Neutral Citation: [2024] UKFTT 00512 (TC)

Case Number: TC09200

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2021/16260

Interaction of s279 CTA 2010 and Part 22 CTA in calculating capital allowances – transfer of a hydrocarbon pipeline to wholly owned subsidiary – activity conducted within ring fence trade before transfer but partly outside ring fence after transfer – whether intragroup transfer of trade provisions apply and if so is it on the basis of the transfer of one or two trades – is a disposal event triggered by the use partly outside the ring fence - basis of allocation of expenditure to capital allowances pools.
Whether an election made for petroleum revenue tax caused the pipeline activity to be partly outside the ring fence trade for corporation tax before transfer to the subsidiary.

Heard on: 12-14 March 2024
Judgment date: 6 June 2024

Before

TRIBUNAL JUDGE BOWLER

Between

CATS NORTH SEA LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jonathan Peacock KC and Mr Edward Hellier of Counsel, instructed by Freshfields Bruckhaus Deringer LLP

For the Respondents: Mr Jonathan Bremner KC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appeal concerns the capital allowances treatment of the disposal by Amoco (UK) Exploration Company LLC ("Amoco") of its interest in the Central Area Transmission System North Sea Oil and Gas pipeline and associated assets ("the CATS Pipeline") to its subsidiary, the Appellant ("CNSL"), and the subsequent disposal by Amoco of its shares in CNSL to a third party purchaser. (Together those transactions are referred to as the "Disposal" below.)

2. At its core the dispute between the parties focusses on the interaction of the oil tax ring fence trade provisions with the capital allowances code. There is a subsidiary issue concerning the impact of an election made by Amoco's parent (BP) and whether that had effect not only on the application of the Petroleum Revenue Tax ("PRT") rules but also ton he application of the corporation tax ring fence trade rules to Amoco and potentially, in turn, CNSL.

BACKGROUND AND PROCEDURE

The assessments / amendments under appeal

3. CNSL appeals against the conclusions of the final closure notice issued by HMRC on 30 March 2021 in respect of CNSL's accounting period ended 31 December 2015.

BURDEN OF PROOF

4. The burden of proof rests with the Appellant to show that it is entitled to apply the capital allowances regime as claimed by it. The ordinary civil standard of the balance of probabilities applies.

EVIDENCE

5. There is a hearing bundle of 492 pages. However, all facts are agreed. The hearing proceeded by way of submissions only.

FINDINGS OF FACT

6. The agreed facts are as follows.

The Disposal

7. Amoco was a member of the group of companies headed by BP plc at all relevant times. CNSL is a UK incorporated and resident company incorporated on 6 October 2014 as a direct wholly owned subsidiary of Amoco. CNSL was dormant until 1 October 2015.

8. The CATS Pipeline was originally built to transport hydrocarbons from the Everest/ Lomond fields in the North Sea to mainland UK. BP first incurred capital expenditure in relation to the CATS Pipeline in 1990, with first throughput being achieved in May 1993. At all relevant times prior to the Disposal, the CATS Pipeline was owned as a contractual joint venture, operated by Amoco. Immediately prior to the hive-down described below, the BP group held a c.36.2% interest in the CATS Pipeline, which was held entirely by Amoco.

9. Prior to 2014, the majority (c.63.8%) interest in the CATS Pipeline was held by a third party, the BG Group (now part of the Royal Dutch Shell group). In 2013, the BG Group hived-down its interest in the CATS Pipeline to a new holding company and, in 2014, the BG Group sold the shares in that new holding company to Kellas ("the BG Disposal"), accompany ultimately controlled by Antin Infrastructure Partners Luxembourg II SARL ("Antin").

10. In July 2014, immediately after completing the acquisition of the BG Group's interest in the CATS Pipeline via the BG Disposal, Antin made an offer to buy Amoco's interest in the CATS Pipeline business.

11. The Disposal was implemented in two stages, as follows:

(1) Hive-down: The sale by Amoco to CNSL of Amoco's entire legal and beneficial interest in the CATS Pipeline and its entire legal and beneficial interest in all contracts and associated agreements that enable the transportation of hydrocarbons belonging to the fields that use the CATS Pipeline for consideration of US$1 and is referred to herein as the Hive-down. The Hive-down was implemented pursuant to a Hive-down Agreement entered into between Amoco and CNSL on 18 November 2014. Completion of the Hive-down occurred on 1 October 2015, and CNSL (which had, until that date, been dormant) began trading as at that date; and

(2) Share Sale: The sale by Amoco of the entire issued share capital of CNSL to Kellas, for consideration of approximately US$388 million and is referred to herein as the Share Sale. The Share Sale was implemented on 17 December 2015, pursuant to a Put and Call Option Agreement dated 22 April 2015 which was conditional upon completion of the Hive-down and entered into between (among others) Amoco and Kellas. Further terms in respect of the Share Sale were set out in a side letter also dated 22 April 2015.

12. At the time of the Hive-down, both Amoco and CNSL were members of the BP group (and, on that basis, other companies within that group were "associated companies" of Amoco and CNSL, for the purposes of s271 of the Corporation Tax Act 2010 ("CTA 2010")). On completion of the Share Sale on 17 December 2015:

(1) CNSL ceased to be a member of the BP group (and, consequently, the remaining members of that group ceased to be "associated companies" of CNSL for the purposes of s271 CTA 2010); and

(2) CNSL became a member of a group of companies ultimately controlled by Antin (none of which were companies holding rights authorising the extraction of oil at any place in the United Kingdom or any designated area, for the purposes of s272 CTA 2010).

Ring fence corporation tax treatment of the CATS Pipeline

13. Prior to the Hive-down, Amoco's CATS Pipeline activities involved the transportation of hydrocarbons extracted by BP group and non-BP group companies from the CATS Pipeline user fields, and the receipt of tariffs as consideration for that transportation. From the initial construction of the CATS Pipeline up to the implementation of the Hive-down, Amoco submitted its company tax returns on the basis that these activities formed part of its "ring fence trade" as defined in s 277 CTA 2010 (that is to say, an inside the ring fence trade, or "IRF trade"), because:

(1) as regards the transportation of hydrocarbons extracted under rights held by Amoco or a company associated with Amoco (i.e. other BP group companies), such activities were treated as "oil extraction activities", and thus as "oil-related activities", by virtue of ss 272(4) and 274 CTA 2010; and

(2) as regards the transportation of non-BP group hydrocarbons, Amoco was a deemed participator in the Everest field, and so, by virtue of s291(6) CTA 2010, its activities in making the CATS Pipeline available in return for tariff receipts were also treated as "oil extraction activities" (and, thus, as "oil-related activities").

14. Prior to the Hive-down, Amoco filed its company tax returns on the basis that its activities in respect of the CATS Pipeline formed part of its single IRF trade. As a result, all of the CATS Pipeline profits up to the date of the Hive-down were chargeable to corporation tax and supplementary charge at the rates applicable for IRF trades (the combined rate as at the date of the Hive-down was 50%). In computing its IRF profits during this period, Amoco claimed capital allowances at IRF rates for qualifying capital expenditure in respect of the CATS Pipeline. As at the date of the Hive-down, Amoco had incurred, IRF, a total of £167,467,319.35 of qualifying capital expenditure on plant and machinery in relation to the CATS Pipeline.

