Capital allowances

Expenditure on plant is allowable

SSE built a hydroelectric scheme in Scotland at a cost of £300m, including rectification works. The company claimed capital allowances amounting to £260m on items of plant under CAA 2001, s 11. HMRC accepted only £34m and refused the rest on the basis they were disqualified under s 21 and s 22. The First-tier Tribunal allowed the taxpayer's appeal. After the Upper Tribunal dismissed its appeal, HMRC took the case to the Court of Appeal.

Lady Justice Rose considered first the overlap between s 22(1)(a) (the provision of a structure or other asset in list B) and s 22(1)(b) (works involving the alteration of land). She agreed with the Upper Tribunal that, if the disputed plant was a structure or an asset, it was excluded either by s 22(1)(a) and list B or it was allowable. It was not necessary to consider whether it was caught by the exclusion in s 22(1)(b).

On the meaning of 'tunnel' in list B item 1, the judge, agreeing with the First-tier Tribunal, concluded that a tunnel was 'something along which people or vehicles are intended to travel and not simply any subterranean passage'. Similarly, on the meaning of 'aqueduct', Lady Justice Rose agreed with the Upper Tribunal that this was a 'bridge or viaduct-like structure which carries a canal'.

Applying these provisions to the disputed expenditure, the judge agreed with the Upper Tribunal that the disputed items were neither tunnels nor aqueducts. Nor were they caught by list B item 7 because they were industrial buildings. Given that they were structures they were not covered by s 22(1)(b). The expenditure therefore qualified for capital allowances.

HMRC's appeal was dismissed, apart from on one aspect – expenditure on 'cut and cover' conduits. The First-tier Tribunal had allowed some of the costs, but not all. The Upper Tribunal said the whole expenditure was allowable. However, the taxpayer had failed to seek permission from the lower tribunal to appeal specifically on that point. Lady Justice Rose said: 'I would uphold [the Upper Tribunal's] conclusion that the "cut and cover" conduit expenditure is in principle allowable in full, but would hold that it was not open to SSE to assert that, without having sought and obtained permission to appeal against the exclusion of the expenditure on fabricating the conduit.' HMRC was therefore right to say that the Upper Tribunal erred in concluding the expenditure was recoverable in full.

Comment from Ray Chidell, technical director with Six Forward Capital Allowances and joint author with Jake Iles of Capital Allowances 2020-21, *from Claritax Books:* 'This was one of three First-tier Tribunal cases reported in 2018 and 2019 that concerned capital allowances for large infrastructure projects (with *Cheshire Cavity Storage 1 Ltd* (TC7301) and *Urenco Chemplants Ltd* (TC7318)).

'Although the expenditure in these cases was on a scale that few practitioners may handle in practice, all three addressed capital allowances fundamentals that are of much broader significance. They all involved analysis of CAA 2001, s 11 (whether particular capital expenditure is "on the provision of plant or machinery"). They also addressed the key qualifying expenditure provisions of s 21 to s 23, involving restrictions for buildings and structures, and relief from those restrictions.

'SSE Generation was particularly concerned with the meaning of "the alteration of land". Counsel for SSE persuaded the First-tier Tribunal that the "alteration of land" restriction under s 22 is in fact much narrower than it first seems, a conclusion confirmed by the Upper Tribunal and now by the Court of Appeal.

'This case reminds us yet again that HMRC's refusal to grant allowances cannot always be taken as gospel. The company was claiming allowances for some 87% of the project costs, whereas HMRC sought to restrict that to 11%. The First-tier Tribunal sided very largely with the company, and HMRC's appeal was dismissed at the Upper Tribunal and, apart from one procedural technicality, by the Court of Appeal.

'Capital allowances provisions in relation to land, buildings and fixtures are still poorly understood, both within and outside HMRC. In *Cheshire Cavity*, the tribunal noted that the appellant "could only speculate" as to why HMRC appeared unaware of a fundamental capital allowances principle that had applied since 1985. Tax advisers must be ready to challenge HMRC arguments where these do not stand technical scrutiny.'

CRC v SSE Generation Ltd, Court of Appeal, 1 February 2021