putney to develop the Copse Road site. Putney was entitled not to proceed with that development without financial penalty if, for example, Triple Point concluded that its rate of return from the proposed venture was too low ([36]).

16. Between November 2016 and May 2017, Putney undertook due diligence on both the financial, technical and legal aspects of the Copse Road project. It incurred professional fees to Ove Arup and Partners Limited and lawyers as part of its due diligence ([38] to [41]).

17. In April 2017, Putney took steps to secure a "gas connection offer" and a "grid connection offer" to ensure that gas could be supplied to the Copse Road site and electricity that the Copse Road plant generated could be transferred into the national grid ([41] and [42]).

18. Meanwhile Putney was holding regular meetings to discuss aspects of its business such as who would be the best engine manufacturer and gas supplier. In October 2016, Putney contacted Gazprom Marketing & Trading Limited (**Gazprom**) with a view to negotiating heads of agreement under which Gazprom would supply gas to Putney, and purchase electricity from Putney.

19. In May 2017, "financial close" took place. This involved Putney signing a framework of contracts that were central to its gas-peaking business. The FTT found

that all the contracts entered into at financial close were inextricably linked: none would have been entered into without the others. The FTT set out full details of the relevant contracts at [44]. Some of the more important agreements were as follows:

> (1) By an Engine Supply Agreement, Putney agreed to buy four gas powered generators from JCB Power Products Limited (**JCB**) for £2,795,734 plus VAT.
>
> (2) Putney agreed to pay AGR £2,294,304 plus VAT under the **Balance of Plant Agreement** to perform engineering, procurement and construction works at the Copse Road site.
>
> (3) Putney agreed to pay £231,314.58 plus VAT and £224,684 plus VAT to secure a gas connection and a grid connection.
>
> (4) Putney obtained an option to take a lease of the Copse Road site for 21 years for an annual rent of £56,000.
>
> (5) Putney entered into agreements with Gazprom (the **Gazprom Agreements**) for the purchase of gas and the sale of electricity.
>
> (6) Putney entered into a Long Term Maintenance Agreement with JCB to provide various maintenance and other support in relation to the generators. Obviously, that support would be needed only after the generators were delivered. In a similar vein, Putney entered into a Technical Maintenance and Management Agreement with AGR relating to the Copse Road site which would be necessary only once that site was developed.

20. The FTT dealt with the Gazprom Agreements in detail at [56] to [65] and also at [188]. The FTT described these as "framework agreements" because they set a framework that would govern any purchases of gas from, and any sales of electricity to, Gazprom, with no further contracts or agreements necessary to govern the terms on which gas and electricity were purchased or sold. The FTT's unchallenged conclusions in relation to the Gazprom Agreements were as follows:

> (1) The Gazprom Agreements were binding contracts from the moment they were signed. They were not, for example, conditional on Putney completing development of the Copse Road plant.
>
> (2) That said, the Gazprom Agreements referred to the concept of a "start date", defined as "From commissioning, expected to be 1st January 2018". It was common ground that the Gazprom Agreements could not impose any contractual obligation on either Gazprom or Putney to purchase or sell gas or electricity until that "start date" was reached by Putney having an operational generating facility ([57] and [64]).
>
> (3) Clause 3.1.6 of the Gazprom Agreements provided that Putney could not do anything that reduced, or was likely to reduce the Copse Road plant's ability to generate electricity except for planned maintenance. This did not involve Putney agreeing with Gazprom that it would complete the development of the gas-peaking facility at Copse Road. However, it did prevent Putney from doing anything that might "stop the plant operating as

planned" ([188]). In particular, Clause 3.1.6 of the Gazprom Agreements prevented Putney from terminating the various construction contracts.

(4) The Gazprom Agreements did not oblige Putney to generate any particular level of power ([65]).

(5) Under the Gazprom Agreements, Putney agreed to sell electricity only to Gazprom unless Gazprom agreed otherwise ([63]). Gazprom would have remote access to the Copse Road facility and so could turn the plant on and off without asking Putney to do so.

(6) Gazprom would not have entered into the Gazprom Agreements unless it had been sure that the Copse Road plant would be completed and able to operate at the required level of capacity.

21. It follows from the above findings that, unless and until the Copse Road plant was completed, Putney had no contractual right, or obligation, to sell any quantity of electricity to Gazprom. Even after the facility had been completed, and the "start date" achieved, Putney could not require Gazprom to buy any particular quantity of electricity. While Putney could specify certain "must run" periods in which Gazprom would be obliged to purchase a volume of electricity and sell it in the market ([58]), unless and until such "must run" periods were specified Gazprom had no obligation to purchase any electricity.

22. Construction work at the Copse Road site started in September 2017 ([48]).

23. In around December 2017 Putney prequalified into the capacity market. It paid £80,590 by way of credit cover ([51]).

24. In January 2018, at which point the Copse Road facility was still not operational, Putney entered into a capacity market agreement with an entity referred to as Flexitricity (the **Flexitricity Agreement**). By the Flexitricity Agreement, Flexitricity agreed to transfer capacity market contracts to Putney, but only once the Copse Road facility was operational. Putney was required to take steps to ensure substantial completion of the Copse Road plant and, if it did not do so, it would be exposed to the risk of Flexitricity taking legal action ([53]).

25. Putney had contracts requiring generators to be delivered by 8 December 2017 and for construction and other work at Copse Road to be completed by 31 December 2017 ([49]). However, those deadlines were not met and Putney obtained liquidated damages from its contractors. As at 4 April 2018, the Copse Road site was not operational. The site did not become operational until 31 August 2018 ([54]) at which point Flexitricity transferred capacity market contracts pursuant to the Flexitricity Agreement.

