Neutral Citation Number: [2022] EWCA Civ 1520

Case No: CA-2021-000232

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Fancourt and Upper Tribunal Judge Cannan
[2021] UKUT 0200 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2022

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
SIR LAUNCELOT HENDERSON

- -

Between :

COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
CENTRICA OVERSEAS HOLDINGS LIMITED	**Respondent**

- -
- -

David Ewart KC, James Henderson and Barbara Belgrano (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Appellants**
James Rivett KC and Ronan Magee (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing dates: 26 and 27 October 2022

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The two issues in this appeal are whether: (1) the expenses in question ("the Disputed Expenses or Expenditure") were "expenses of management" for corporation tax purposes under section 1219 of the Corporation Tax Act 2009 ("CTA 2009") (the "Expenses of Management" issue); and (2) the Disputed Expenses were "expenses of a capital nature" (the "Capital Expenditure issue"). Section 1219 of the CTA 2009 enables a company with an investment business to deduct the expenses of management of that business in calculating its profits for the purpose of determining its liability to corporation tax.

2. At the hearing before us we heard submissions from Mr David Ewart KC, who appeared with Mr James Henderson and Ms Barbara Belgrano for the Appellants, the Commissioners for His Majesty's Revenue and Customs ("HMRC"); and from Mr James Rivett KC, who appeared with Mr Ronan Magee for the Respondent. I express the Court's gratitude to them all.

Factual Background

3. Both the tribunals below set out the facts in detail. The Upper Tribunal (Tax and Chancery Chamber) ("UT") set out the relevant factual background at paras. 2 and 12-43, and the factual findings of the First-tier Tribunal (Tax Chamber) ("FTT") can be found at paras. 13-147 and 336-363. At this stage I will outline the salient facts.

4. Centrica Overseas Holdings Limited ("COHL", which is the Respondent to this appeal) is an intermediate holding company in the Centrica group which holds shares in multiple subsidiaries. Its immediate parent is GB Gas Holdings Limited and the ultimate parent company is Centrica plc.

5. Between July 2009 and March 2011 expenses were paid for professional services to Deutsche Bank AG London ("Deutsche Bank"), PricewaterhouseCoopers ("PwC") and De Brauw Blackstone Westbroek ("De Brauw"). In its company tax return for the accounting period ending 31 December 2011 COHL claimed relief on the Disputed Expenditure, totalling £2,529,697.

6. On 1 July 2005, COHL had acquired 100% of the share capital in Oxxio BV ("Oxxio"), a company with four subsidiaries in the Netherlands. The four subsidiaries were Oxxio Nederland BV, Centrica Energy Netherland BV ("CEN"), Oxxio Tolling BV, and Oxxio Metering BV. The investment was not a success and caused the Respondent significant losses.

7. By June or July 2009 the board of Centrica plc had decided that it wanted to sell the Oxxio business in principle and was taking steps to do so. The FTT noted, at para. 20 of its judgment, that Centrica plc's annual report and accounts for 2009 stated that: "It is anticipated that the sale of Oxxio …will complete by 30 June 2010." The report went on to say that "Oxxio … was classified as a discontinued operation from 30 June 2009". Although the accounts stated that Oxxio was to be treated as a discontinued

business from 30 June 2009, it seems that the formal decision was taken on 28 July 2009 at a board meeting of Centrica plc.

8. As the FTT noted at para. 23 of its judgment, "held for sale" is an accounting term of art and is defined by IFRS5. A "disposal group" is to be classified as "held for sale" if its value is to be recovered principally through a sale transaction. The disposal group must be "available for immediate sale in its current condition" and a sale must be "highly probable". The FTT continued:

> "For this to apply, management must be committed to a plan to sell the asset and must have initiated an active programme to locate a buyer and complete the plan. It must be actively marketed for sale at a price which is reasonable in relation to its current fair value. It should be expected that the sale will complete within a year."

9. As the FTT observed at para. 24:

> "Clearly, the board of Centrica had decided, in June 2009, that it wanted to sell the Oxxio business and it was taking steps to do so."

10. Although initially the plan was to sell the shares in Oxxio the group considered other options such as selling the assets of the business, rectifying the problems of the business and winding the business down rather than selling it. At para. 218 the FTT said:

> "In the present case, the initial intention was for COHL to sell the shares in Oxxio BV. … In fact, it became clear fairly early on that the sale of the shares was more of an aspiration than an intention. Although that aspiration continued until the time of the Eneco transaction, the evidence shows that consideration was, from an early stage, given to other ways of realising value from the Oxxio business and those alternatives continued to be considered. We heard that options included selling the assets of the business, rectifying the problems in the business with a view to a future share sale and not selling the business at all but winding it down. Whilst Centrica had taken a strategic decision to exit the Dutch market, this was not something to be done at any price. The aim was to realise as much value as possible from the investment in a commercial way. …"

11. The significant losses, accounting irregularities and poor risk management practices of Oxxio meant that the sale became difficult. As things progressed, an asset sale seemed more attractive to purchasers than a share sale.

12. In September 2010 Eneco first made an indicative offer in September 2010, which was rejected, and may have made another offer, which was also rejected in December 2010. In January 2011 Eneco made a final offer, which was approved by the board of Centrica plc at a meeting on 22 February 2011, at which they delegated authority to agree the final terms of the deal to certain board members including the CEO, CFO and General Counsel.

13. In March 2011 the final transaction took place, which involved an asset sale involving partial de-mergers, whereby the assets of Oxxio Nederland and CEN were demerged and purchased by Eneco Group NV, which also acquired the entire shareholding in Oxxio Metering from Oxxio. The Respondent continued to own Oxxio and provide financial support.

14. I turn to the fees that were incurred for the services provided by Deutsche Bank, PwC and De Brauw. These were summarised at para. 31 of the UT judgment:

> "Deutsche Bank, PwC and De Brauw were involved throughout the process. Each firm was engaged by Centrica plc to provide certain services. In the first instance, the fees were paid by Centrica Plc as COHL did not have a bank account. This was usual practice within the group and costs incurred in this way would then be charged to what was considered the appropriate entity by means of book entries. The Disputed Expenditure was included as an accrual in the financial statements of COHL for the period ended 31 December 2011. It was accepted by HMRC that COHL had borne the cost of the fees. The fees paid were as follows:
>
> PWC - £172,423
>
> De Brauw - €766,328
>
> Deutsche Bank - €3,550,515.32"

15. Deutsche Bank's fee consisted of a fixed fee of €2.5m payable "in the event the Oxxio Transaction [a defined term] is completed" and an additional incentivisation fee of €1m payable in Centrica's sole discretion. The incentivisation fee was paid but COHL did not claim any deduction for that fee in its tax return. The Respondent observes that the structure of the Deutsche Bank fee "was typical for this type of transaction and gave Deutsche Bank an incentive to get the deal over the line."