15. CNSL was not an actual or a deemed participator in the Everest field. Accordingly, during the period between the Hive-down and the Share Sale, CNSL submitted its company tax return on the basis that only CNSL's activities in transporting BP group hydrocarbons through the CATS Pipeline were treated as "oil extraction activities". That is to say, only those activities were IRF and its remaining CATS activities in transporting non-BP group hydrocarbons were outside the ring fence (or ORF). (For completeness, as a result of the partial non-IRF usage of the CATS Pipeline by a connected company following the Hive-down, Amoco was required to make a notification under section 45G of the Capital Allowances Act 2001, which had the effect that allowances which Amoco had previously claimed in the five-year period prior to the Hive-down in respect of first-year qualifying expenditure on the CATS Pipeline were withdrawn and were replaced by writing down allowances at 25%. The notification was submitted to HMRC on 18 December 2015.)

16. At the time of the Hive-down, based on estimated future throughput over the remaining economic life of the CATS Pipeline (i.e. to 2045) and BP's interests in the Andrew, ETAP, Culzean and Kinnoull fields at the time of the Hive-down, CNSL anticipated that approximately 13.55% of the total tariff income received by CNSL in respect of CATS activities would be in respect of the transportation of BP group hydrocarbons, with the remaining 86.45% in respect of the transportation of non-BP group hydrocarbons through the CATS Pipeline. These estimates were used in determining the apportionment of expenditure for capital allowances purposes in CNSL's company tax return for the accounting period ended 31 December 2015, as filed, although, for the avoidance of doubt, the parties disagree as to whether such apportionment is appropriate.

17. In practice, in the period between the Hive-down and the Share Sale, CNSL determined that 11% of tariff income received by CNSL in respect of its CATS activities related to the transportation of BP group hydrocarbons from the Andrew, ETAP, Culzean and Kinnoull fields (and so was treated in CNSL's company tax return for the accounting period ended 31 December 2015 as arising IRF), and the remaining 89% related to the transportation of non-BP group hydrocarbons (and so was treated in CNSL's company tax return for the accounting period ended 31 December 2015 as arising ORF).

18. Following completion of the Share Sale, CNSL's company tax return was filed on the basis that CNSL's CATS Pipeline activities were entirely ORF, as BP group companies ceased to be "associated companies" of CNSL for the purposes of section 272 CTA 2010, and there were no Antin group companies which transported hydrocarbons through the CATS Pipeline.

Petroleum revenue tax ("PRT") treatment of the CATS Pipeline

19. The CATS Pipeline was a "qualifying asset" of the Everest field for PRT purposes (s8 Oil Taxation Act 1983 ("OTA").

20. Although Amoco disposed of its interest in the Everest field in 2009, it remained a "deemed participator" in the field for PRT purposes for all subsequent chargeable periods by virtue of ss 98 (1) and 98(2) of the Finance Act 1999.

21. Accordingly, in the absence of making the Election (as defined below), the "tariff receipts" arising to Amoco in respect of the CATS Pipeline were chargeable to PRT (s6 OTA).

22. With effect from 1 January 1996, Amoco made an election under s231(1) of the Finance Act 1994 in respect of the CATS Pipeline (the "Election").

23. By virtue of s233(1) Finance Act 1994, the effect of the Election was that tariffs received by Amoco in respect of the transportation of hydrocarbons from non-PRT fields through the CATS Pipeline would not be regarded as a "tariff receipt" for the purposes of the Oil Taxation Acts. Accordingly, only tariffs received by Amoco in respect of the transportation of hydrocarbons from PRT fields would be chargeable to PRT.

AGREED ISSUES

24. The parties have agreed that the appeal raises the following issues.

Questions of law on which the parties are agreed

25. Prior to the Hive-down, Amoco had filed its company tax returns on the basis that it was conducting a wholly-IRF trade. Following the Hive-down, CNSL's transportation of "associated company" hydrocarbons through the CATS Pipeline were IRF activities, by virtue of s272(4) CTA 2010, which were treated for the purposes of the charge to corporation tax under s279 CTA 2010 ("s279") as a separate trade, distinct from other activities carried on by the company, including ORF transportation of non-associated company hydrocarbons through the CATS Pipeline.

26. If it is not necessary to take into account the 'deeming effect' of s279 in determining whether the Hive-down represents a "transfer of a trade" for the purposes of Part 22 CTA 2010, it is common ground that the Hive-down would represent a "transfer of a trade" for the purposes of Part 22 CTA 2010, as defined in s940B CTA 2010 (as supplemented by s951 CTA 2010).

Issues for determination

27. ISSUE 1: does Chapter 1 of Part 22 CTA 2010 ("Part 22") apply in the present case?

28. ISSUE 2A: On the footing that Part 22 applies as a result of the Hive-down, what are the capital allowances consequences of the Disposal for CNSL?

29. ISSUE 2B: On the footing that Part 22 does not apply as a result of the Hive-down, what are the capital allowances consequences of the Disposal for CNSL?

30. ISSUE 3: What, if anything, is the effect of the Election on the analysis of the above Issues? If the Tribunal were to determine that the Election does have an impact on the analysis of the preceding Issues, the parties would seek to agree between themselves the specific numerical impact which this has on CNSL's tax return for the year ended 31 December 2015, reflecting the principles articulated by the Tribunal in its determination of Issue 3 (and failing agreement the parties would apply to the Tribunal for a determination of that dispute).

THE PARTIES' CASES

31. In this part of the decision I set out the key elements of the parties' cases. Each has put forward a preferred, secondary and tertiary approach. I have addressed the detailed arguments arising more specifically in the discussion section of this decision in so far as

those arguments go to the basis of this decision. The decision would be unwieldy were I to address every variation which the parties addressed in the hearing and there is limited value in so doing.

CNSL's case

32. These alternative cases assume that the Election has no effect which means that Issue 3 is answered as having no effect.

33. CNSL's preferred analysis may be summarised as follows:

(1) On the Hive-down:

(a) There is not a "transfer of a trade" (or trades), and Part 22 does not apply:

(i) Prior to the Hive-down Amoco carried on a single IRF trade, including (but not limited to) its activities in relation to CATS;

(ii) After the Hive-down of part of Amoco's IRF trade and due to the deeming effect of s.279, CNSL carried on two separate and distinct trades in relation to CATS – an IRF trade and an ORF trade; and

(iii) The deeming effect of s279, as described in (ii) above, must be taken into account when assessing the question whether s951 CTA 2010 applies;

(iv) On that basis, Part 22 cannot apply because: s.951(3) CTA 2010 does not apply in circumstances where a part trade of the transferor becomes two separate trades of the transferee; and, in any event, the two separate and distinct trades (ORF and IRF) carried on by CNSL cannot be the same trade as the part of Amoco's IRF trade that ceased on the Hive-down;

(b) In Amoco there is a disposal event under s.61(1)(a) CAA 2001 on it ceasing to own the CATS assets. This leads to a main pool balancing charge of some £2 million (being the difference between the net proceeds of sale brought in under item 1 of the table in s61(2) CAA 2001 (i.e. US$1) and the (negative) tax written down value ("TWDV") of the CATS Pipeline at the time of the sale to CNSL); and

(c) s53(2) CAA 2001 requires that, where a person carries on more than one qualifying activity (for example, an IRF qualifying activity and a separate ORF qualifying activity), expenditure relating to the different activities must not be allocated to the same pool. CNSL was therefore required to allocate the US$1 qualifying expenditure incurred on the Hive-down between its IRF and ORF pools. CNSL performed this allocation by reference to anticipated throughput over the remaining economic life of the CATS Pipeline (i.e. 13.55% IRF and 86.45% ORF).