26. At [188], the FTT made a finding as to "operational risk" which Putney considers to be significant and which we therefore set out in full:

> 188. Mr. Stone suggested that the Gazprom contract was conditional, in that there was no obligation on Putney until the plant had been constructed and no obvious obligation in the contract for Putney to secure the construction of the plant. We found the Gazprom contract a

> difficult one to analyse in this regard. Clause 3.1.6 contains a provision to the effect that Putney will not allow the plant to be degraded, but there is no express covenant under which Putney agrees in terms to procure the construction of the plant. We are not with Mr. Ewart when he says that clause 3.1.6 is effectively a covenant on the part of Putney to procure the construction of the plant. We would expect a provision of such importance, were it be agreed to by Putney, to be much more explicitly spelled out. In our view, clause 3.1.6 is an obligation on Putney's part not to do anything that might stop the plant being constructed or operating as planned. So, for example, Putney could not terminate the various construction contracts. However, we do not consider that anything turns on the precise interpretation of this contract. As we explained earlier, we consider the question whether Putney is trading at any point to be one which should be looked at in the light of the commercial reality of the overall arrangements. We agree with Mr Shenkman when he said that the contracts need to be looked at as a matrix. It would be wholly artificial to say that there is no real risk or reward on Putney in relation to the Gazprom contract, when it has already entered into an agreement with a third-party under which the plant will be constructed. In that context, we regard the Gazprom agreement as effectively committing Putney and Gazprom to a particular set of arrangements for the sale and purchase of gas and electricity and as exposing Putney to a real possibility of future operational risk or reward in relation to the generation of electricity at the Copse Road site.

27. HMRC argue that this sets out nothing more than a conclusion that, ultimately, Putney might make or lose money if the Copse Road plant was developed. We consider the FTT was saying a little more than that, though not much more. In the passage above, the FTT was addressing the question whether the Gazprom contract itself imposed "real risk or reward" on Putney no doubt because HMRC were arguing that it was a mere framework that set out an agreement to agree in relation to future sales of gas or electricity. The FTT's point was that the Gazprom agreement was more than that because Putney agreed with Gazprom that it would not stop the Copse Road facility from being constructed. Therefore, because Putney was a signatory to contracts that provided for that facility to be constructed, the Gazprom Agreements and the matrix of contracts of which it formed part, set Putney on a course under which that facility would be constructed assuming all contracts were performed. Accordingly, the Gazprom Agreements committed Putney and Gazprom to arrangements that would lead to a "real possibility" of gas and electricity actually being supplied in the future. Since gas and electricity prices could fluctuate, and Putney had already incurred significant expenditure, that in turn meant that Putney was exposed to a "real possibility of future operational risk".

28. At [189], the FTT reached a similar conclusion in relation to the Flexitricity Agreement. Since the Flexitricity Agreement was part of the same "matrix of agreements" as the Gazprom Contracts, it too exposed Putney to a "real possibility of future operational risk or reward in relation to the capacity market contracts".

Findings as to Piston

29. The FTT made findings regarding Piston at [67]-[75] and [191]. The following are the most relevant.

30. On 4 April 2016, Piston had entered an agreement with Triple Point for it to provide Piston with certain business administration services in exchange for a business administration fee ([69]).

31. In July 2016 Piston held meetings with AGR who shared a portfolio of potential sites for a CHP plant including one in Ely (**the Ely Site**) and one in Stevenage (**the Caswell Site**) where the plant was eventually constructed ([68]).

32. By the EIS Deadline of 4 April 2018, Piston had ([70]):

> (1) entered into a business administration fee agreement with Triple Point. This agreement was merely part of establishing the internal functions of the business.
>
> (2) registered for the capacity market, with payment of a deposit. It had registered in relation to the Ely Site, rather than in relation to the Caswell Site which it ultimately developed.
>
> (3) signed heads of terms with AGR in relation to the Ely Site. As explained above in relation to Putney, the heads of terms did not impose an obligation on Piston to complete development of the Ely Site. Piston decided not to pursue this project, but there is no evidence that it was required to make any payment to AGR under clause 4 of the heads of terms as a result.

33. At the time of the EIS Deadline, Piston had not entered any contracts directly related to the Caswell Site (whether related to raw materials, the sale of electricity, construction of the plant or otherwise) ([72]). It was still in the process of exploring where its trade would be carried out from and had not started the construction phase which subsequently began on the Caswell site in October 2018 ([74]-[75]).

34. After the EIS deadline, on 3 October 2018, Piston entered into contracts with various parties ([74]): i) for the construction of the plant at the Caswell site; ii) connecting the plant to the gas network and electricity grid; iii) a 10 year lease over the Caswell site; iv) a contract with Gazprom for the purchase of power and the supply of gas.

35. The FTT concluded at [191]:

> 191. For completeness, we should comment on Piston's position. It had signed heads of terms in relation to the Ely project. The heads of terms (as we explored in greater detail in relation to Putney) did not lock Piston into the Ely project they relate to. They provide a framework for the parties to work towards financial close. Piston was able to (and in due course did) "walk away" from the project without incurring a penalty and the money it paid to pre-qualify in the capacity contract process was not at risk if it withdrew from the process. The nature and quality of the arrangements Piston was party to at

> the time of the EIS Deadline were very different from those to which Putney was party; in particular, we do not consider that any of the arrangements Piston was party to at the time of the EIS Deadline exposed it to a real possibility of future operational risk or reward.

The correct way of approaching the question of when the Appellants began to carry on their trades

36. As will be seen, the Appellants challenge the Decision on the basis that the FTT went about its task in the wrong way. It is, therefore, appropriate to start with what we consider to be the right way to approach the task.

37. The question before the FTT was, as noted, raised by a specific statutory provision, s179(2)(b) of ITA 2007. That statutory provision required the FTT to determine whether the trades of the Appellants were "begun to be carried on" on or before 4 April 2018. This enquiry did not rely on statutory definitions of any great legal complexity.