16. The nature of the services that were provided was set out by the UT at paras. 36-42:

> "36. Deutsche Bank's role was to advise, provide information and make recommendations in relation to the disposal of the Oxxio businesses. This included wide-ranging advice and assistance in relation to strategic alternatives for the various businesses, for example the possibilities of share or asset sales and asset swaps, structuring, negotiating, planning and

managing the disposal process and identifying and evaluating potential purchasers. …

37. By June 2010, Eneco had been identified as a potential purchaser and by October 2010 a virtual data room had been set up, co-ordinated by Deutsche Bank to provide information to Eneco. Eneco made an initial offer in September 2010 which was rejected, and it was not until 24 March 2011 that the transaction with Eneco completed. Deutsche Bank continued to be involved with the transaction until that time, advising in relation to other options for the disposal in case the deal with Eneco fell through.

38. PwC's role was principally in the preparation of a Vendor Due Diligence Report ('the VDD Report') to be made available to potential purchasers. VDD Reports are generally obtained where there are difficulties in the business being sold. PwC were given full access to Oxxio's management and financial records. The VDD Report was available to Centrica but was primarily intended for the preferred bidder on the basis that PwC would assume a duty of care to the preferred bidder in relation to the report. In fact, the VDD Report helped Centrica understand what was going on in the Oxxio business and how best to proceed with the transaction.

39. In July 2010 PwC produced what was described as a 'deep dive' report ('the Deep Dive'). The purpose of the Deep Dive was to enable Centrica to understand the extent of the problems in Oxxio and inform Centrica as to the options available, including whether the problem were so bad that the business was unsaleable. In its half-year accounts to 30 June 2010 Centrica stated that it intended to dispose of Oxxio as soon as practicable and continued to report it within discontinued operations. However, there had been discussions about whether the sale process should be put on hold whilst the problems were resolved or abandoned altogether in light of the issues.

40. PwC submitted their final VDD Report on 28 January 2011, which marked the completion of their work.

41. De Brauw acted as legal advisers, advising Centrica on matters of Dutch law including employment law, competition law, tax, material contracts, the preparation of draft and final sale and purchase agreements. This included advice on the structure of the sale and generally in relation to completion of the transaction. They were involved in preparation of the virtual data room. A draft sale and purchase agreement had been prepared as early as November 2009. The FTT describes some of this work as general advice on legal issues in evaluating potential structures for the sale and some of it as '"nitty gritty" transaction specific work'.

> 42. In November 2010, De Brauw prepared a document setting out a detailed explanation of the steps to be taken to achieve a demerger of the Oxxio businesses, although the transaction eventually took a slightly different form. At the same time, De Brauw provided advice on competition law issues."

17. On 19 December 2016 HMRC issued a closure notice amending COHL's company tax return on the basis that none of the Disputed Expenditure was deductible under section 1219 of the CTA 2009. COHL appealed against that decision to the FTT on 11 May 2017.

18. In a decision released on 23 April 2020 the FTT dismissed the appeal. On 22 July 2020 it gave permission to appeal to the UT.

19. On 18 August 2021 the UT allowed COHL's appeal. It granted HMRC permission to appeal to this Court on 5 October 2021 on only one of the three grounds proposed. This ground concerned whether the UT erred in finding that the Disputed Expenditure was not "capital in nature" and was therefore excluded from relief under section 1219(3)(a) of the CTA 2009. This is now Ground 2 in the appeal before this Court.

20. On 24 February 2022, Lewison LJ granted HMRC permission to appeal on a further ground: whether the Disputed Expenditure constituted expenses of management at all. This is now Ground 1 in the appeal before this Court.

The Decisions of the FTT and the UT

The Expenses of Management issue

21. At the FTT stage the appeal by COHL was dismissed on the ground that it was not COHL which had carried out the management activities in relation to which the Disputed Expenses were incurred, and so they were not expenses of management of COHL. As we shall see, the UT allowed COHL's appeal on this point. The FTT, however, did go on to consider the issues relevant to the present appeal.

22. The FTT closely analysed the roles of Deutsche Bank, PwC and De Brauw to conclude that most of Deutsche Bank and PwC's, and possibly some of De Brauw's, costs were expenses of management, including the relevant part of Deutsche Bank's contingent fee.

23. On appeal the UT was satisfied that the FTT had applied the correct legal test and was entitled to reach the conclusions it did as to whether the Disputed Expenses were expenses of management. This was certainly the case in respect of the fees of Deutsche Bank and PwC. The UT considered that the findings of the FTT were unclear in relation to the fees of De Brauw and so it remitted that issue to the FTT for further determination.

The Capital Expenditure issue

24. The FTT concluded that Deutsche Bank and PwC's fees up to the initial offer by Eneco in January 2011 were not expenses of a capital nature. The UT held that the FTT was right to conclude that the Deutsche Bank and PwC expenses were not capital in nature.

25. The FTT, however, found that the costs of De Brauw were capital in nature. It distinguished these costs on the basis that there comes a point where there is a potential transaction, a credible offeror, and an acceptable offer, so that the subsequent expenditure is more closely connected to the capital transaction than the decision-making process. The UT held that the FTT was wrong on this point and remitted the matter to the same judge.

Material legislation

26. Part 16 of the CTA 2009 is concerned with companies with investment business. Chapter 2 is headed 'Management Expenses *Relief for Expenses of Management*'. Section 1219, which has the sidenote 'Expenses of Management of a Company's Investment Business', provides:

> "(1) In calculating the corporation tax to which a company with investment business is liable for an accounting period, expenses of management of the company's investment business which are referable to that period are allowed as a deduction from the company's total profits. …
>
> (2) For the purposes of this section expenses of management are expenses of management of a company's investment business so far as –
>
> (a) they are in respect of so much of the company's investment business as consists of making investments, and
>
> (b) the investments concerned are not held for an unallowable purpose during the accounting period to which the expenses are referable.
>
> (3) But –
>
> (a) no deduction is allowed under this section for expenses of a capital nature, …"

27. I should also note that, in Chapter 4 of Part 3, which deals with 'Trade Profits: Rules Restricting Deductions', section 53(1) provides:

> "In calculating the profits of a trade, no deduction is allowed for items of a capital nature."

Grounds of Appeal

28. On the appeal before this Court Ground 1 is that the UT erred in deciding that the Disputed Expenditure constituted "expenses of management" under section 1219(1) of the CTA 2009.

29. Ground 2 is that the UT erred in finding that the Disputed Expenditure did not constitute "expenses of a capital nature" within the meaning of section 1219(3)(a) of the CTA 2009.

Ground 1: the Expenses of Management issue

30. The Appellants submit that the FTT made various errors of law in its consideration of whether the Disputed Expenditure constituted "expenses of management" and the UT erred in not correcting these. The Appellants submit that para. 329 of the FTT judgment is at the heart of the flawed analysis, where the Judge said:

> "I agree with [Counsel for COHL] that in order to have the kind of decision to sell which marks the transition from managing the investments to implementing the decision already made:
>
> (1) There must be an identified purchaser who the seller has concluded is satisfactory. That is the seller must be content that the purchaser is credible and has the funds available or can obtain the funds to go through with the purchase.
>
> (2) The price must be acceptable.
>
> (3) The broad structure of the transaction must be agreed.
>
> (4) The other terms of the deal must be broadly satisfactory."

