

It's a gas

Ray Chidell and Jake Iles review a recent decision of the First-tier Tribunal on the meaning of plant, with particular reference to storage trades.

The First-tier Tribunal has recently considered yet another case on the meaning of plant. In fact, this was a dual appeal from two connected companies: *Cheshire Cavity Storage 1 Ltd and EDF Energy (Gas Storage Hole House) Ltd* (TC7301). As so often, the nature of the asset itself (gas cavities in this instance) will be of very limited relevance to most readers, but the lessons emerging from the case (which HMRC won) are of much wider interest, most particularly for trades that involve or include storage.

It is something of a cliché, but still an essential starting point, to quote the century-old non-tax case of *Yarmouth v France* (1887) 19 QBD 647, in which the term plant was defined to include 'whatever apparatus is used by a business man for carrying on his business – not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business'.

All statutory references in this article are to CAA 2001.

Apparatus

In practice, the difficulties in defining plant almost always revolve around the word 'apparatus' and the question of whether the asset in question is merely or primarily part of the premises *within which* the business is performed, or whether it is apparatus *with which* the business activities are carried on. The courts have sometimes discussed a test of functionality but, in reality, this comes back to the same question: is the asset functioning as plant or as (merely) premises?

Key points

- The definition of 'plant' continues to exercise the courts, especially the distinction between plant and premises.
- The fact that an asset is essential to the business does not mean that it is plant.
- The question is whether an asset functions primarily as premises/setting or as plant/apparatus.
- Storage is a premises-like function rather than a plant-like function.
- In this case, the 'significant and predominant' function of the assets in question (large cavities for storing gas) was the premises-like function of shelter and containment.
- The tribunal also reaffirmed that list C (at CAA 2001, s 23), which rescues certain assets from a statutory bar on qualifying as plant, does not act by analogy.



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This test must always be applied by looking at the function of the asset in the context of the business. Take ships as an example: if we ignore any that are held as trading stock, a ship may be an item of plant or machinery in 99 cases out of 100. But the key capital allowances case concerning a ship (*Benson v Yard Arm Club Ltd* (1979) 53 TC 67) held that it was not plant in that case, but was merely premises. The vessel was permanently moored and served simply as the premises within which the restaurant trade in question was carried on. One judge could see 'no distinction between a restaurant in the Thames and a fish and chip shop in Bethnal Green'.

Nature of the business

So how does the recent case concerning the vast underground gas cavities move on the argument? The companies operate gas storage facilities on adjoining sites in Cheshire, together holding up to one-fifth of the UK's daily delivery capacity. The tribunal determined that the appellants were not in the business of either processing or distributing gas (even though they carried out, incidentally, both of these activities), but only of storing gas. The tribunal also determined that the cavities could not be described as pumps (even though they might in some circumstances be said to act as a substitute for a pump or compressor).

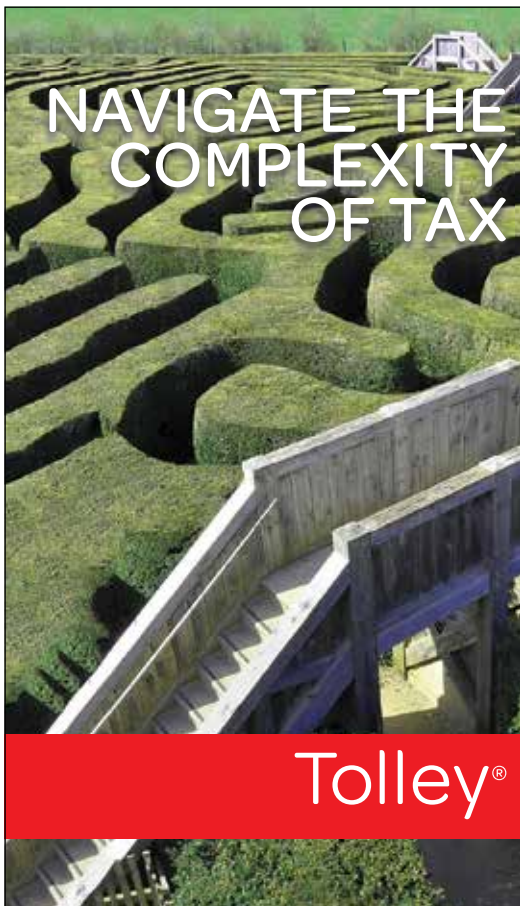
The companies spent tens of millions of pounds on a process of 'de-brining' and 'leaching' the cavities – the technicalities of which need not concern us unduly – to make them suitable for gas storage. HMRC accepted that related costs (boreholes, pipework, pumping and dehydration equipment, and control mechanisms) qualified for plant and machinery allowances. The dispute was therefore over the costs of preparing the cavities themselves.

Tribunal reasoning

The case provided a useful review of some of the key existing case law, and the tribunal then went on to make the following observations:

- 1) The gas cavities were central to the appellants' business, but that would not in itself make them plant: premises and plant can both be essential.
- 2) The cavities were not merely fixed to the land, but were clearly a part of it, similar to an underground reservoir.
- 3) That did not rule out the possibility that they were plant: the matter depended on whether the cavities functioned as premises or as plant.
- 4) The function of the cavities was to store gas in such a way that it did not dissipate and that it remained in a suitable condition.
- 5) Despite the tribunal's finding that the cavities did perform a plant-like function (equivalent to pumps/compressors, but using natural forces), this was held to be an 'incident of the construction' and not the reason they were constructed in that manner.
- 6) A plant-like function 'does not necessarily make premises plant, in circumstances where the premises also functions as premises'. It is a 'matter of degree':
 - The water tower in *Margrett v The Lowestoft Water and Gas Company* (1935) 19 TC 481 was used to store water, but its *purpose* was to increase pressure.
 - The silo in the case of *Schofield* [1975] STC 353 was used to store grain, but had the *purpose* of discharging the grain at speed, for the business was one of distribution not storage.
 - Here, by contrast, the purpose of the cavities was to store gas, for however short a period, so as to profit from price fluctuations. Storage is a premises-like function and not a plant-like function.
- 7) So the 'significant and predominant' function of the cavities was the premises-like function of shelter and containment.
- 8) An analogy with a cold room did not help because the main function of the cold room was to reduce the temperature of what was stored, whereas altering the temperature of the gas was not a function of the cavity.
- 9) The fact that the cavities could be used to store gas at high pressure merely meant that they were very good at performing their premises-like storage function.