38. The concept of a "trade" is well understood. In *Ransom (Inspector or Taxes) v Higgs* [1974] 3 All ER 949 (***Ransom v Higgs***), Lord Reid stated at 955D-G:

> As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some a kind of goods or services…
>
> As there is no limiting definition trade has been held to include cases where some element is absent which is normally present in trading. Normally it is a question of law whether the provisions of an Act apply to the facts of a particular case. There may be a difference where the question is whether provisions with regard to trading apply to particular facts…

39. Lord Wilberforce stated similarly at 964A-F:

> …everyone is supposed to know what 'trade' means; so Parliament, which wrote it into the law of income tax in 1799, has wisely abstained from defining it and has left it to the courts to say what it does or does not include…
>
> Trade is infinitely varied; so we often find applied to it the cliché that its categories are not closed. Of course they are not; but this does not mean that the concept of trade is without limits…
>
> Trade involves, normally, the exchange of goods, or of services, for reward, not of all service, since some qualify as a profession, or employment, or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm)…

40. The concept of 'beginning to carry on a trade' similarly involves ordinary English words.

41. The statute gives limited guidance on how the enquiry is to be conducted beyond making it clear that there is a distinction between "preparing to carry on" and "carrying on" an activity. In short, the statute requires the kind of multi-factorial examination that is frequently found in taxing statutes.

42. Of course, the FTT needed to consider how that multi-factorial examination should be approached. Since the question was, in essence, when the Appellants' trades were begun to be carried on, the FTT could usefully make findings about what the Appellants' trades consisted of, and indeed it did so. The FTT could also usefully, as it did, make findings as to what steps the Appellants had taken before 4 April 2018, and what steps it took after that date.

43. Having made those findings, the FTT would have the raw material necessary to reach its evaluative conclusions as to whether the particular Appellants had begun to carry on their particular trades on or before 4 April 2018. A useful area of enquiry, given the statutory indication set out in paragraph 41, would involve considering whether the steps taken on or before 4 April 2018 involved preparing to carry on a trade, or the actual carrying on of the trade. If the latter, the trade could properly be said to have begun on or before 4 April 2018.

44. The FTT was certainly not obliged to approach its examination in a silo, without considering other situations in which other tribunals of fact had addressed similar issues. The FTT could, therefore, quite properly turn to other such decisions for illustrations of useful factors to consider. Having considered such decisions, the FTT would find that other tribunals have found it useful to consider whether a taxpayer had particular "infrastructure" in place on which it relied for its trading activities. It would find that other tribunals have considered whether a putative trader, said to have begun a trade of manufacturing, was able to supply the manufactured goods in question.

45. However, in looking elsewhere for inspiration, an FTT should not lose sight of the statutory question posed: namely when particular taxpayers began to carry on their own particular trades. An FTT needs to take care that its examination of other FTT or Special Commissioners' decisions does not cause it to apply a gloss on the legislation rather than the legislation itself. So, for example, the mere fact that a previous FTT thought it significant that a particular trader lacked "infrastructure" at a particular point and so had not begun a trade at that point does not mean that there is a "test" to the effect that no trade can be commenced without infrastructure. In that situation, an FTT should certainly not be approaching the question before it by asking whether a particular set of assets answers to the concept of "infrastructure" applied in the previous FTT decision. That would involve a process of construing a previous FTT decision whereas the task is to construe and apply the statutory provisions.

46. That said, an FTT should be aware that sometimes superior courts and tribunals do give guidance on how it should apply a statutory test. Therefore, when reviewing previous decision, an FTT should distinguish between (i) those decisions, of first instance tribunals, that are in reality simply examples of the application of similar statutory tests and (ii) those decisions, of superior courts and tribunals, that provide binding guidance on how the statutory test should be applied.

The key authorities that were before the FTT

*Birmingham and District Cattle By-Products Co Ltd v Commissioners of Inland Revenue (1919) 12 TC 92 (**Birmingham Cattle**)*

47. This was a judgment of Rowlatt J in the High Court. By his judgment Rowlatt J dismissed an appeal from a determination of the Commissioners of Inland Revenue as to the calculation of Excess Profits Duty. The calculation of that duty involved a question as to when the taxpayer company had commenced trading. Rowlatt J dismissed the appeal because he concluded that there was no error of law or fact in the Commissioners' conclusion that the company had commenced its trade or business on 6 October 1913.

48. We invited both parties in their oral submissions to identify what, if any propositions of law *Birmingham Cattle* established that were binding on the FTT in this case. Neither party identified any such proposition of law and we agree that there was none. At most, as HMRC submit, the judgment of Rowlatt J establishes that there is a distinction, in law, between carrying on a trade and preparing to carry it on. However, that distinction is in any event apparent from the statutory provisions under consideration in this appeal (see paragraph 8 above).

Ransom v Higgs

49. This was a judgment of the House of Lords in a dispute as to whether the taxpayer was carrying on a trade at all. It raised no question of when a particular trading activity was carried on. HMRC approach this case as establishing a proposition of law, binding on the FTT, that a person cannot be trading at all unless that person is "trading with someone" (see 960h of the report). The Appellants do not dispute that. Neither party suggests that *Ransom v Higgs* establishes any other proposition of law that the FTT was obliged to take into account in reaching its conclusion.

Khan v Miah [2001] All ER 20

50. Both parties agree that this judgment of the House of Lords set out no legal principle, binding on the FTT that the FTT was obliged to follow when reaching its decision. The central conclusion of their Lordships' judgment was that it is possible for two partners to be carrying on a "business in common", and so to have formed a partnership for the purposes of the Partnership Act 1890, before partnership's trading activities commence.

51. In the course of their analysis, their Lordships of course referred to what the partners and the partnership had done in relation to the proposed partnership business of carrying on a restaurant business. For example, at 24a of his speech, Lord Millett observed that the restaurant was not "open for business", no bookings had been taken and no food bought. Lord Millett suggested that, at this point everything that had been done was "preparatory to the commencement of trading". This is, of course, a characteristically incisive analysis by the highest court in the country that commands respect. However, it establishes no rule of law to the effect that a trade is commenced only when it is open for business or has purchased raw materials.

*Mansell v Revenue and Customs Commissioners [2006] STC (SCD) 605 (**Mansell**)*

52. This was a decision of a Special Commissioner. Neither party suggests that the decision, itself, establishes any proposition of law that was binding on the FTT but they did suggest it provided useful guidance and a framework which had been applied in a number of cases. Since *Mansell* considers in detail the question of when a particular trade was commenced, and has been referred to with approval in the judgment of Henderson J (as he then was) in *Tower MCashback LLP1 v HMRC* (***Tower MCashback***) we consider it in some detail.