(2) On the Share Sale there is a disposal event under s61(1)(e) CAA 2001 in relation to CNSL's IRF pool as the CATS Pipeline starts to be used for purposes other than an IRF qualifying activity. The disposal value brought in under s61(2) CAA 2001 (13.55% of which must be brought into CNSL's IRF pool) is equal to the market value of the CATS Pipeline plant and machinery, capped at historic cost by virtue of s.62 CAA 2001. As a result, there is a balancing charge in the IRF pool of c.£23 million, and corresponding expenditure qualifying for ORF capital allowances going forward.

34. In following CNSL's primary analysis the answers to the agreed issues would be:

(1) Issue 1 (whether Part 22 applies in the present case) – no, Part 22 does not apply.

(2) Issue 2A (the capital allowances consequences of the Disposal for CNSL if Part 22 applies) – is not engaged.

(3) Issue 2B (the capital allowances consequences of the Disposal for CNSL if Part 22 does not apply) – the capital allowances/corporation tax consequences are that:

(a) Amoco incurs a balancing charge of c.£2 million on the Hive-down; and

(b) CNSL incurs a balancing charge of c.£23 million on the Share Sale.

(4) Issue 3 (the effect of the Election on the analysis of these issues, if anything) – is not engaged.

35. CNSL's secondary analysis is relied upon should I conclude that section 279 is relevant when analysing the Hive-down and there is a transfer of trades (not a trade) on the Hive-down. In that situation CNSL says:

(1) On the Hive-down:

(a) There is a "transfer of trades" and Part 22 does apply:

(i) It is necessary to take into account the deeming effect of s.279 in applying s.951 CTA 2010;

(ii) The two trades transferred were CNSL's ORF trade (which was 86.45% of the relevant part of Amoco's IRF trade), and CNSL's IRF trade (which was 13.55% of the relevant part of Amoco's IRF trade); and

(b) s948(3) CTA 2010 applies to each transfer of a trade such that there are no balancing charges on either CNSL or Amoco on the Hive-down.

(2) On the Share Sale:

(a) CNSL's IRF trade ceased, leading to a disposal event in relation to its IRF pool under s61(1)(e) CAA 2001 as (from that point) the CATS assets started to be used for purposes other than the IRF qualifying activity carried on by CNSL previously. The disposal value brought in under item 7 of the table in s61(2) CAA 2001 is equal to 13.55% of the market value of the CATS plant and machinery, capped at historic cost by virtue of s62 CAA 2001. This leads to an IRF balancing charge of c.£23 million, and corresponding expenditure qualifying for ORF capital allowances going forward; and

(b) CNSL's ORF trade continued.

36. In following CNSL's secondary analysis, the answers to the agreed issues are:

(1) Issue 1 (whether Part 22 applies in the present case) – yes, Part 22 does apply to the Hive-down. It applies in light of the s.279 deeming, and there is a transfer of two trades (the IRF and ORF trades) on the Hive-down;

(2) Issue 2A (the capital allowances consequences of the Disposal for CNSL if Part 22 applies) – the capital allowances/corporation tax consequences are:

(a) No balancing charge arises as a result of the Hive-down; and

(b) CNSL incurs a balancing charge of c.£23 million on the Share Sale.

(3) Issue 2B (the capital allowances consequences of the Disposal for CNSL if Part 22 does not apply) – is not engaged.

(4) Issue 3 (the effect of the Election on the analysis of these issues, if anything) – is not engaged.

37. If I conclude that there is a transfer of a single trade on Hive-down CNSL says:

(1) On the Hive-down:

(a) s.948(3) CTA 2010 applies to the transfer of the single trade such that there are no balancing charges in either CNSL or Amoco; and

(b) By virtue of s948(2) CTA 2010, CNSL inherits the TWDV of the CATS assets from Amoco and allocates this between IRF and ORF single asset pools by reference to anticipated throughput over the remaining economic life of the CATS plant and machinery (i.e. 13.55% IRF and 86.45% ORF).

(2) On the Share Sale there is a disposal event under s61(1)(e) CAA 2001 in relation to CNSL's IRF pool as (from that point) the CATS assets start to be used for purposes other than the IRF qualifying activity carried on by CNSL previously. The disposal value brought in under item 7 of the table in s61(2) CAA 2001 (13.55% of which must be brought into CNSL's IRF pool) is equal to the market value of the CATS plant and machinery, capped at historic cost by virtue of s62 CAA 2001. As a result, there is a balancing charge in the IRF pool of c.£23 million, and corresponding expenditure qualifying for ORF capital allowances going forward.

38. In following CNSL's tertiary analysis, the answers to the agreed issues are:

(1) Issue 1 (whether Part 22 applies in the present case) – Yes, Part 22 does apply and there is a transfer of a (singular) trade on the Hive-down;

(2) Issue 2A (the capital allowances consequences of the Disposal for CNSL if Part 22 applies) – The capital allowances and corporation tax consequences are:

(a) No balancing charge arises as a result of the Hive-down; and

(b) CNSL incurs a balancing charge of c.£23 million on the Share Sale.

(3) Issue 2B (the capital allowances consequences of the Disposal for CNSL if Part 22 does not apply) – Is not engaged.

(4) Issue 3 (the effect of the Election on the analysis of these issues, if anything) – Is not engaged.

39. In short CNSL says that the Election means that in fact Amoco was carrying on an IRF and ORF trade before the Hive-down. If I conclude that CNSL is correct on the effect of the Election CNSL says that:

(1) In relation to its preferred case (that Part 22 does not apply) there is no effect. The trades in Amoco are not the same and are not constituted of the same activities as the trades in CNSL;

(2) In relation to its secondary case (that there is a transfer of two trades within Part 22) the Election has no effect on the analysis;

(3) The tertiary analysis (a transfer of a single trade) can no longer be considered as there would necessarily have been a transfer of two trades by Amoco.

HMRC's Case

40. The core of HMRC's case is that disposal events within the meaning of s61(1) CAA 2001 have arisen in relation to the CATS Pipeline in CNSL's accounting period ending 31 December 2015. As a result, capital allowances balancing charges arise for CNSL and CNSL's chargeable profits for corporation tax purposes have therefore been understated.