31. The Appellants describe the decision of the FTT that the tests were not satisfied until 22 February 2011, when Centrica plc's board approved the transaction with Eneco, as "an extreme and incorrect proposition" for the following reasons:

(1) It was an error to seek to identify a precise date.

(2) It was an error to suggest that until there is a deal on the table, a decision to sell is not being implemented.

32. It is also submitted that both the FTT and the UT erred in not acknowledging that the contingent nature of the Deutsche Bank fees was a strong indication that they were fees for successfully implementing Centrica plc's decision to sell the Oxxio business rather than expenses of management.

33. The Respondent submits that HMRC's argument that the fees in issue were "simply implementation expenditure" is inconsistent with both the primary findings of fact

and the evaluation of those findings made by the FTT. As HMRC have not sought to challenge those findings in accordance with *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, it is submitted that there is no basis for interfering with the FTT's conclusions on appeal.

Relevant principles on the Expenses of Management issue

34. The decision of the House of Lords in *Sun Life Assurance Society v Davidson (Inspector of Taxes)* [1958] AC 184; 37 TC 330 concerned an early predecessor to section 1219 of the CTA 2009: section 33 of the Income Tax Act 1918. That provision applied to an assurance company carrying on life assurance business or any company whose business consisted mainly in the making of investments and certain other companies. The material phrase at that time was "expenses of management (including commissions)".

35. The particular issue which arose in *Sun Life* was whether brokerage expenses and stamp duty were deductible as expenses of management. The majority of the House of Lords decided that they were not, although Lord Reid dissented in respect of the brokerage fees.

36. As Viscount Simonds noted at page 355, counsel for the Society conceded that there could not be included as expenses of management the cost of purchase of the investments themselves. Viscount Simonds considered that concession to be difficult to understand but nevertheless the House of Lords proceeded on the basis of it. He continued:

> "… If the expense of purchasing an investment is not an expense of management, I can see no valid ground of distinction between the price of the stock which is purchased and the stamp duty upon contract or transfer and the brokerage paid to the broker. Each item is an integral part of the cost of acquisition or … a part of the expenses of the particular purchase, not of the expenses of management. This is perhaps even more clearly seen upon a sale than upon a purchase of an investment, for in that case there is no disbursement at all but only a diminution of the sum received by the Society."

37. Similar statements of principle can be found in the opinions of Lord Morton of Henryton at page 357; and Lord Somervell of Harrow at pages 362-363. Lord Keith of Avonholm did not deliver a separate opinion but agreed with Viscount Simonds.

38. Although the different members of the appellate committee expressed their reasoning in slightly different terms, the essential principle appears to be clear and was common ground before this Court. It was expressed succinctly by Lord Reid at page 360 as follows:

> "It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management."

Earlier on the same page Lord Reid had observed that the words "expenses of management" are ordinary words of the English language and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. Further, he said, looking to the purpose and content of the legislative provision the phrase "has a fairly wide meaning" so that, for example, "expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management."

39. It was common ground before us that what was said there about the *acquisition* of an investment applies equally to its *disposal*.

40. In *Camas Plc v Atkinson (Inspector of Taxes)* 76 TC 641 the taxpayer company was an investment company within section 130 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"). In 1995 the company identified a group of companies as a possible target for a merger or acquisition. Meetings were held, papers were prepared and presented, and various other activities were undertaken, but eventually neither a merger nor an acquisition resulted from the project. In the course of the project the company had paid fees to various financial advisers, legal advisers and printers for their services. It claimed a deduction of those fees in the computation of its profits for corporation tax purposes for the accounting period ended 31 December 1995 on the footing that they were deductible as expenses of management within section 75 of the ICTA 1988. An important issue in the Court of Appeal was whether, as the Revenue contended, capital expenses were excluded from the concept of "expenses of management". The Court rejected that argument. It held that it was unnecessary to consider whether any particular expense was capital or not because the expression "expenses of management" had to be given its natural meaning without any gloss.

41. The lead judgment was given by Carnwath LJ, with whom Chadwick LJ and the Vice-Chancellor (Sir Andrew Morritt) agreed. Having considered the authorities, in particular *Sun Life*, Carnwath LJ summarised the relevant principles as follows, at paras. 20-21:

> "20. In the extracts cited above, I have emphasised the words which seem to me best to encapsulate the effect of the various judgments. All stress the closeness of the link between the expenditure in that case and the process of acquisition:—
>
> 'part of the expenses of purchase';
>
> 'an integral part of the cost of acquisition';
>
> 'items in the total cost of a purchase which has already been resolved upon';

> 'a direct and necessary part of the cost of a normal method of purchase'.
>
> 21. Conversely, expenditure is not excluded merely because it relates to activities carried out in contemplation of acquisition. Lord Reid said that the expenses of 'investigation and consideration' whether to pay out money in acquisition of an investment should be treated as expenses of management. … Nothing in *Sun Life* … supports the exclusion of the cost of investigations and other activities which are part of the process leading to the decision to purchase. … [W]hat is excluded by *Sun Life* is expenditure on 'the mechanics of implementation'."

42. At paras. 26 and 33 Carnwath LJ emphasised that there is no "wholly and exclusively" test in this context. Accordingly, an expense may be an expense of management even if it has more than one purpose or effect.

43. At para. 32 Carnwath LJ concluded that on the facts of that case, unlike *Sun Life*, no final decision to purchase was ever made. He considered that the Revenue's argument might have been stronger if the stage had been reached of a "firm intention to make an offer", triggering a "strict timetable" but, even then, he would not necessarily have concluded that any expenditure thereafter, even if the purchase proceeded, would have to be treated as costs of acquisition rather than management. "It must depend on the circumstances." Between such a "triggering event" and a "final purchase" there may be many chances and changes, requiring what can properly be regarded as "managerial" consideration. He said that how one should categorise particular expenses in any such case must depend on the particular facts.

44. At para. 33 Carnwath LJ explained that this conclusion did not involve any disagreement with the Special Commissioners on their findings of fact. He concluded that the fact that the work was part of the "decision-making process" supported its categorisation as managerial. This was not affected by the fact that it was also a "necessary" prerequisite to acquisition and directed to that possibility. He said that it was "preparatory to the making of a decision to purchase, not part of the implementation of a purchase already decided upon."

45. At para. 34 Carnwath LJ said that it was unnecessary to express a concluded view on whether the fact that no acquisition in fact occurred is in itself determinative. However, in that particular case, the lack of an actual purchase merely confirmed the fact that there never was a "firm decision to buy."