In reaching these views, the tribunal relied on expert witnesses from both sides, and it is evident from the report that there were some significant differences of opinion. This left the tribunal with contradictory advice on the correct definition of certain key concepts (pressure vessel, pump), and with some surprising gaps in understanding the processes. For example, the tribunal commented that there was 'no evidence' allowing it to conclude that the cavities significantly influenced the temperature of the gas. Further – and fundamentally – it was only a 'necessary implication' of the expert evidence that any need to alter the temperature of the gas 'arose from compressing it and/or storing it and was an incident of the storage and certainly not the purpose of the storage'. This was a complex case, with genuine disagreement between the parties, but the distinction between being an 'incident' of the storage or the 'purpose' of the storage was fundamental to the argument. This therefore brings out the importance of gaining absolute clarity on the underlying processes, preferably long before the case comes to the tribunal.



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Structures

On the basis of the above reasoning, the tribunal held that the cavities were not plant, which was enough to dismiss the appeal. For completeness (and in anticipation of any appeal, which must be a possibility given the sums involved), the tribunal nevertheless went on to consider the restrictions of s 22 which, in principle, prevent allowances for structures, subject to other statutory provisions.

The arguments here were more specific to the nature of the gas trade, and are therefore of less general interest. In summary, the tribunal concluded that allowances were also prohibited by s 22. In reaching this conclusion, it had to consider whether the cavities were 'in use for the purposes of an undertaking for the extraction, production, processing or distribution of gas' (under list B, item 7(b) at s 22). The tribunal decided that an 'undertaking' in this context meant a task or action, rather than an entity (such as a company or partnership). In its view, the task or action was to *store* gas and not to extract, produce, process or distribute it. So this exemption did not help the appellants.

In considering whether allowances were prohibited by s 22, the tribunal also gave consideration to the meaning of 'the alteration of land for the purposes only of installing plant or machinery', which would provide an exemption from the statutory restrictions (per item 22 at list C). There was no disagreement that the land was being altered. However, the tribunal took issue with the conclusion of last year's First-tier Tribunal decision in *SSE Generation* (TC6618) as to the meaning of 'install' (see *Taxation*, 1 November 2018, page 20). In this instance, the tribunal held that install carries the implication that something that already exists is put in place. In this case, the leaching and de-brining activities *created* a cavity suitable for gas storage, but did not *install* such a cavity. So this exemption, too, was of no help to the appellant companies.

The tribunal supported the long-held HMRC view that the relieving provisions of list C (in s 23) cannot be applied to other assets by analogy (based on function) except in particular circumstances that are made clear in the list. So list C must be seen as complete in its own right, and it is not possible to argue that another asset is saved by list C because it has the same function as one that is specifically included. Thus, because the tribunal determined that the cavities were not in fact storage tanks (which are included at item 28 of list C), it was not possible to argue that the cavities were exempted from statutory restriction by analogy to such tanks.

Two other points emerging from the case are also worth mentioning: ownership and order of play.

Ownership

HMRC had, before the hearing, questioned whether the companies (as tenants) could be said to own the sites in

question (a pre-requisite for claiming allowances: s 11(4)(b)). It appears that HMRC may have been overlooking the ownership deeming provisions within Pt 2 Ch 14 – which would be alarming if true because these provisions are fundamental to all fixtures claims. However, and in any case, this was not a point that HMRC pursued and the tribunal was satisfied that the ownership condition was met.

Order of play

The tribunal also addressed the question (raised in *SSE Generation*) of whether it was appropriate to consider, first, the case law principles concerning the meaning of plant, or whether the statutory restrictions of s 21 and s 22 should take priority. It concluded, hopefully knocking this matter permanently into touch, that 'the order in which I considered them did not seem to matter and this dispute was therefore rather anodyne'.

Will we see an appeal?

It will be interesting to see how any appeal fares, if the companies decide to go for it, because these are notoriously grey areas. Certainly, the cavities in this case were near the borderline between qualifying or not.

Lord Lowry famously stated, in the House of Lords decision in *CIR v Scottish & Newcastle Breweries Ltd* [1982] BTC 187:

'I think that much difficulty is caused by seeking to place limitative interpretations on the simple word "plant": I do not think that the classic definition propounded in *Yarmouth v France* suggests that it is a word which is other than of comprehensive meaning.'

The meaning of 'plant' is indeed very broad, but it is not without its boundaries – and it is nowadays subject to the further statutory restrictions of s 21 and s 22. In recent years, HMRC has been repeatedly (and rightly) criticised for imposing inappropriately 'limitative interpretations' so it will be relieved to have got this one over the line – at least for now. ●

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Planning point

Determining whether an asset is plant often concerns whether it is part of the premises *within which* the business is performed, or whether it is something *with which* the business activities are carried on. The main question is whether the asset functions as plant or premises.

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