41. In addition, HMRC maintain that the Election did not cause Amoco to be carrying on an IRF and ORF trade in relation to the CATS Pipeline for Corporation Tax purposes. Consequently under each of their preferred analyses HMRC says that the Election has no effect.

42. HMRC's preferred analysis is:

(1) On the Hive-down

(a) the Hive-down on 1 October 2015 constituted a transfer of a trade within Part 22 CTA 2010 such that there was no disposal event.

(b) CNSL inherited the TWDV of Amoco;

(2) usage of the CATS Pipeline by CNSL:

(a) CNSL's use of the CATS Pipeline otherwise than wholly for the purposes of a ring fence trade was a disposal event for capital allowances purposes (s61(1) CAA); and

(b) that disposal event gave rise to a balancing charge for capital allowances purposes of £169,197,035.

(3) On the share sale there was no disposal event.

43. HMRC's secondary case is:

(1) On the Hive-down:

(a) CNSL's inside the ring fence (lRF) and outside the ring fence (ORF) trades must be analysed separately for the purposes of Part 22 CTA 2010;

(b) there was, in effect, a transfer of two part trades to CNSL by Amoco: one part which CNSL begins to carry on as IRF trade; and one part which CNSL begins to carry on as ORF trade. Part 22 therefore applies;

(c) section 952 CTA 2010 requires the "just and reasonable" apportionment of the relevant assets which would be 13.55% allocated to the IRF trade and 86.45% allocated to the ORF trade; and

(d) this gives rise to a disposal event for the ORF assets as they start to be used for purposes other than the IRF qualifying activity;

(2) On the share sale there is a further market value disposal event on the cessation of the IRF trade.

(3) Taking both disposal events together a balancing charge of £169,197,035 would arise.

44. HMRC's tertiary case is:

(1) On the Hive-down there is not a "transfer of a trade" (or trades) and Part 22 does not apply;

(2) CNSL was wrong to apportion the $1 consideration for the Hive-down between an IRF pool and an ORF pool. $1 should be allocated to each pool; and

(3) On the sale of CNSL there was a cessation of CNSL's ring fence trade which constituted a disposal event and gave rise to a balancing charge of £166,094,088.

THE LEGISLATION

45. The concept of a separate IRF trade is provided in particular in this case by s279 which states that:

> "If a company carries on any oil-related activities as part of a trade, those activities are treated for the purposes of the charge to corporation tax on income as a separate trade, distinct from all other activities carried on by the company as part of the trade."

46. As explained above, it is agreed by the parties that when the definition of oil-related activities is worked through the operation of the CATS Pipeline was entirely IRF for Amoco (subject to the dispute about the application of the Election dealt with later in this decision); and was partly IRF and partly ORF for CNSL.

47. Where a company ceases to carry on a trade, cessation rules apply. Where that is in the context of a sale of the trade to another company the starting point is that there is no succession to the transferor's losses and capital allowances.

48. However, Part 22 "contains rules for cases where a trade is transferred between companies meeting stated ownership conditions who are within the charge to tax" (see s940A(1)) CTA 2010). (The parties agree that the ownership and tax conditions are met.)

49. Section 940B CTA 2010 defines a "transfer of a trade" as occurring if "on a company ceasing to carry on a trade, another company begins to carry it on" (s940B(2)).

50. Section 951 CTA 2010 is a deeming provision that extends the core provisions of s940A to situations beyond that arising where a transferor transfers its trade to the transferee who carries it on. It expressly covers:

(1) the transferor ceasing to carry on a trade and the transferee beginning to carry on those activities as part of its trade (s951(1)); and

(2) the transferor ceasing to carry on a part of a trade and the transferee beginning to carry on those activities as its trade or as part of its trade (s951(3)).

51. In each case the legislation causes the transfer to fall within the definition of a "transfer of a trade" in s940B CTA 2010) by deeming the rules to have effect as if the transferor carried on the trade or part trade as a separate trade. In this case Amoco transferred part of its trade to CNSL. The relevant provisions in s951(3) and (4) CTA 2010 provide as follows:

> "(3) Subsection (4) applies (subject to subsection (5)) if-
>
> (a) a company ("the transferor") ceases to carry on a part of a trade ("part Y") and another company ("the transferee") begins to carry on the activities of part Y as its trade or as part of its trade, and
>
> (b) there would have been a transfer of a trade… from the transferor to the transferee had the transferor been carrying on part Y as a separate trade.
>
> (4) This Chapter has effect as if the transferor had carried on part Y as a separate trade."

52. Section 952 CTA 2010 provides for apportionment if, when applying s951, part of the trade is treated as a separate trade for the successor:

> "(1) If part of a trade is treated as a separate trade in accordance with section 951(2) or (4), just and reasonable apportionments are to be made of receipts, expenses, assets and liabilities."

53. When the Part 22 rules apply the operation of the capital allowances code in CAA 2001 (which would otherwise result in a balancing charge or allowance arising on the cessation of the use of the assets) is altered. Section 948 CTA 2010 provides:

> "(3) A transfer of assets from the predecessor to the successor does not of itself give rise to any allowances or charges if—
>
> (a) the transfer of the assets is made on the transfer of the transferred trade, and
>
> (b) the assets are in use for the purposes of that trade.
>
> (4) For the purpose of determining the amount of the allowances or charges mentioned in subsection (2) to be made to the successor—
>
> (a) the successor is to be treated as if it has been carrying on the transferred trade since the predecessor began to do so, and
>
> (b) anything done to or by the predecessor is to be treated as having been done to or by the successor."

Capital Allowances Code

54. Section 11 CAA 2001 sets out the general conditions for the availability of allowances:

> "(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
>
> (2) "Qualifying activity" has the meaning given by Chapter 2.
>
> (3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on."

55. Section 162 CAA 2001 provides that if a person carries on a ring fence trade, it is "a separate qualifying activity for the purposes of this Part".

56. Carrying on a ring fence trade is defined (as far as relevant) as meaning activities which fall within the definition of "oil -related activities" in s274 CTA 2010 and which constitute a separate trade (whether as a result of s279 CTA 2010) or otherwise.

57. Therefore an IRF trade and an ORF trade are separate qualifying activities.

58. Both s11 CAA 2001 and s162 CAA 2001 are in the same Part of the Act, i.e. Part 2.

59. Section 53 CAA 2001 sets out rules regarding the pooling of expenditure:

> "(1) Qualifying expenditure has to be pooled for the purpose of determining a person's entitlement to writing-down allowances and balancing allowances and liability to balancing charges.
>
> (2) If a person carries on more than one qualifying activity, expenditure relating to the different activities must not be allocated to the same pool."

60. Section 206 CAA 2001 requires qualifying expenditure which is incurred partly for the purposes of a qualifying activity and partly for other purposes to be allocated to a single asset pool. More particularly the provision states:

> "(1) Qualifying expenditure to which this subsection applies, if allocated to a pool, must be allocated to a single asset pool.
>
> (2) Subsection (1) applies to qualifying expenditure incurred by a person carrying on a qualifying activity-
>
> (a) partly for the purposes of the qualifying activity, and
>
> (b) partly for other purposes.