53. *Mansell* concerned a particular statutory provision set out in s218 of the Finance Act 1994. Very broadly, sections 200 to 218 of Finance Act 1994 amended the basis on which trading profits of an individual were assessed. However, there were statutory transitional provisions that applied to trades that were "set up and commenced" before 6 April 1994. In *Mansell*, therefore, the Special Commissioner needed to determine whether Mr Mansell's trade was "set up and commenced" before 6 April 1994.

54. At [39] to [79] of his decision, the Special Commissioner conducted a survey of other reported decisions including Commonwealth authorities that he considered to be of relevance (including *Birmingham Cattle* and *Khan v Miah*). He derived some guidance from a judgment of Fisher J in the New Zealand case of *Slater v Commissioner of Inland Revenue* [1996] 1 NZLR 759 in which Fisher J said the following as to what involved the conduct of a "business" which the Special Commissioner considered to be synonymous with the concept of a "trade":

> there must be more than mere preparation ... the taxpayer must embark on the actual course of conduct which it is hoped would ultimately yield profit if persisted in. I did not think that merely setting up a business structure and purchasing plant or organising the decision making structures, management and equity structures will suffice. That is not "carrying on a business" but "setting up a business". Nor do I think that activities which are confined to the organisation of relationships between the proprietors, ... would normally qualify because they are non-productive of income. As I understand it there must be an operational activity.

55. At [88] of *Mansell*, the Special Commissioner noted that he had to decide when the taxpayer's trade was "set up and commenced" for the purposes of s218 of Finance Act 1994. He noted that s218 seemed to envisage that there was a distinction between "setting up" and "commencing". He concluded that a "trade cannot commence until it has been set up".

56. At [88], and [93] to [95] of his decision, the Special Commissioner said this:

> 88. I conclude that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing.

> Depending on the trade more or less than this may be required before it is set up…
>
> 93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities—and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.
>
> 94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed, will constitute operational activity is sufficient. At that stage no operational risk has been undertaken: no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.
>
> 95. It seems to me that Lord Millet's statement that `it is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it' is equally applicable to the question as to whether a person has commenced a trade. But it is necessary that there be a fairly specific concept of the type of activity in the mind of the putative trader which is to be carried on, although it does not have to be given, or be capable of being given a simple name.

57. This analysis is undoubtedly a penetrating analysis of the sort of questions that a tribunal might wish to consider when deciding whether a trade has commenced. However, it is not capable of setting out any legal "test". In part that is because Special Commissioners' decisions set out no binding precedent. However, even putting that point to one side, the above analysis was simply not capable of setting out a legal test since it could not be applied to all trades. A trade of personal training, for example, may well require no "plant" of the kind described in paragraph [88] of the Special Commissioner's decision. Moreover, the distinction between "setting up" and "commencing" a trade to which the Special Commissioner refers was a feature of the specific statutory provisions under consideration.

58. The parties suggest that the approach set out in *Mansell* was elevated into something like a "test" following the judgment of Henderson J in *Tower MCashback*. We do not agree. At [94] of his judgment in *Tower MCashback* noted expressly that *Mansell* was concerned with the specific statutory regime in s218 of Finance Act 1994. Henderson J

certainly noted that the Special Commissioner's analysis in Mansell was "valuable", and we respectfully agree. Moreover, at [95], of *Tower MCashback* Henderson J said:

> It is unnecessary for me to say whether I would have reached the same conclusion on the facts as Mr Hellier did in Mansell's case, but in broad terms I find his test of the beginning of operational activities a useful one. Every case will turn on its own facts, but in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin. Mr Hellier gave as examples of setting up a trade such matters as the purchase of plant, and organisation of the decision making structures, the management and the financing (see [2006] STC (SCD) 605, para 88). In my judgment a similar approach is helpful in answering the question whether a trade is being carried on for the purposes of s 11 of CAA 2001 …

59. Although Henderson J refers to a "test" his overall meaning is clear. A consideration of when "operational activities" commenced is useful in deciding whether a trade has commenced. "Operational activities" can be contrasted with "framework or structure". What Henderson J is endorsing is not a comprehensive legal test, but rather a sensible approach to a factual enquiry that tribunals of fact can find useful when distinguishing between acts that are part of preparations to trade, and acts that suggest that a trade has actually commenced.

Other cases

60. The FTT referred also to the facts of a number of FTT decisions for example: *Hunt v HMRC* [2019] UKFTT 515 (TC); *John Wardle v HMRC* [2021] UKFTT 0124 (TC) (***Wardle 1***); John Wardle v HMRC (***Wardle 2***) [2022] UKFTT 00158 (TC); and John Wardle v HMRC (***Wardle 3***) [2024] UKFTT 00543 (TC).

61. There was nothing wrong with the FTT looking at these cases to see how similar statutory tests concerning the commencement of trade had been applied in other situations. Indeed the three cases involving Mr Wardle involved a not dissimilar trade that consisted of generating electricity from biomass. However, these cases could not set out any principle of law that would assist the FTT. Nor was the FTT's task to seek to match the facts before it with those of, for example, the *Wardle* decisions.

The FTT's conclusion and the challenge to it

62. We will consider the FTT's reasoning in the context of the Appellants' single ground of appeal which is as follows:

> The Tribunal's test for when a trade commences, as set out in paragraph [202] of the Decision, is incorrect. In particular, the Tribunal was wrong to conclude (i) that a trade is not set up before the time when the putative trader is able to supply whatever goods or services or carry out whatever other dealings form the subject matter of the trade (paragraph [202](2)), and (ii) that a matrix of contracts cannot be equated to an established trade infrastructure (paragraph [195]).

63. At [76] to [120] the FTT summarised the facts of a number of the cases to which we have referred. At [121] to [160], it summarised the competing submissions of the parties. The FTT's analysis and reasoning is set out in a section headed "Discussion" that begins at [161].