The judgment of the FTT on the Expenses of Management issue

46. In a detailed and carefully structured judgment the FTT addressed the Expenses of Management issue at paras. 238-365. At the outset of that discussion the Judge summarised the applicable principles as follows at paras. 239-240:

> "239. The applicable principles were summarised by Mann J in [*Dawsongroup plc v HMRC* [2010] EWHC 1061 (Ch); [2010] STC 1906] at paragraph 49 where he said:
>
> > 'Thus the relevant principles in considering the point:
> >
> > i) The expression "expenses of management" is to be treated as an ordinary English expression, which is incapable of detailed definition.
> >
> > ii) It is that expression, and that concept, which needs to be considered. The question is whether the expenditure falls within that category, and not whether it fails to fall within some other and thereby qualifies by default (as it were).
> >
> > iii) The expression is a wide or fairly wide one (the difference probably makes no practical difference).
> >
> > iv) There is a distinction between the expenses of management and the general expenses of the business. An expense can fall within the latter category and not be within the former. The emphasis must be on "management."'
>
> 240. Further, expenses can be deductible expenses of management even where they have a duality of purpose. In the case of *Camas Plc v Atkinson* [2004] EWCA Civ 541 (2004) 76 TC 641 ("*Camas*") the Court of Appeal said at paragraph 26:
>
> > '…it was common ground [in the *Sun Life* case considered below] that the process of reaching a decision to purchase was management in the ordinary sense. There is nothing in the speeches which supports the view that an activity which is part of that decision-making process ceases to be management, merely because it may also assist in the purchase if that is decided upon – still less if it is not. Unlike the provisions relating to Schedule D expenses, there is no requirement that the expense should be "wholly and exclusively" related to management.'"

47. Much of the discussion then considered the application of the relevant legal principles to the particular facts of this case, in particular by reference to the services provided by each of Deutsche Bank, PwC and De Brauw.

The judgment of the UT on the Expenses of Management issue

48. The UT addressed the expenses of management issue at paras. 68-104 of its judgment. Having considered the authorities at length, the UT summarised the relevant principles as follows, at para. 83:

> "It is clear therefore that there is a distinction between expenses incurred in deciding whether to acquire or dispose of an asset, and expenses incurred on the 'mechanics of implementation' once that decision has been taken. The former will be expenses of management and the latter will not be expenses of management. The categorisation of particular expenses will be a fact-sensitive enquiry. Further, in our view expenditure incurred in assessing how to make an acquisition or a disposal may fall on either side of the line. It may be part of the decision whether to proceed or part of the implementation of a decision. The answer will be part of the factual enquiry and may involve a value judgment."

49. As the UT observed at para. 85, there was no fundamental difference in approach between the parties as to the *nature* of the test and the dispute was really whether the FTT had properly *applied* that test to the facts which it had found. The UT noted that it was common ground before the FTT that everything after 22 February 2011 was implementation expenditure and was not deductible. The UT concluded that the FTT had not adopted a "cut-off date" but rather had regard to the *nature* of the expenditure rather than *when* it was incurred. It considered that the FTT had correctly applied the test outlined in *Camas* to the disputed expenditure.

50. The UT concluded, at para. 98, that the FTT had been entitled to conclude that both the Deutsche Bank fees and the PwC fees prior to 22 February 2011 were expenses of management. Turning to the De Brauw fees, the UT concluded that the FTT findings of fact about this were not entirely clear. Accordingly, the UT remitted the issue to the FTT to determine that question in the light of its judgment: see para. 104.

51. In the UT there was a separate issue in relation to the "success fee" payable to Deutsche Bank only if the transaction was in fact completed. This was addressed by the UT at paras. 105-113 of its judgment. The UT concluded that the FTT was right to find that in substance the fees were for services which enabled COHL to decide whether and how to dispose of the Oxxio business. The fact that the fixed fee was only payable on completion of the transaction did not change the nature of the expense so as to make it part of the cost of disposal, applying the test in *Camas*. In the UT's view the fixed fee could be severed from the costs of disposal, to use the language of Lord Reid in *Sun Life*: see para. 113 of the UT's judgment. Before this Court HMRC did not submit that the FTT and UT erred in law in relation to the success fee point as a distinct ground of appeal but did submit that the fact that the fee was payable only on the contingency that the transaction did in fact take place was a factor in support of the more basic submission that the Disputed Expenses were not in truth expenses of management.

Analysis

52. The following principles were common ground before us. First, an appeal from the FTT can only succeed if its decision was erroneous in law. Secondly, the Expenses of

Management issue does not raise a pure question of law (in contrast to the Capital Expenditure issue, which does). Thirdly, it follows that the role of an appellate court or tribunal is a limited one. Neither this Court nor the UT would be entitled to interfere with the conclusion of the FTT on the Expenses of Management issue unless it erred in its approach to the issue, for example by misdirecting itself on a point of law; or if its findings of fact were unsupported by any evidence; or if its conclusion from those findings was one that was not reasonably open to it.

53. I am not persuaded by HMRC's submissions that the FTT did fall into error in any way that would entitle this Court to interfere with its conclusion on this issue. I can set out my reasons briefly, since I agree with the UT on this issue.

54. In my judgement, the FTT correctly directed itself as to the relevant legal principles. It then carefully considered the facts in detail and applied those legal principles to those facts. It has not been suggested that the findings of fact it made were not supported by any evidence. Like the UT I consider that the FTT was entitled to reach the conclusion that the Disputed Expenses were expenses of management.

55. I would, accordingly, dismiss HMRC's appeal on Ground 1.

Ground 2: The Capital Expenditure issue

56. The Appellants submit that both the FTT and the UT erred in concluding that the Disputed Expenses were not expenses of a capital nature for the following reasons:

(1) Expenditure incidental to a capital transaction (here the disposal of the Oxxio business) is itself capital.

(2) Both the FTT and UT erred in not applying the principles from the existing capital/revenue case law. Doing so would have led them to conclude that the Disputed Expenditure was capital in nature.

(3) There is no justification for suggesting that the concept of capital expenditure in the present context is more limited than its meaning in the context of trading businesses. Parliament intended to import the capital/revenue principles which can be derived from the trading business case law into what is now section 1219 of the CTA 2009.

57. The Respondent submits that, once the proper scope of the exclusion imposed by section 1219(3)(a) of the CTA 2009 is identified, it is clear on the findings of fact by the FTT that the Disputed Expenditure was not expenditure of a capital nature. In essence, the Respondent submits that the expenditure consisted of expenses of management which were likely to recur and did not have the effect of creating, enhancing or disposing of a capital investment.

Interpretation of the relevant legislation

58. The provision which is now to be found in section 1219(3)(a) of the CTA 2009 was first introduced in the Finance Bill 2004 as an amendment to section 75 of the ICTA 1988. Accordingly, the legislation which was considered by the House of Lords in *Sun Life* and by the Court of Appeal in *Camas* did not include that important provision.

59. I accept Mr Ewart's submission as to the correct interpretation of section 1219(3)(a) of the CTA 2009, that the reference to "expenses of a capital nature" must have the same meaning as "items of a capital nature" in section 53(1) of that Act, for the following reasons.