> (3) If a person is required to bring a disposal value into account in a pool for a chargeable period because the plant or machinery begins to be used partly for purposes other than those of the qualifying activity, an amount equal to that disposal value is allocated (as expenditure on the plant or machinery) to a single asset pool for that chargeable period."

61. Section 207 CAA 2001 provides for adjustment of allowances and charges to reflect, in particular, the use of plant and machinery in a chargeable period for purposes other than those of a person's qualifying activity:

> 207 Reduction of allowances and charges on expenditure in single asset pool
>
> (1) This section applies if a person's expenditure is in a single asset pool under section 206(1) or (3).
>
> (2) The amount of—
>
> (a) any writing-down allowance or balancing allowance to which the person is entitled, or
>
> (b) any balancing charge to which the person is liable,
>
> must be reduced to an amount which is just and reasonable having regard to the relevant circumstances.
>
> (3) The relevant circumstances include, in particular, the extent to which it appears that the plant or machinery was used in the chargeable period in question for purposes other than those of the person's qualifying activity.

62. Section 61 CAA 2001 sets out when disposal events arise for capital allowances purposes. So far as relevant it states:

> (1) A person who has incurred qualifying expenditure is required to bring the disposal value of the plant or machinery into account for the chargeable period in which—
>
> … (e) the plant or machinery begins to be used wholly or partly for purposes other than those of the qualifying activity
>
> …
>
> (f) the qualifying activity is permanently discontinued.

63. A table sets out the values to be brought into account and it is agreed that if s61(1)(e) applies the amount is the market value of the plant or machinery at the time of the event (Item 7 of the table). Section 62 CAA 2001 caps the market value at historic cost.

DISCUSSION

64. I am particularly grateful to the parties for their clear presentation of their cases including the provision of summary flowcharts by CNSL.

Comment and structure of this decision

65. This is a complex case, but aside from consideration of the effect, if any, of the Election there are two key points which may be helpful to note in summary form at this point:

(1) the primary difference between the parties is the extent to which it is said that the provisions of s279 CTA 2010 should be applied in applying Part 22; and

(2) in HMRC's preferred and secondary cases it is submitted that the Hive-down should be considered separately from the usage by CNSL of the assets thereafter. Mr Peacock submitted that this begs the question as to when the separation of the assets into the IRF and ORF trade in CNSL takes place: is it before the Hive-down, at the

same time as the Hive-down, or a scintilla of time after the Hive-down, given that it is a legal impossibility for CNSL to be treated as having a wholly IRF trade. Mr Bremner submitted that no such issue arises as the application of Part 22 to the Hive-down is separate from the consideration of using the plant and machinery for ORF activity.

66. With that in mind and having regard to the fact that some of the issues which were raised by the parties and addressed in the hearing fall aside by virtue of my conclusions, I will order the issues in the following way:

(1) Does Part 22 apply to the Hive-down?

(2) Does the usage by CNSL of the plant and machinery for the ORF trade trigger a disposal event under s61 CAA?

(3) On the basis that Part 22 does apply and there is a disposal event what plant and machinery pools should CNSL set up and what expenditure should be allocated to those pools?

(4) What is the effect of the sale of CNSL on CNSL's capital allowances position given that it then ceased to carry on any IRF activity?

(5) What is the effect of the CATS Election on these issues?

67. I was invited by Mr Peacock to address all issues whether forming part of my decision or not. As noted earlier, I have decided that doing so would make this decision unwieldy and the value in doing so is extremely limited.

General approach

68. As Mr Peacock comments in his skeleton argument, the determination of this dispute requires the consideration of a series of complex questions of statutory interpretation in respect of which the parties propose a number of alternative, interlocking, analyses. In making my decision I am required to consider the statutory language in context and so as to give effect to the purpose of Parliament in enacting the relevant provisions as made clear most recently by the Supreme Court in *R (on the application of AAA (Syria) & Ors) v Secretary of State for the Home Department* [2023] UKSC 42 at [129]. That purposive approach to the construction of the legislation is one which I address at various points in the discussion below.

Does Part 22 apply to the Hive-down?

69. The first of the questions and upon which the parties' cases turn fundamentally is whether Part 22 applied on the Hive-down.

70. I have concluded that Part 22 does apply and that it does so on the basis of the transfer by Amoco of part of its trade to CNSL for the following reasons.

71. The parties agree that the ownership and tax conditions of Part 22 apply in this case. There has been a transfer from a parent to a wholly owned subsidiary.

72. Furthermore, the parties agree that if it were not for the question regarding the application of s279 it would be clear that Part 22 applies: Amoco transferred part of its trade – that involving the transportation of hydrocarbons through the CATS Pipeline - to CNSL and CNSL carried on that part of the trade as trading activity.

73. The tension arises from the fact that what was transferred by Amoco to CNSL was part of Amoco's IRF trade but CNSL could not at any time carry it on wholly as an IRF trade. Section 279 says that oil-related activities are treated as a separate trade. Therefore in accordance with s279 CNSL carries on an IRF trade and an ORF trade ab initio on the Hive-down.

74. Mr Peacock submitted that:

(1) Part 22 does not envisage the transfer of a part of a trade which is carried on as two trades by the transferee;

(2) CNSL did not begin to carry on the activities of part of Amoco's IRF trade as those were all oil-related activities for Amoco whereas CNSL was carrying on two distinct forms of activity: IRF and ORF; and

(3) Amoco's IRF trade encompassed activities transporting both BP and non-BP group hydrocarbons whereas CNSL's IRF trade only comprised the transportation of BP group hydrocarbons (as the non BP group hydrocarbons did not fall within the definition of IRF trade). It was therefore not the same trade before and after the transfer.

75. The fundamental issue therefore is whether s279 should be applied in the context of Part 22 such that the Hive-down falls outside the scope of Part 22. Mr Peacock submitted, in essence, that s279 is stated to apply for corporation tax purposes and there is no exception for the application of Part 22. Indeed, he submitted that it is relevant that other provisions within Part 22 (namely ss.944D and 944E) make specific provision for IRF trades. These provisions deal with the modification of the transfer of trades rules in the context of decommissioning or non-decommissioning losses.

76. I note that ss944D and 944E (dealing with transfer of losses on a transfer of a trade) were only introduced with effect from 1 April 2017, after the accounting period with which this appeal is concerned. Neither party sought to say that the provisions influence the interpretation of s940B, s948 or s951 beyond Mr Peacock submitting that their existence means that it is contemplated that Part 22 deals with the transfer of ring-fenced trades. However, I do not consider that this takes the question of how Part 22 applies in this context much further forward. HMRC are not arguing that a ring-fenced trade is outside the provisions of Part 22. Clearly the draftsman of Part 22 was aware of issues relating to the specific ring fence regime but that does not mean in itself that s279 should be interposed in the manner sought by CNSL. Instead, the matter comes down to the manner in which Part 22 is applied in the context of a trade which is ring-fenced when conducted by the transferor and IRF and ORF when conducted by the transferee.