64. At [161], the FTT emphasised that a "careful scrutiny of the statutory provisions is necessary in order to understand the test which needs to be satisfied". It correctly noted at [162] that the statutory provisions set out a "bright line" test in the sense that the relevant trade needs to be begun to be carried on within a period of two years. At [163], the FTT correctly noted that Parliament did not require all money raised by the issue of shares to have been spent within that two year period. At [164] to [166], the FTT emphasised the fact-specific nature of the enquiry. Significantly, it concluded at [164], that the mere fact that the Appellants were not generating electricity by 4 April 2018 was not in itself fatal. The FTT noted at [165] that a "multi-factorial evaluation" was necessary, commenting at [166] that:

> We consider that the question whether a trade has begun needs to be answered as a question of commercial substance, looking at the whole picture of what is going on and, most importantly, considering what is required to start a trade of the kind in question. Looking at the commercial substance may mean (as the FTT did in *Wardle 3*) placing more weight on the commercial reality of a set of arrangements than on the precise legal analysis of contractual rights and obligations.

65. Thus far in its analysis, the FTT was describing an approach that aligns with what we consider to be the correct one described in paragraphs 36 to 46 above. The Appellants' case, however, is that the FTT started to go wrong when it considered the implications of the various cases to which it had been referred, the facts of which it had summarised at [76] to [120].

66. We have not found this point straightforward as the FTT's approach seems to shift. At [171], there is a correct acknowledgement that every case will turn on its own facts and that the specific statutory context matters. However, at [169] there is a suggestion that the FTT considered that Rowlatt J in *Birmingham Cattle* "regarded the starting of a trade as being a very physical, operational test ("Have I started to make things"?)." If what the FTT meant was that it is relevant to consider when a trader has started "making things", we would have no difficulty with this statement. However, there is a suggestion that the FTT considered that Rowlatt J had set out a legal test of general application.

67. Some further question as to whether the FTT was following the correct approach can be see at [172] where the FTT wrote:

> 172. The conclusion we draw from these cases is that a trade starts when operational activities start (for example, when my restaurant is open for business or when my factory starts to make things). To get to that point a trader will need to have set up their business infrastructure (for example, bought or leased a restaurant and fitted it out or bought or leased a factory and the necessary manufacturing equipment) and taken operational steps (for example, buying food for the restaurant or raw materials for the manufacturing process). The cases do not suggest that

> it is necessary to have achieved a sale, but it is necessary to be "open for business", to be ready, willing and able to supply the relevant goods or services.

68. That paragraph is framed as a "conclusion" derived from the judgments in *Birmingham Cattle*, *Mansell* and *Tower MCashback*. However, it consists to a significant extent of pure glosses on the legislation such as the concepts of "business infrastructure", "open for business" and "operational activities". That would not be a problem if the FTT simply approached those glosses as providing a potentially useful guide to the multifactorial enquiry it needed to perform. However, there is a suggestion that the FTT considered that the glosses were more than that.

69. That issue persists at [175] and [176]. In those paragraphs, the FTT considers a hypothetical example canvassed in the parties' submissions, of a restaurateur taking advance bookings before the restaurant in question had been built. There were obvious parallels between that hypothetical situation and the Gazprom Contracts and there was nothing wrong with the FTT considering that hypothetical scenario. However, the FTT's analysis of it reveals a potential error of approach. In rejecting the Appellants' submission, through its counsel Mr Ewart KC, that the hypothetical restaurateur would be trading when he or she took advance bookings, the FTT said:

> 176. We are not with Mr. Ewart on this point. The effect of his submission, if it is correct, is almost (if not entirely) to do away with any requirement for necessary trading infrastructure to be established before a business can be said to be trading. Going back to Mr Ewart's initial submission, that the question whether a trade has started needs to be answered by taking a commercial, holistic view of all the facts, we simply cannot accept that a business which is not able to carry out its intended operational activities, because those intending to carry on the business have not assembled the necessary infrastructure, can be said in any commercial sense to have started to trade. It is particularly difficult to accept that proposition in the context of a statutory scheme which draws such a clear distinction between preparing to carry on a trade and carrying on a trade as the scheme we are concerned with does. Mr Ewart's submission is also, in our view, wholly out of line with the position adopted in the cases which are binding on us. Henderson J in Tower MCashback clearly thought that setting up the business infrastructure was a prerequisite to trading, that is certainly the view that Rowlatt J took in *Birmingham Cattle* and Lord Millet in *Khan* also very clearly thought that the partnership had not started to trade before the restaurant opened its doors for business and he drew a clear distinction between that activity and the preparatory activities which went before it.

70. Again, there are indications in this passage of a correct approach in the reference to the need for a "commercial holistic view of all the facts". If the FTT's point in that part of the passage is simply that the absence of "necessary infrastructure" points against a trade having commenced, that is unexceptionable. However, against that, at the beginning of [176] is the more problematic suggestion that there is a "requirement for necessary trading infrastructure to be established before a business can be said to be trading".

71. A further indication of a possibly incorrect approach can be seen at [177] to [179]. These passages contain a detailed analysis of what the Special Commissioner in *Mansell* meant by various phrases that he used in his decision. There was nothing wrong with the FTT examining the Special Commissioner's reasoning in detail, but the way it did so suggested that it was seeking to construe a legal test, as does the FTT's analysis at [181] to [183] of what it described as the "three-limb test" of *Mansell*.