60. First, the phrases are to be found in the same Act. It would be surprising if Parliament intended to give them different meanings in the same Act. Parliament did not give the phrase a special or different meaning in section 1219(3)(a): it simply amended the equivalent predecessor legislation by introducing what is a short phrase. Moreover, that phrase was already well known from other parts of the tax code, in particular what is now section 53(1). It should also be recalled that the CTA 2009 was enacted as part of the Tax Law Rewrite project. One of the purposes of that project was to set out tax legislation in a comprehensive way that could be understood by a reasonably informed taxpayer: see *R (Derry) v HMRC* [2019] UKSC 19; [2019] 1 WLR 2754, at paras. 7-10 (Lord Carnwath JSC). I note that, at para. 10, Lord Carnwath said that the purpose of the project was "in particular to give clear pointers to each stage of the taxpayer's journey to fiscal enlightenment."

61. Secondly, it is clear from the Explanatory Notes to the Corporation Tax Bill that clause 1219(3) was intended to exclude capital expenditure "in terms that follow closely the Trading Income Rule": see para. 3089 of the Explanatory Notes. Similarly the Explanatory Notes to the CTA 2009 made that clear in identical language: see para. 3091. Explanatory Notes are a legitimate aid to statutory interpretation although they have a "secondary role" to play: see *R (Project for the Registration of Children as British Citizens)* ["*PRCBC*"] *v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343, at para. 30 (Lord Hodge DPSC).

62. Thirdly, the legislative history of a statutory provision, including the chronology of events, is relevant and can be taken into account in its interpretation: see *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875; [2022] 3 WLR 121, at para. 68 (Singh LJ). In the present case the timing of the introduction of the amendment in 2004 sheds some light on the intention of Parliament. The amendment was introduced by clause 38 of the Finance Bill 2004, which replaced section 75 of the ICTA 1988. The Explanatory Notes to the Finance Bill 2004 state that the new clause 75(3) provided that expenses of a capital nature are not expenses of management. At para. 11 it was said:

> "The Inland Revenue has always argued that capital expenditure is inadmissible as an expense of managing investments under the current rules but the High Court has recently found against the Inland Revenue on the point (in *Camas v Atkinson* …). The Inland Revenue is taking its appeal

> against this decision to the Court of Appeal but the hearing has not yet taken place."

63. As Mr Ewart pointed out before us, in *Camas* itself it was never established as a matter of fact which parts of the expenditure in issue were in fact capital and which were of a revenue nature. This is simply because it was unnecessary to make such a finding of fact under the legislation as it then was. In *Camas* it was contended on behalf of the Inland Revenue that capital expenditure was inherently excluded from the concept of expenses of management in the then legislation but this argument was rejected by the courts. The simple point was made by the Court of Appeal that, if that had been the intention of Parliament, it could easily have said so by expressly enacting a provision excluding expenses of a capital nature. It is significant that that is precisely what Parliament has now done.

64. Fourthly, the concept of "items of a capital nature" has a very long history in the case law going back for almost a century. I will return to that case law later. It can reasonably be presumed therefore that, in enacting a similar provision in 2004, the intention of Parliament was to adopt the meaning which had been given to that concept in the case law.

65. In *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] AC 1259, the Supreme Court re-affirmed the well known principle in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402. At para. 53, Lord Hodge JSC said that:

> "… where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established …"

66. In my view, what Parliament did in 2004 is analogous. This indicates that Parliament intended that the phrase "expenses of a capital nature" should be interpreted in accordance with the meaning which it had acquired in the case law on what is materially the same phrase in other parts of the tax code.

67. When asked about this at the hearing before us, Mr Rivett candidly acknowledged that, on his submission, there would have to be an entirely new body of case law developed over the coming years to distinguish between capital and revenue expenditure in the context of expenses of management. I cannot accept that that can have been the intention of Parliament. It would create great legal uncertainty for all concerned, not least the business community.

68. Furthermore, Mr Rivett was unable to offer any realistic alternative to the principles in the established case law for making the distinction between capital and revenue expenditure in this context. On analysis, the test he appeared to put forward is materially the same as the test for deciding whether an expense is an expense of management in the first place (in accordance with *Sun Life* and *Camas*), in other words the distinction between expenses incurred as part of the decision-making

process and those incurred in the implementation of that decision, but, if that were right, it is difficult to see what practical purpose was to be served at all when Parliament decided to amend the legislation in 2004.

69. At the hearing before this Court Mr Rivett submitted that the legislation should be given a purposive construction, so as to tax what he described as the true "economic profits" of the Respondent's investment business. He submitted that the intention of Parliament ever since similar legislation was first introduced in 1915 has been to place investment companies so far as possible on the same footing as trading companies, so that they are not treated less favourably.

70. In the *PRCBC* case, at para. 29, Lord Hodge said that:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

71. Lord Hodge went on to explain, by reference to the opinion of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] AC 349, at 397, that there is an important constitutional reason for having regard primarily to the statutory context. This is because citizens, with the assistance of their advisers, are intended to be able to understand Parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.

72. In the present context, the best guide therefore to the purpose of the legislation is to be found in the provisions enacted by Parliament itself, including the amendment made in 2004. It would not be appropriate to approach that task of interpretation by having a preconception that the exception in section 1219(3)(a) of the CTA 2009 should be given either a broad or a narrow meaning.

73. Furthermore, it is clear from cases such as *ECC Quarries Ltd v Watkis (Inspector of Taxes)* [1975] STC 578 (Brightman J) that the fact that expenditure is properly chargeable against revenue in accordance with ordinary principles of commercial accountancy does not lead to the conclusion that it must be treated in that way as a matter of law. To rely therefore on the true "economic profits" of a company is to rely on an elusive concept and begs the question. What are the true profits in this context has to be determined in accordance with the law. That in turn depends on what is the true meaning and effect of the legislation which Parliament has enacted, not some extrinsic economic concept.

74. Finally, I should mention that, in the Appellants' skeleton argument for this appeal, reference was made to Parliamentary material in support of their interpretation of the relevant legislation but this was not developed at the hearing before us. It is, in any

event, unnecessary to dwell on this given the view to which I have already come on the issue of interpretation.

The role of an appellate court or tribunal on Ground 2

75. At one time it used to be thought that the question whether an expense is of a revenue or capital nature was a question of fact: see *Atherton (Inspector of Taxes) v British Insulated and Helsby Cables Ltd* [1926] AC 205; 10 TC 155, at 192 (Viscount Cave LC). In *Mallett (Inspector of Taxes) v Staveley Coal and Iron Company Ltd* [1928] 2 KB 405; 13 TC 772, at 785, Lord Hanworth MR thought that it was "at least a question of mixed law and fact" but was inclined to think that it was a question of law only. It has since been made clear by the House of Lords that it is a pure question of law.

76. In *Beauchamp (Inspector of Taxes) v F W Woolworth plc* [1990] 1 AC 478, at 491-492, the House of Lords confirmed that the question whether expenditure is of a capital nature or not is a question of law (Lord Templeman). It is not a question of fact nor is it a question of mixed law and fact, as the Court of Appeal had thought in that case.

77. Accordingly, on this issue, an appellate court or tribunal is not confined to the well-known test in *Edwards v Bairstow*, namely whether, on the facts found, no person acting judicially and properly instructed as to the relevant law could have come to the determination reached.