77. I agree with Mr Peacock that s279 applies for the charging of corporation tax on income, and calculating capital allowances is part of the way in which that charge is calculated. Indeed, s162 CAA (which states that where a person carries on an IRF trade it is a separate qualifying activity) does so by referring to a ring fence trade as activities which fall with the CTA 2010 definition of oil-related activities and constitute a separate trade whether as a result of s279 CTA 2010 or otherwise.

78. Regarding Mr Peacock's submissions that Part 22 does not envisage the transfer of a trade (or part) which is then carried on as two trades by the transferee, I agree with Mr Bremner's submissions that the normal approach to statutory drafting (in accordance with s6(c) Interpretation Act 1978) is that reference to "trade" in s951 CTA 2010 can include "trades". Consequently, s951(3)(a) CTA 2010 can be read as: "a company ("the transferor") ceases to carry on a part of a trade ("part Y") and another company ("the transferee") begins to carry on the activities of part Y as its trades." Therefore even when one applies s279 in relation to CNSL on the Hive-down, the result of CNSL carrying on two trades ab initio is a matter which is within the scope of s951(3).

79. Coming back to the purpose of Part 22 to facilitate intra-group reorganisations where the same business is carried on by two group companies and both the transferor and

transferee can be said to be trading when carrying on that business, I see no reason why the split into two trades – especially where that is a matter of tax legislation deeming, in this case by s279 CTA – should offend that underlying purpose.

80. Mr Peacock submits that this conclusion does not work under s951 CTA 2010 because:

(1) s940B CTA 2010 states that there is a transfer of a trade where a company ceases to carry on a trade and another company begins to carry it on. That is therefore restricted to considering whether the same trade as carried on by Amoco was carried on by CNSL. It was not and could not be because CNSL could not carry on the trade as wholly IRF as Amoco had;

(2) Even if the approach of Millett J in *Falmer Jeans* was applied as HMRC submit, the focus is on whether the same activities were carried on by Amoco and CNSL, but CNSL could never carry out the "oil -related activities" as Amoco did within its IRF trade.

81. In relation to the first of those submissions I agree with Mr Bremner that s951 extends s940B. It is therefore wrong to apply the narrow interpretation of the words in s940B in isolation. Section 951(3) provides the route for the transfer of part of a trade to come within the scope of the Part 22 provisions and the interpretation described relying upon the Interpretation Act is not excluded by s940B.

82. Turning to the second submission regarding the nature of the "activities", it is necessary to consider the case of *Falmer Jeans*. Falmer Manufacturing ("FM") took cloth given to it by Falmer Jeans and manufactured jeans, for which it was paid a cost-plus payment. FM then transferred its trade to Falmer Jeans by way of sale and there was then a question as to whether Falmer Jeans could use the losses that had been made by FM. After the transfer Falmer Jeans had separate internal accounts for the manufacturing activity to which it accorded a margin, and for the retail sale of jeans. The question was whether Falmer Jeans obtained the benefit of FM's losses. The Special Commissioners had decided that Falmer Jeans did not obtain the losses. Their decision had focussed on whether the trade had been transferred rather than the activities of the trade. In FM there was a trade resulting from the costs-plus nature of the manufacture and payment but in Falmer Jeans itself the activities were subsumed within the existing trade of the sale of the jeans. The Special Commissioners' approach was said to be wrong by Mr Justice Millett.

83. Mr Justice Millett reviewed the existing authorities considering the legislation preceding s951 CTA 2010 i.e. s252 of the Income and Corporation Taxes Act 1970 ("ICTA 1970") (which had later become s343 of the Income and Corporation Taxes Act 1988). The provisions in Part 22 are those resulting from the tax law rewrite which the parties agree was supposed not to change the substance of the law. Mr Peacock did not seek to argue that s252 ICTA 1970 was different in substance from the provisions contained in Part 22.

84. Mr Justice Millett concluded that:

> "The solution adopted … is to concentrate on the trading activities and not the trade: to treat the trading activities which the successor begins to carry on as if they were a separate trade; to apportion part of the successor's receipts to the notional separate trade which it has begun to carry on, and then to apply subs (1) with any semantic considerations which may be involved in that application to that notional separate trade."

85. He set out a detailed explanation of how the provisions should be applied. He started by considering the operation of s252(1) ICTA 1970 which contained the provisions dealing with the situation where the predecessor has ceased to carry on a trade and the successor has

begun to carry it on (i.e. the predecessor to s940B CTA 2010). He then considered s252(7) ICTA 1970 which dealt with the transfer of part of a trade where the successor carried on that part as its trade or as part of its trade (i.e. the predecessor to s951 CTA 2010) at p281 j:

> (4) …The first limb of the subsection must, on analysis, be dealing with a situation where (a) the successor has begun to carry on `the activities of the trade' of the predecessor as part of its trade but has not begun to carry on `the trade' of the predecessor as part of its trade (or sub-s (1) would cover it); and (b) the case can be brought within sub-s (1) by treating that part of the successor's a trade as a separate trade. This alone shows that `the activities of the trade' is not merely a synonym for `the trade'. A major purpose of the subsection is to deal with the situation where the carrying on of the former does not constitute the carrying on of the latter…Whereas the application of sub-s (1) is or may be affected by the way in which the relevant trade is described, sub-s (7) by contrast directs attention to the trading activities themselves. Under sub-s (7), they are to be identified, not described.
>
> (5) The Crown submitted that `the activities of the trade' means `all the activities of the trade'. I disagree. It means sufficient of them (a) to be capable of being treated as a separate trade and (b) to satisfy the commissioners that, if so treated, that separate trade is the same trade as that formerly carried on by the predecessor.
>
> (6) The deeming provision has effect `for the purposes of this section' i.e. sub-s (1)... It is not therefore introduced solely in order to restrict the availability of losses carried forward so that they may be set off only against future profits of the notional new separate trade (though it has that effect), but also to require sub-s (1) to be applied, not to the whole of the successor's trade, but to the notional new separate trade. .. in describing the successor's trade it will be the notional new separate trade created by the deeming provision which will fall to be described. ...

86. Mr Justice Millett then turned to s252(8) ICTA 2010 which was the predecessor of s952 CTA 2010:

> (7) Finally, and to my mind most significantly, sub-s (8) provides that where any of the deeming provisions of sub-s (7) come into operation, any necessary apportionment shall be made of receipts or expenses. The reference to the apportionment of receipts is of the first significance. It throws a flood of light on sub-s (7). It shows, above all, that the requirements of sub-s (7) (that the predecessor has ceased to carry on a trade and the successor has begun to carry on the activities of the trade as part of its trade) may be satisfied even though the trading activities in question are no longer turned to account or charged for separately by the successor but are absorbed into a single trade in which profits are realised by receipts which do not distinguish between the various activities by which they are earned.

87. This led Mr Justice Millett to conclude (at p282h):

> “a major purpose of the sub-section is to carry forward relief in situations not covered by subs (1); specifically in situations where (i) the trading activities formerly carried on by the predecessor are carried on by the successor but would be differently described when the successor's trade is described as a whole.”