72. As we have sought to explain, in some passages of the Decision, the FTT appears to be following a correct approach. In other passages it does not. On balance, we conclude that ultimately the FTT's analysis of decided cases led it into error. The FTT came, wrongly, to conclude that there were questions of pure principle that determined whether the Appellants were trading or not. Perhaps the clearest expression of that comes at [195]-[199]:

> 195….We have set out our conclusions and analysis on the questions whether and the extent to which the infrastructure of a trade needs to be established before a trade can be held to have commenced at [176]-[180] above. For the reasons we give there, a trade is not set up before the time when the putative trader is able to supply whatever goods or services or carry out whatever other dealings form the subject matter of the trade. Our attention has not been drawn to any authority that supports the proposition that a matrix of contracts, which, if performed, will result in the infrastructure of a trade being established, can be equated with an established trade infrastructure.
>
> 196. *Hunt* is not such a case. As we have explained, the FTT found that Altala had clearly established a framework or structure for the trade. It did not analyse the failure to obtain a licence as contributing to a failure to build the required infrastructure and merely observed that, despite not having the required licence, Altala had created the required infrastructure and engaged in operational activities.
>
> …
>
> 199…we remain convinced that our analysis at [176]-[180] above is correct and that the trading infrastructure must be actually (not just contractually) assembled, so that it can be used to deliver the trading activity, before a trade can be said to have commenced.

73. In these paragraphs, the FTT makes a number of errors:

> (1) It concludes that "infrastructure of a trade needs to be established before a trade can commence". Of course there is nothing wrong with considering the presence or absence of "infrastructure" as a relevant factor, but there is no legal test of the kind the FTT suggests.
>
> (2) In a similar vein, the concept of being "able to supply" goods or services is presented as a legal test, rather than as a useful question to ask when analysing the facts.
>
> (3) It is suggested that whether a "matrix of contracts" is sufficient to establish a trade is something that could be determined by "authority". It could not since the question of whether a trade has commenced is fact-

> specific. In some cases a matrix of contracts might be enough, but in others it may not. Much will depend on the obligations imposed by the contracts and how they relate to the trade in question. There is also a suggestion that a relevant question is whether a matrix of contracts answers to a definition of "infrastructure", continuing with the error set out in paragraph (1).

74. A further suggestion of this kind of error can be seen at [202] and [203] which appear under the heading "Overall Conclusion".

> 202. For the reasons set out above, we consider that:
>
> > (1) A trade commences when the putative trader is "open for business".
> >
> > (2) A putative trader cannot be "open for business" until they are ready to provide the goods or services or carry out the other dealings which form the subject matter of their intended trade. This requires the putative trader to have assembled whatever infrastructure (if any) is necessary for them to provide those goods or services or carry out those dealings.
> >
> > (3) Assembly of the trade infrastructure does not need to have been completed before trading starts as long as the infrastructure is operational (i.e. the trader needs to be able to operate/use it to provide whatever goods or services or carry out the dealings they are concerned with, even if not on the scale or in the manner ultimately planned).
> >
> > (4) Once the trader has assembled their operational infrastructure (if required), they "open for business" by taking a step which exposes them to real operational risk and reward (for example, producing goods "on spec", buying food for a restaurant or other raw materials, incurring the staff or other costs of opening a restaurant or being ready to provide some other service, with or without a booking or client signed up, contracting to supply goods or services now or in the future).
> >
> > (5) If (as we find was the case here with Putney, but not Piston) a putative trader takes an operational step (of the type discussed in (4)) in anticipation of finishing assembling their trade infrastructure, that will not accelerate the commencement of their trade.
>
> 203. As neither Putney nor Piston had completed the assembly of their trade infrastructure by the EIS Deadline, neither Appellant had begun to carry on a "qualifying trade" (as defined in section 189 ITA) by that time, as required by section 179(2)(b)(ii) ITA.

75. The whole flavour of these passages is that an abstract test or set of principles is set out at [202] with Putney and Piston's appeals failing at [203] because they did not meet that test or principles – in particular, the failure to assemble the trade infrastructure (repeating a 'test' suggested at [176], [195] and [199]).

76. We have considered carefully whether the problems that we see in the Decision represent pure criticisms of drafting. As we have said, there would have been nothing

wrong with the FTT, when conducting its multi-factorial assessment, determining that the absence of "trade infrastructure", and the fact that the Appellants were not "open for business" were pointers against their trades having begun. However, while recognising that there are indications to the contrary, we have concluded on balance that the FTT did err, in identifying "principles" and a test that does not exist in law, and concluding that the Appellants' appeals failed because their activities did not satisfy those principles.

Remaking the Decision

77. Our conclusion in paragraph 76 is that the Decision contains an error of law. That error was clearly material to the FTT's conclusions and we will, therefore, set the Decision aside.

78. The FTT has, however, made clear and comprehensive findings of primary fact, none of which are challenged in this appeal. Neither party asks us to remit the matter back to the FTT. Since the FTT's findings enable us to remake the FTT's decision we will do so.

Putney

79. Mr Ewart KC, for Putney, had argued that the only reason its appeal to the FTT failed was because the FTT sought to apply some legal "principles" that did not actually exist. Therefore, he argues that once those asserted legal principles are left out of account, one is left with the findings of the FTT at [188] and [189] that its matrix of contracts, when executed, exposed it to a real possibility of future operational risk or reward in relation to both electricity generation and capacity market activities. Those findings are, in Putney's submission, clear findings that "operational activities" of the kind referred to at [93] of *Mansell* had commenced and lead inexorably to the conclusion that Putney had begun to carry on its trade, before 4 April 2018, at the point it entered into the matrix of contracts.

80. We do not accept that argument. In the first place, we consider that it involves over-reading what the FTT concluded at [188] and [189] as we have explained in paragraphs 27 and 28 above. More fundamentally, it involves precisely the same error of law as we identified in the FTT Decision as it involves an assertion that there is a "principle", established either by *Mansell* or by *Tower MCashback*, to the effect that once something that could loosely be described as "operational activities" have commenced, a trade is begun. However, as we have explained there is no such principle and it is necessary to look more deeply into the FTT's findings in order to answer the single, true question, namely whether Putney's trade was begun to be carried on, on or before 4 April 2018.

81. As we have noted in paragraphs, 11, 13 and 14 above, Putney's trade had two broad strands. First, it would receive income by using gas to generate electricity and selling the electricity as soon as it was produced. Second, it would receive income by entering into the capacity market and agreeing to stand by and being ready to generate and sell

electricity if called upon to do so. We must decide whether that trade specifically was begun to be carried on, on or before 4 April 2018.