78. It is therefore common ground that this Court can and should arrive at its own conclusion on the Capital Expenditure issue but must do so on the basis of the findings of fact made by the FTT. This Court is not confined to asking the question whether the FTT or UT erred in law, although Mr Ewart also submits that they did do so.

Relevant principles on the distinction between capital and revenue expenditure

79. The starting point for any discussion of the distinction between capital and revenue expenditure is usually the opinion of Viscount Cave LC in *Atherton*, at pages 192-193, where he said that:

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

80. Although the question is one of law, the authorities also make clear that there is no single "test" which will be decisive in all circumstances. Although there are useful

statements of principle, in particular in decisions of the House of Lords and similar supreme courts in other jurisdictions, it should always be recalled that the principle of law for which an authority stands is the principle which explains the outcome on the facts of that case.

81. This was made clear in *Strick (Inspector of Taxes) v Regent Oil Co. Ltd* [1966] AC 295; 43 TC 1, at 54-55, where Lord Wilberforce said:

> "In the course of the numerous decisions which have distinguished between capital and revenue expenditure in relation to widely different trades and varying circumstances, certain 'tests' have emerged. These may be useful, so long as it is recognised that they have emerged *a posteriori* from the facts of a given situation and that they may not always be suitable as guiding lines in other situations. I begin by asking two questions, which may be said to be generally relevant: What is the nature of the payment, and for what was the payment made? These, together with a third question, namely, how that for which the payment was made was to be used, were stated by Dixon J. in his classic judgment in *Sun Newspapers Ltd. v. Federal Commissioner for Taxation* 61 CLR 337.
>
> There are, he said, at page 363:
>
> > 'three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment'
>
> I may add to this another statement by the same learned Judge in the later case of *Hallstrom's Pty. Ltd. v. Federal Commissioner of Taxation* 72 C.L.R. 634, at page 648:
>
> > 'What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process'"

82. When one is dealing with tangible assets it is generally not very difficult to reach a decision about whether expenditure is capital or not: see e.g. *Strick* at page 30 (Lord Reid). As Lord Reid said there, things which a trader uses in his business to produce what he has to sell are part of his fixed capital and their cost is a capital outlay even if their useful life may be short. On the other hand, things which he turns over in the course of his trade are circulating capital and their cost is a revenue expense.

Difficulties can arise when a capital asset is improved, for example in distinguishing between repairs, which are a revenue expense, and renovation, which is not.

83. As Lord Reid said at page 31, when one comes to intangible assets there can be more difficulty. A trader may acquire the right to do something on someone else's property or benefit from an obligation by someone to do or refrain from doing something or may make a contract which affects the way in which he conducts his business. The right or obligation or the effect of the contract may endure for a short or a long period of years.

84. Lord Wilberforce returned to the difficulty in identifying a single test for distinguishing between capital and revenue expenditure in *Tucker (Inspector of Taxes) v Granada Motorway Services Ltd* [1979] 1 WLR 683, at 686:

> "It is common in cases which raise the question whether a payment is to be treated as a revenue or as a capital payment for indicia to point different ways. In the end the courts can do little better than form an opinion which way the balance lies. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulae which have been found useful in another: see *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] A.C. 948. Nevertheless reported cases are the best tools that we have, even if they may sometimes be blunt instruments.
>
> I think that the key to the present case is to be found in those cases which have sought to *identify an asset*. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard *money spent on getting rid of a disadvantageous asset as capital expenditure* and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems." (Emphasis added)

85. At page 687, Lord Wilberforce emphasised that, although the "identifiable asset" test may to some extent be arbitrary, it does provide a means which the courts can understand for distinguishing capital and income expenditure and "I think that we would be wise to maintain it."

86. In the same case, at pages 694-695, Lord Fraser of Tullybelton emphasised that there is "no single rule or touchstone" which has been devised for distinguishing between capital and revenue payments but that there can be many factors, some or all of which

may be relevant in the circumstances of a particular case. One such factor, which is not decisive, is that the payment is a one-off rather than a recurrent one. In that case Lord Fraser considered that a more relevant test was to see "for what the payment was made."

87. In *Wharf Properties Ltd v Commissioner of Inland Revenue* [1997] STC 351, the Judicial Committee of the Privy Council emphasised the importance of the purpose for which money is spent when deciding whether it is of a revenue or capital nature, although Mr Ewart rightly accepted that "purpose" in this context is to be understood in an objective rather than a subjective sense. In *Wharf Properties* the Privy Council had to consider the status of loans obtained from various banks and financial institutions in order to acquire and redevelop an old tramway depot. In giving the judgment of the Board Lord Hoffmann said, at pages 354-355, that the status of those loans depended on the different positions of the payer and the recipient. While it was true that, in the hands of the recipient, interest will be either the earnings of capital advanced or, in some cases, additional income derived from trading in money, and so in either case it will have the character of income, from the point of view of the payer, a payment of interest may be a capital or revenue expense, "depending upon the *purpose* for which it was paid." (Emphasis added)

88. Lord Hoffmann continued:

> "The fact that it is income in the hands of the recipient and a recurring and periodic payment does not necessarily mean that it must be a revenue expense. Wages and rent are income in the hands of their recipients; periodic payments, in return for services or the use of land or chattels respectively. But whether such payments are of a capital or revenue nature depends on their *purpose*. The wages of an electrician employed in the construction of a building by an owner who intends to retain the building as a capital investment are part of its capital costs. The wages of the same electrician employed by a construction company, or by the building owner in maintaining the building when it is completed and let, are a revenue expense." (Emphasis added)

On the facts of that case the Board concluded that the interest was expended for a capital purpose.

89. In support of his submissions before us Mr Ewart relied in particular on two decisions of the High Court. The first is *Pendleton (Inspector of Taxes) v Mitchells & Butlers Ltd* 45 TC 341, in which the taxpayer company claimed to deduct legal costs incurred in obtaining the removal of licences on its premises. It carried on business as brewers and retailers of beer and owned a large number of licensed premises in the Midlands. From time to time it removed trade from premises which were given up to other premises for which it had to obtain a licence. The Crown contended that the legal costs were capital expenditure. The Special Commissioners held that, where the object of the removal was to increase trade, the expenditure was of a capital nature but that the reason for the majority of licensing removals in Birmingham was to enable the company to maintain its existing but threatened trade and therefore the relevant

expenditure was not of a capital nature. On appeal to the High Court, Cross J held that the expenditure in question was capital expenditure.

90. In *Pendleton* the Crown contended that the company was forced to acquire new licensed premises. For that purpose it had both to build premises and also to provide them with a licence. There was no ground, it was submitted, for drawing a distinction between the costs of the bricks and mortar and the costs of obtaining a licence. The fact that the company was forced to discontinue trade at the old premises and did not expect to do more at best than to maintain the same volume of trade at the new premises was irrelevant. Cross J accepted the submissions of the Crown. He said that:

> "If once one accepts that money expended in getting a licence transferred from one old house to one new house, where one hopes thereby to improve one's trade, is a capital expense, I cannot see why the fact that the transfer is one of a long series of transfers which one will be obliged to make over a number of years, and that in all such cases there is not or probably will not be any expectation of increased trade, should convert the expense into a revenue expense."