88. Applying these principles to the case before him, Mr Justice Millett said that sub-s (7) was brought into operation and, importantly, that when sub-s (1) was then applied to “the notional separate trade thereby created”, it was obvious that the two trades were identical. He explained, however, that the trades carried on by FJ and FM did not operate identically: FJ

did not make up its customers' cloth to its customers' specifications, but its own cloth to its own requirements; and FJ did not charge its customers a separate fee for the manufacturing activities which it had begun to carry on. However, it carried on the activities for reward. The activities formed part of FJ's trade. It was impossible to identify any physical activity of the trade formerly carried on by FM which was not undertaken by FJ, except the charging of a fee.

89. I therefore agree with Mr Bremner that the focus is on the activities carried on by Amoco and then CNSL. A reference to activities is explained by Mr Justice Millett as referring to what is in fact done. Mr Justice Millett specifically envisaged a situation where the activities are differently described in the predecessor and successor.

90. When one considers the situation in this case the "activities" as referred to by Millett J are in substance the same for Amoco before the Hive-down and CNSL after the Hive-down as a matter of fact. CNSL in fact provides the CATS Pipeline for the transportation of BP group and non-BP group hydrocarbons as Amoco did. The difference is the effect of the corporation tax oil rules on the charging of those two parts of the activity. Just as the fact that in *Falmer Jeans* the activities were subsumed within Falmer Jeans trade and were not a separate trade, so in this case the activities carried on by Amoco as one trade become split into two deemed trades (by virtue of s279). I agree with Mr Bremner that s951 is concerned with the activities actually carried on. It is not restricted by the classification for tax purposes of those activities. Instead, as Millett J made clear it is the "notional trade" which must be considered and whether the activities comprising that notional trade are the same.

91. Mr Peacock submits that *Falmer Jeans* is simply not relevant as it does not concern oil activities and the specific rule contained in s279. In addition, he says that it is wrong to rely on *Falmer Jeans* to conclude that the activities must be considered as a matter of fact with no further qualification arising from s279, given that s279 itself specifically refers to "activities". He submitted that the consequence of s279 is that the oil related activities (IRF) are a separate trade and this therefore provides the start and end point for the analysis under Part 22. Amoco transferred part of its trade and that part was wholly IRF. When the assets were held by CNSL they were used partly for ORF. Therefore the provisions of Part 22 could not be satisfied as the result of s279 is that the activities are different for predecessor and successor. In particular, the successor, CNSL could never carry on the activities in the same way as Amoco because it could not carry on a wholly IRF trade.

92. I agree with Mr Bremner that this takes the effect of s279 too far for the following reasons.

93. The parties agree that both s279 and s951 are deeming provisions but differ as to the way in which the deeming should apply here. Both parties have relied on the case of *Fowler v HMRC* [2020] UKSC 22 as setting out the approach to deeming provisions. At paragraph 27 Lord Briggs said:

> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of artificial assumption which the deeming provision requires to be made.

> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury BC* [1951] 2 All ER 587 at 599, [1952] AC 109 at 133:
>
> 'The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'

94. The parties agree that the purpose of s279 is clearly as an adjunct to s274 to create the ring fence so as to apply the special rules and the special higher rates of tax and create a separate trade even if there are other non-oil related activities. However, Mr Peacock submits that in so doing Parliament has made it abundantly clear what the extent of the deeming is: it is "for the purposes of the charge to corporation tax on income". That is a purpose without relevant qualification.

95. However, I agree with Mr Bremner that as Mr Peacock submits the purpose of s279 is to apply the special rules and the special higher rates of tax to the IRF activities and it is this purpose which should be focussed upon. It specifically applies where a company carries on oil-related activities as part of a trade and it then carves those activities out as a separate trade for the application of the more limiting rules which follow and the higher rates of tax. To my mind, that is re-enforced by reference to the treatment as a separate trade being for the purposes of the "charge" to corporation tax on income as a separate trade. That focus on the charge to tax is then followed through in the subsequent provisions contained in ss279A, 279B and 279C CTA 2010. As Mr Bremner submitted the ring fence regime is in essence therefore concerned with the calculation of the charge to corporation tax.

96. I agree with Mr Peacock that capital allowances form part of the calculation of the corporation tax charge, but when considering the interaction with Part 22 (where that interaction is not expressly stated in the legislation) the purpose of s279 must be set alongside the purpose of Part 22. Part 22 provides rules to allow restructuring within a group of companies such that a trade (or part thereof) can be moved from one group company to another without triggering capital allowance charges and preserving the continuity of losses and capital allowances.

97. Inevitably, as in *Falmer Jeans*, the two group companies may carry on the activities of that trade or part trade differently and the focus is therefore on considering the activities of the notional trade to consider whether those are the same. Here the activities are still being carried on by CNSL such that what Millett J described as the notional trade is the same for both it and Amoco. As a matter of fact, CNSL was carrying on the activities of part of Amoco's trade.

98. This conclusion also means that the intragroup transfer does not produce unexpected results for a group transfer – the TWDV is inherited by CNSL and CNSL is treated as if it had been carrying on the transferred trade since Amoco began to do so. It is then a question as to whether CNSL's use of the assets gives rise to a disposal event just as it would be necessary to ask if there had been no transfer and a change of use by Amoco.

99. Mr Peacock submits that it is wrong to focus on "activities" in this way. He submits that s279 specifically applies in relation to the "activities" of the company and requires those

activities to be considered as "distinct from all the other activities" of the company, whilst also badging those activities as a "separate trade".

100. However, I agree with Mr Bremner that s951 CTA 2010 deems a notional trade is transferred where, as a matter of fact, the activities carried out by the transferor and transferee are the same. The activities may then be viewed through the s279 prism for the purposes of applying the specific charging regime to which s279 is directed, but that is a separate process to consideration of whether Part 22 applies.

101. Mr Peacock submitted that the word "activities" is used in both s951 CTA 2010 and s279 and must be assumed to have the same meaning. Consequently, when applying s951 CTA 2010 the reference to "activities" must be interpreted in line with the direction given in s279 when the very same concept is described. While it is clear that both sections use the same word, I consider that again the purpose of the use of each section must be taken into account in using the term. Section 951 CTA 2010 is concerned to identify whether a trade continues to be carried on; section 279 deals with the tax charge applicable to an ORF trade. Therefore the fact that "activities" is used in both does not undermine the conclusions reached above.

102. Therefore I conclude for the reasons stated that Issue 1 is answered yes – Part 22 applies to the Hive-down either on the basis that:

(1) the transfer of a part trade which is conducted as two trades by the transferee is within s951 CTA 2010; or

(2) the deeming of two trades under s279 does not alter the fundamental conclusion that there was a transfer of part of a trade to which Part 22 applies.

CNSL's capital allowances following the Hive-down

103. Mr Peacock submits the correct analysis is that on Hive-down if Part 22 applies, CNSL should be treated as inheriting the TWDV of Amoco and allocating it to two separate IRF and ORF capital allowances pools, apportioning by reference to anticipated throughput of the CATS Pipeline. I consider that this misses the step of the transfer of the tax written down value from Amoco to CNSL and the application of the disposal event provisions contained in s61 CAA.