82. By 4 April 2018, Putney had no ability to generate electricity from gas because the Copse Road facility was neither completed nor operational. It was, accordingly, incapable of earning any income from the first strand of its activities on or before 4 April 2018. Putney only received an allocation of capacity in the capacity market on 31 August 2018 (see paragraph 25 above). It could not, therefore, earn income from the capacity market on or before 4 April 2018. Indeed, it would have been extremely unwise for Putney even to attempt to enter the capacity market before 4 April 2018: since it had no ability to generate electricity it would inevitably have faced penalties on failing to deliver electricity.

83. The fact that Putney was simply incapable of generating any income from its chosen trade on or before 4 April 2018 represents a firm pointer against the proposition that it had begun to carry on that trade by then. Putney, however, argues that this difficulty is not fatal because, prior to 4 April 2018, it had entered into binding contracts which would enable it to earn income once the Copse Road facility was completed. Moreover, Putney was party to contracts that would result in that facility being completed as well as contracts that prevented it from impeding or preventing construction. In short, Putney suggests that, quite apart from the obvious commercial imperative to complete the Copse Road facility having raised money from shareholders for that very purpose, Putney was party to a network of contracts that means that Copse Road would be completed and so revenue would be earned.

84. We agree with Putney that the matrix of contracts entered into before 4 April 2018 would, if performed, result in Putney having a functional plant. That in turn would enable Putney to purchase gas from, and sell electricity to, Gazprom with no further agreements beyond the Gazprom Agreements necessary to set out the terms of such purchase and sale. We also agree with Putney that the Flexitricity Agreement conferred on Putney, from the moment it was signed, a right to require the transfer of capacity market contracts once the Copse Road plant reached substantial completion.

85. However, in our judgment, entering into that matrix of contracts formed part of Putney's preparations to trade, rather than conducting the trade itself. Putney could only trade if it had contracts for the purchase of gas and the sale of electricity together with contracts that enabled it to receive income by agreeing to offer generating capacity. Putney quite sensibly entered into contracts, before 4 April 2018, that would enable it to earn revenue as soon as the Copse Road plant was operational. By doing so, it avoided the delay that would arise if, having got Copse Road to practical completion, it then needed to agree the terms of contracts. It also avoided the risk that, if it waited until Copse Road was operational, it would not be able to find contracting counterparties at that stage. However, by entering into the Gazprom Agreements and the Flexitricity Agreement, Putney was ensuring that it would be able to trade in the future. That involved it preparing to trade, rather than trading.

86. In oral submissions, Mr Ewart KC suggested various scenarios in which it would be possible for a trade to commence, following the execution of contracts by the trader,

even before the trader is able actually to earn revenue. He gave the example of a bespoke furniture maker who first takes orders for furniture and only having done so purchases the necessary tools and wood to complete that order. He asserted that a trade such as this could sensibly be regarded as commencing when the orders were taken. By analogy, he characterised the Gazprom Agreements as a "forward sale" of electricity that could be regarded as analogous to the furniture-maker's orders.

87. Of course, this approach relies on the proposition, which may or not be correct, that the furniture-maker would indeed have begun a trade when the orders are taken. Mr Ewart KC's example is short on key facts. If the furniture-maker took a deposit, thereby starting to earn revenue, and used that deposit to incur revenue expenditure on the purchase of wood, we would see something in the argument that the trade had begun before tools were purchased. However, if the furniture-maker received no deposit, the analysis might be different. That said, we are prepared to accept the possibility that certain particular trades might be begun before certain elements of "infrastructure" are present.

88. A more fundamental objection to Mr Ewart KC's reasoning by analogy with his example is that it does not engage with the nature of Putney's trade. Putney was not selling a bespoke item like furniture, or a ship, that necessarily needs to be ordered a good time in advance. It was selling electricity which was, because of the very nature of its gas-peaking trade, to be sold almost simultaneously with its generation (see paragraphs 13 and 14 above). Putney's proposed dealings in the capacity market had a similar quality: it would agree to stand by to provide electricity on a particular day and would be paid for doing so on or around the day in question.

89. Nor is it accurate to describe the Gazprom Agreements as containing a "forward sale" of electricity. On signing the Gazprom Agreements, Putney was not obliged to purchase any specified quantity of gas or to sell any specified quantity of electricity. It neither made, nor received any payment on signing the Gazprom Agreements and indeed could not specify any particular sum that it would have to pay, or would receive under those agreements.

90. We are quite prepared to accept Putney's argument that, in the context of a manufacturing trade, customers are essential. We agree that Putney's trade was similar to that of manufacturing and that, by the Gazprom Agreements, Putney entered into contracts with its proposed single customer. However, that does not displace the analysis above. The question has to be approached by reference to Putney's actual trade and the precise nature of the contracts it entered into. The Gazprom Agreement gave Putney assurance that it could, when the Copse Road facility was operational, carry on a gas-peaking activity that involved it generating and selling electricity in the future at times of particularly high demand. However, it embodied no "forward sale" of electricity and, in any event, it was no part of Putney's trade to sell electricity forward.

91. Putney presses an analogy with HMRC's practice in relation to petroliferous trades. At paragraph OT20250, HMRC state that:

> The date on which a trade commences is a matter of fact…HMRC accepts that a petroliferous trade commences as soon as a decision is taken to proceed with the commercial development of a discovery that will lead to production but do not accept that exploration by itself constitutes a trade

92. HMRC's practice in relation to other trades has, in our judgment, nothing to say about when Putney's particular trade commenced.