91. The other decision of the High Court on which Mr Ewart placed particular reliance is *ECC Quarries*. That case concerned items of expenditure on preparing and presenting applications for planning permission. These were properly treated as being chargeable against revenue in accordance with ordinary principles of commercial accountancy. That, however, was not the end of the matter, since the question whether expenditure is of a capital or revenue nature is ultimately a question of law.

92. *ECC Quarries* was cited, with apparent approval, by Lord Wilberforce in *Tucker*, at pages 687-688. Since Mr Ewart submitted that it is the case which is closest to the present as a matter of analysis, it is worth looking at its facts in more detail. The case concerned a claim to deduct legal and professional charges incurred in the context of applications for planning permission. The taxpayer company was in the business of extracting and selling stone and gravel and the manufacture of products based on those materials for the building and construction industries. It acquired new sites in order to work sand and gravel from them and applied for planning permission to do so. The planning applications were lodged in February 1967 but were called in for determination by the Minister, who refused them in 1969. During the accounting periods ending 30 September 1968 and 30 September 1969 the company spent sums on preparing and presenting its planning applications. In computing its profits for tax purposes for those two accounting periods the company sought to deduct those expenses. As the case stated (set out for relevant purposes at page 582 of the report) said at paras. 5(13) and (14) there was a lengthy process of consultation between the company and representatives of various local authorities. The company also attended a meeting of representatives of the local authorities at which the proposals were explained in detail and questions answered. Further, after the calling in of the applications by the Minister, a public inquiry was held which occupied 18 working days.

93. It is important to bear in mind (as was common ground before us) that the expenses in issue in that case were not incurred at a preliminary stage, for example when advice is taken from planning consultants or lawyers or other professionals in order to see whether it may be worth making an application for planning permission. The expenses in question were incurred in connection with the making of the applications themselves and subsequently in order to persuade first the local authority and then the Minister to grant the permission sought.

94. At page 595, Brightman J said that:

> "On common sense principles, and with the benefit of judicial guidance in the reported authorities, it seems to me that the expenditure was of a capital and not of an income nature. To use the words of Lord Wilberforce in the *Carron* case [45 TC 18], the planning permission, if obtained, would in some sense have been an intangible asset of a capital nature. If that is right, *money expended in seeking to acquire such an asset must equally be expenditure of a capital nature*." (Emphasis added)

Analysis of the present case

95. Mr Ewart submits that the acquisition of an asset like a company as an investment would easily be regarded as being capital expenditure. It is common ground that the disposal of such an asset will equally be capital rather than revenue. This is clearly right in principle and is supported by authority: see e.g. *Mallett*, which concerned the surrender of an onerous liability (see page 783 in the judgment of Lord Hanworth MR). As Sargant LJ put it, at page 786, in that case a payment was made for the purpose of putting an end to the existence of a disadvantage or onerous asset for the enduring benefit of the trade. As Lawrence LJ emphasised, at page 788, it was not a payment made for the purpose of the company's trade, which was one of winning and selling coal.

96. Mr Ewart submits that, consistent with authority, money which is expended in order to achieve a disposal of an asset or, in this case, the disposal of a business, should also be treated as being of a capital nature, especially when one recalls that this matter is to be looked at from a commercial point of view rather than by reference to legal technicalities.

97. At the hearing before us Mr Rivett took us in detail through the findings of fact made by the FTT. He submitted that, on the basis of those findings, it would be wrong in law to conclude that the disputed expenditure was of a capital nature. In particular Mr Rivett took us through the chronology of events at length in order to demonstrate that, although a "strategic decision" had been taken by Centrica in June 2009 to dispose of the Oxxio business, all options still remained open almost up to the last moment in early 2011. He submitted that what happened in that period could not be described as being simply the "mechanics of implementation" of a decision to dispose of an asset.

98. The second thing which Mr Rivett emphasised was the nature of the work which was done by Deutsche Bank, PwC and De Brauw in that period. He submitted that it

consisted of far more than mere construction of the "mechanics of implementation" of a deal which had already been decided upon. In particular he emphasised the number of occasions when the FTT found that the services provided included "advice" as to the options, including the option that there should be no sale of the business at all.

99. I hope it will suffice if I cite only some of the passages to which we were referred in order to give a flavour of Mr Rivett's submissions on this point.

100. At paras. 71-72 the FTT said:

> "71. An important part of Deutsche Bank's role was to evaluate the options available in relation to Oxxio. The strategic decision to divest had already been taken, but the options as to how to achieve this were wider than in normal transactions because of the diversity of the businesses within the Oxxio sub-group and the problems which emerged in the finances and management of the main customer business. It was not clear what appetite the potential purchasers in the market might have for the different elements in the business. There was even the possibility that the business would prove unsellable and would have to be closed down.
>
> 72. Another major part of Deutsche Bank's engagement was to identify possible buyers and to evaluate the level of interest they might have in the different parts of Oxxio's business. In June 2009, they produced a document for 'Project Erasmus' which considered the 'buyer universe' of energy companies who might want to buy or to enter into an asset swap. A number of similar documents were produced in the course of the transaction as the range of potential buyers narrowed and other options, such as a sale to private equity investors were considered."

101. In relation to the work done by PwC, Mr Rivett emphasised that the main service to be provided by PwC was the preparation of the VDD report: see para. 95 of the FTT judgment. The VDD report could be made available to potential purchasers. At a later stage, PwC might assume a duty of care to the preferred bidder. The evidence before the FTT was that this practice was not uncommon but was not standard.

102. At para. 100 it was said that the report also helped Centrica to understand what was going on in the Oxxio business and also to decide how to proceed. "Should they carry on with the sale now or stop and try and resolve the issues before attempting to sell Oxxio? It informed Centrica's thinking and provided insight into the problems."

103. At para. 127 and elsewhere, the FTT emphasised that Centrica was not prepared to dispose of the Oxxio business at any price.

104. I accept the submission made by Mr Ewart on behalf of HMRC. In my judgement, the primary findings of fact by the FTT are not contradicted by the conclusion that the

Disputed Expenditure was capital in nature. To the contrary, that conclusion follows from those primary findings. The crucial feature of this case is that in June or July 2009 it was decided from a commercial point of view that the Oxxio business had to be disposed of. Precisely how that was achieved was the purpose (in an objective sense) of obtaining the services of Deutsche Bank, PwC and De Brauw.

105. Of course, professional people would, and would be expected to, give advice to their client from time to time, including advice about how and indeed whether the client should proceed to dispose of the business if it became apparent that that was not a sensible thing to do, but that does not alter the fundamental, commercial reality of what had been decided by the client.

106. Nor is this affected by the consideration, which will often and perhaps always be true, that a commercial business will not be prepared to dispose of its assets at any price.