93. HMRC submitted that considerations of the purpose behind s179(2)(b) of ITA 2007 support the conclusion that Putney did not begin its trade on or before 4 April 2018. In his oral submissions, Mr Stone KC suggested that a purpose of s179(2)(b) is to ensure that EIS relief should not be given unless trading activities started within two years of the issuing of the shares. He argued that, if Putney started to trade simply because it had a decision-making structure and a conditional contract for future supply, that would lead to the absurd position that investors could enjoy EIS relief well before Putney started its "core" revenue generating activities. That, he submitted, would undermine the statutory purpose of the two-year time limit. We do not, however, consider that an analysis of statutory purpose advances the debate greatly. Parliament clearly did not want to be giving investors EIS relief until the trade begins and s179(2)(b) specified that the trade had to begin no more than two years after the shares were issued. We consider that s179(2)(b) is addressed simply by looking at whether Putney had begun to carry on its trade on or before 4 April 2018. As we have sought to explain, we consider that to be a test that involves the application of ordinary English words and a multi-factorial evaluation of all the circumstances.

94. Our conclusion is that, as at 4 April 2018, Putney was still preparing to trade and had not begun to carry on its trade. We will remake the Decision in relation to Putney so as to reach the same conclusion as the FTT by a different route. Putney's appeal against HMRC's decision is dismissed.

Piston

95. The position in relation to Piston is more stark than that of Putney.

96. Piston's anticipated trade consisted of the same two broad strands as Putney. First, it would receive income by using gas to generate electricity and selling the electricity as soon as it was produced. Second, it would receive income by entering into the capacity market and agreeing to stand by and being ready to generate and sell electricity if called upon to do so. Again, we must decide whether that trade specifically was begun to be carried on, on or before 4 April 2018.

97. By 4 April 2018, Piston had no ability to generate electricity from gas and no plant was completed or operational. It was, accordingly, incapable of earning any income from the first strand of its activities on or before 4 April 2018. It could not, likewise, earn income from the capacity market, its second strand, on or before 4 April 2018. The fact that Piston, like Putney, was simply incapable of generating any income from its chosen trade on or before 4 April 2018 represents a firm pointer against the proposition that it had begun to carry on that trade by then.

98. At the time of the EIS Deadline, Piston had: (1) entered into a business administration fee agreement with Triple Point which was merely part of establishing the internal functions of the business; (2) registered for the capacity market, with payment of a deposit, but it had registered in relation to the Ely Site, rather than in relation to the Caswell Site which it ultimately developed; (3) signed heads of terms with AGR in relation to the Ely Site which did not impose an obligation on Piston to complete development of the Ely Site.

99. At the relevant time, Piston was still in the process of exploring where its trade would be carried out from and had not started the construction phase which subsequently began on the Caswell site in October 2018. It had not entered any contracts directly related to the Caswell Site whether related to raw materials, the sale of electricity, construction of the plant or otherwise.

100. Mr Brodsky, however, argued in oral submissions that these difficulties were not fatal for Piston. Unlike Putney, Piston had not reached "financial close" by the EIS deadline. However, Mr Brodsky submits that the conclusion that it is necessary to reach financial close may, depending on the facts, be *"too strict a view"*: see *Micro Fusion 2004-1 LLP v HMRC* [2008] STC (SCD) 952 **(*Micro Fusion*).** In *Micro Fusion* the Special Commissioners found the taxpayer to have commenced its trade of the exploitation of films on 20 September 2004, (for the purposes of ss. 42 & 48 Finance (No.2) Act 1992). This was the date on which there began shooting of principal photography of the film *Mrs Henderson Presents* (see [98]-[112]). This was notwithstanding 'financial close' taking place later, on 1 October 2004, at which time the taxpayer entered into contracts for the licence to produce the film, physical production of the film, its financing, distribution and the earning of income from its exploitation. Mr Brodsky submits, by reference to this decision, that it is possible for a trade to commence in advance not only of profits being earned but even in advance of it being possible to begin earning profits by making sales or otherwise exploiting rights.

101. Mr Brodsky contended that in this case, Piston had shown a firm commercial commitment to the arrangements by its engagement of Triple Point, and (through Triple Point) the production of a detailed information memorandum and a detailed financial model. It also reached heads of terms in relation to one possible site, registered for the capacity market, and was engaged in detailed discussions as to the terms of possible engagement with Gazprom and/or Statkraft (a global energy group ultimately owned by the Norwegian state). Those matters are set out in the witness statement of Max Shenkman, whose evidence was accepted by the FTT in full: see [17]**.**

102. Notwithstanding these submissions, we have concluded that Piston had not begun to trade by the relevant deadline even though it had a settled intention to do so (and did begin trading after the relevant time). For reasons that we have set out above, we do not consider that *Micro Fusion* sets out any principle of law as to when a trade is begun to be carried on. Nor do we consider that much is to be gained by an attempt to match the facts of this case to those of *Micro Fusion* since the task is to decide when Piston began its trade which was different in nature to that considered in *Micro Fusion*.

103. All the reasoning that militated against Putney having begun to carry on its trade at the relevant time applies with even greater force to Piston. The facts remain that by the EIS deadline Piston had not entered into any contracts: i) for the construction of the plant at the Caswell site; ii) for connecting the plant to the gas network and electricity grid; iii) for any lease over the Caswell site; iv) with any proposed supplier nor customer for the supply of gas nor the purchase of power to be generated by electricity. No binding commitments had been entered into by Piston at the relevant time that would result in financial risk or reward.

104. At paragraph 35, we have quoted the FTT's finding at [191] which is not challenged which makes it clear that Piston was much less far advanced in its preparations to trade than was Putney. The FTT was not even prepared to accept that Piston was exposed to any real possibility of future operational risk or reward, by contrast with its findings on Putney.

105. Stepping back and conducting a multi-factorial assessment of all these matters, we find that as at 4 April 2018, Piston was still preparing to trade and had not begun to carry on its trade. Indeed Piston's preparations to trade were less far advanced than those of Putney. We will remake the Decision in relation to Piston so as to reach the same conclusion as the FTT by a different route. Piston's appeal against HMRC's decision is dismissed.

Conclusion

106. The Decision is set aside for material error of law. The Decision is remade and the Appellants' appeals against HMRC's decisions are dismissed (the same conclusion that the FTT reached, albeit for different reasons).

MR JUSTICE RICHARDS
JUDGE RUPERT JONES
RELEASE DATE: 05 March 2026