107. Although Mr Ewart does not need to establish any error of approach in the reasoning of the tribunals below, since Ground 2 raises an issue of pure law, which is for this Court to determine for itself, I do accept his further submission that in fact those tribunals did fall into error. In particular, I consider that at times they approached the Capital Expenditure issue as if it were determined by the same principles as the Expenses of Management issue. I will therefore turn to consider how the FTT and the UT dealt with this issue.

The judgment of the FTT on the Capital Expenditure issue

108. The FTT addressed the capital expenditure issue at paras. 393-437. The Judge cited the main authorities on the subject, including *Atherton*, *Mallett*, *Strick*, *Tucker*, *Pendleton* and *ECC Quarries*. After setting out the rival submissions made by Mr Henderson for HMRC and Mr Rivett for COHL, her analysis of the issue began at para. 419. At para. 420, she noted that Mr Henderson did not go so far as to submit that all expenses connected with an investment company's investments (which are its capital assets) are excluded by section 1219(3)(a), because otherwise the relief would have little or no benefit. The question, she said, is where to draw the line and noted that HMRC sought to draw it at the point where a company decides to sell the asset which, in this case, it was argued, was when Centrica declared its strategic decision to divest itself of the Oxxio business. But she found that that was much too early a point in considering whether the disputed expenditure was an expense of management or expense of implementation. In my judgement, that was the first place where the FTT started to fall into error, because it appears to have confused the two different legal issues before it: the Expenses of Management issue and the Capital Expenditure issue.

109. At para. 425, the FTT considered the *Strick* type of cases and concluded that:

> "The *effect* of the advice which Centrica obtained was not to bring about a disposal of the Oxxio businesses, but to inform the management decisions about how best to do so." (Emphasis in original)

In my judgement, this was another instance where the FTT seems to have fallen into error by confusing the test for whether something is an expense of management with the distinct legal question of whether it is capital expenditure.

110. At para. 430, she said:

> "The line between income and capital management expenses is to be drawn between expenses which are incurred in connection with an investment company's consideration of and decisions about managing its investments, and expenses incurred in connection with an actual or potential capital transaction. I acknowledge that the line may not always be easy to draw."

111. At para. 432, the Judge said:

> "The investment decisions which an investment company like COHL has to make are not just whether to sell an investment. It also needs to decide who to sell it to and how to sell it. If it cannot be sold outright it needs to decide how otherwise value can be realised, and how much value it needs to obtain or whether the asset should be retained after all and improved or wound down. All these decisions are management decisions and the cost of advice and assistance in connection with them will be expenses of management of the investment business."

112. In my view, those passages also indicated that the Judge appears to have fallen into error by confusing the two distinct legal issues before her.

The judgment of the UT on the Capital Expenditure issue

113. The UT addressed the capital expenditure issue at paras. 114-134 of its judgment. The main issues of principle were addressed at paras. 114-128. At paras. 129-134 the UT addressed the distinct question of the De Brauw fees. The UT disagreed with the FTT in relation to those fees and concluded that they were revenue in nature.

114. At para. 121, the UT said that they did not consider that the amendment made by the Finance Bill 2004 was intended to deal with the concerns expressed in *Sun Life* as to whether the concession in that case was rightly made. It had not been suggested that following *Sun Life* taxpayers had ever sought to argue that such expenditure might be expenses of management. I agree with the UT on this point, although before us Mr Rivett did resurrect the suggestion that this may have been the limited purpose of the amendment in 2004. I reject that suggestion.

115. The UT did not feel it necessary to refer to all of the authorities cited by HMRC as to the distinction between capital and revenue expenditure. They considered that the point was illustrated by just one authority: *Sargent v Eayrs* [1973] STC 50. The facts

of that case were that the taxpayer carried on a farming business in the UK. He claimed as a deduction the sum of £1,093, which represented the expenses he had incurred in visiting Australia to investigate farming conditions with a view to emigrating and buying a farm there. He did not in fact emigrate as he found the cost of property prohibitive. In the High Court Goff J held that the taxpayer was not entitled to deduct the expenses in question for two reasons. The first was that the relevant provision at the time (section 152 of the Income Tax Act 1952) was to be treated as referring only to farming in the UK. The second and alternative ground for the decision was that the expenditure was not revenue in character but of a capital nature since it was incurred for the purpose of initiating or extending a business. The fact that it had proved abortive did not affect the nature of the expenditure. Goff J cited the statement of principle by Viscount Cave LC in *Atherton* which I have quoted above: see pages 54-55.

116. In my view, the decision in *Sargent v Eayrs* does not set out any new principle; it simply provides an example of the application of well established principles to the facts of that case. Moreover, and with respect to the UT, the facts are very far removed from those of the present case.

117. At paras. 127-128, the UT said:

> "127. In our view, Parliament must have intended that some expenses of management would not be relieved where they were also capital in nature. On the basis of what was said in *Sun Life* and *Camas*, such expenditure is likely to be very limited in nature and it may be that Parliament was acting out of an abundance of caution and because HMRC had long considered that capital expenditure was excluded from relief under s 1219. *The meaning of capital expenditure in the context of expenses of management is necessarily more limited than the meaning in the context of trading businesses*. In our view it is aimed at expenses which do not normally recur, but which have the effect of creating, enhancing or disposing of a capital investment. It does not exclude expenditure which informs decision-making and the exercise of managerial discretion.
>
> 128. In a case such as this, *expenses of management are likely to be revenue expenses because the test is similar*. The expenditure was not one-off in nature because COHL had many capital investments apart from Oxxio Group, which might involve management from time to time including appraising an acquisition, disposal or restructuring, and because Oxxio Group would not necessarily be sold. We consider that the FTT was right to conclude that the Deutsche Bank and PwC expenses were not capital in nature." (Emphasis added)

118. In my judgement, the UT fell into error in that passage because they considered that the test for expenses of management and the capital expenditure test are similar. Accordingly, they considered that expenses of management are likely to be revenue

expenses. I respectfully disagree. As I have explained when setting out the correct statutory interpretation of section 1219(3)(a) of the CTA 2009, in my view the clear intention of Parliament was to carve out of the expenses of management regime those expenses which are capital in nature by reference to the well established principles which have been developed by the courts on that distinct legal question over the course of the last century.

119. Accordingly, I have come to the conclusion that this appeal should be allowed on Ground 2: the Disputed Expenditure was of a capital nature and therefore was taken out of the expenses of management regime by section 1219(3)(a) of the CTA 2009.

Conclusion

120. For the reasons I have given I would dismiss HMRC's appeal on Ground 1 (the Expenses of Management issue) but allow it on Ground 2 (the Capital Expenditure issue). In my judgement, all of the Disputed Expenditure fell within the exception in section 1219(3)(a) of the CTA 2009, including the De Brauw fees. Accordingly, there is no reason for that part of the case to be remitted to the FTT, as the UT ordered. In the result I would therefore set aside the order made by the UT and decide the underlying appeal in favour of HMRC.

Sir Launcelot Henderson:

121. I agree.

Lord Justice Newey:

122. I also agree.