104. I consider that to split the plant and machinery into two trades under s951 is inconsistent with the conclusion I have already reached that s279 is not to be applied within the deeming provisions of s951 CTA 2010. I conclude that consistent with Mr Justice Millett's approach there is one "notional" trade transferred to CNSL by Amoco and acquired by CNSL even though CNSL carries it on as two trades by virtue of s279. Section 951 CTA 2010 does not look beyond whether the successor, CNSL, has stepped into the shoes of Amoco in relation to the capital allowances position relating to the CATS Pipeline. I see no problem as a matter of logic with concluding that CNSL inherits the TWDV of Amoco with the capital allowances inherited on the basis of one trade having been transferred, recognising in so doing that the tax consequences of the transfer itself are distinct from the tax consequences of use of the assets. It is then a question of whether that inherited position is continued or is altered by virtue of what CNSL does, or more particularly is deemed to do, with the CATS Pipeline. For the reasons I explain more fully below that is then applying the capital allowances code consistently.

105. The effect of s951 CTA 2010 applying is that CNSL as successor is to be treated under s948 as if it has been carrying on the transferred trade since Amoco began to do so, and anything done to or by Amoco is to be treated as having been done to or by CNSL. I struggle to find a way to read this provision to say that allocation to two pools for IRF and ORF is

permitted under s948 given that Amoco did not allocate the CATS Pipeline other than to the IRF pool. Instead, I consider that it is the role of other provisions in the CAA 2001 to deal with the fact that CNSL carries on IRF and ORF trades, as I explain later.

106. Section 61(1)(e) CAA 2001 applies where plant or machinery begins to be used wholly or partly for purposes other than those of the qualifying activity.

107. The qualifying activity of Amoco was the IRF trade carried on by it. I have decided that CNSL is given the TWDV of the CATS Pipeline under s951 when it acquires and starts to carry on the "notional trade". However, in starting to carry on the CATS Pipeline business, CNSL begins to use the CATS Pipeline for an ORF trade as well as the IRF trade. Both parties agree that the IRF trade and the ORF trade are separate qualifying activities.

108. Starting to use the plant and machinery for purposes which are not wholly IRF qualifying activity therefore triggers a disposal event under s61 CAA 2001. The value to be taken into account as the disposal value on that event is the market value of the assets capped at historic cost (i.e. the inherited historic cost of Amoco).

109. Mr Peacock submitted that CNSL did not "begin" to use the plant and machinery for purposes other than that of the IRF qualifying activity because to begin required that something else was done with the assets first and CNSL could never use them wholly for the IRF qualifying purpose.

110. I do not agree that "begin" indicates something happening before. As a matter of normal language "begin" means "perform or undergo the first part of an action or activity" (Oxford English Dictionary). CNSL "began" to use the CATS Pipeline for an ORF trade as soon as it acquired the CATS Pipeline.

111. In addition, as Mr Bremner submitted, CNSL is treated under s948 as having carried on the transferred trade since Amoco began to do so. Mr Peacock submits that this is an illustration of the error in applying Part 22 as CNSL could never have carried on the trade as Amoco did as it was not a deemed participator in the Everest field. However, I see little reason why for the application of Part 22 the effects of other tax computational provisions identifying what is and what is not an IRF trade should be relevant. As I have said previously, to do so is inconsistent with the approach set out by Mr Justice Millett in *Falmer Jeans*. Therefore, if this was necessary, Mr Peacock's submission regarding "begins" is answered by CNSL inheriting Amoco's "beginning".

112. I therefore conclude that there is a disposal event under s61 CAA 2001 on CNSL beginning to use the CATS Pipeline for ORF activities. The value to be brought into account is the market value of the plant and machinery capped at the historic cost of £167 million. That historic cost was the basis on which the capital allowances had been claimed by Amoco. The calculations resulting from the bringing into account of the £167 million are not in dispute. The tax written down value of the CATS Pipeline was -£2 million and therefore there would be a balancing charge of £169,197,035 just as there would have been if Amoco had sold the CATS Pipeline for its market value.

Context of the conclusions reached so far

113. Mr Peacock submitted that this case addresses highly technical legislation where no objectively "right" answer is apparent. He called into question HMRC's apparent high-level analysis in correspondence to the complex interactions. However, I consider that having reached my conclusions of the matter technical analysis it is appropriate to stand back and consider how the conclusions fit within the tax code framework.

114. If Amoco had retained the plant and machinery and had started to use it for purposes other than its IRF qualifying activity a disposal event would have arisen.under s61 CAA.

The market value of the assets capped at historic cost would have been brought into account. Under CNSL's analysis the plant and machinery moves from being used in the IRF trade qualifying activity to being used in the IRF and ORF qualifying activities with dramatically different consequences simply as a result of an intragroup transfer for a consideration of $1.

115. Under CNSL's preferred analysis, s951 CTA 2010 did not apply on Hive-down and the sale of the CATS Pipeline to CNSL was a disposal event such that Amoco brought into account only the $1 consideration under s61 CAA 2001. Alternatively, even if Part 22 applies the TWDV of Amoco is immediately apportioned between two pools for IRF and ORF activity in CNSL so that carrying on the ORF activity does not trigger a disposal event. Somehow, simply by virtue of the Hive-down, the plant and machinery can start to be used for purposes other than the qualifying activity of the IRF trade without the tax consequences which would have arisen if that change has taken place in Amoco. Furthermore, as Mr Bremner submits, CNSL's analysis would leave them with tax depreciation of more than 65% of the cost, despite the fact that the CATS Pipeline had not depreciated in value.

116. There is no good reason why the interaction with the rules contained in s279 should have the result that the basic structure of the capital allowances code is side-stepped by interposing a subsidiary. I agree with the submission of Mr Bremner that this would be a perverse result. I consider that clear wording to achieve that result would be needed and no such wording has been identified. In *Fowler* terms the deeming effect of s279 would go too far and would produce "unjust, absurd or anomalous results". (I recognise that these contextual considerations are altered if the CATS Election is considered to have the effect of causing Amoco to have had an IRF and ORF trade prior to the Hive-down, but for reasons I explained later I have concluded that the CATS Election did not have such effect.)

The operation of the capital allowance pooling rules

117. CNSL has two qualifying activities: the IRF activity and the ORF activity from Hive-down. Section 11 CAA 2001 requires that allowances under Part 2 of the CAA 2001 (i.e. the part dealing with plant and machinery allowances) must be calculated separately for each qualifying activity which a person carries on. In addition, where a person carries on more than one qualifying activity s53(2) CAA 2001 provides that expenditure relating to the different activities must not be allocated to the same pool. Therefore there must be an IRF pool and an ORF pool. Consequently CNSL must set up an IRF and ORF pool from Hive-down.

118. Furthermore, the result of s206 CAA 2001 is that a single asset pool must be set up for each of the IRF and ORF activities. That is because s206(2) CAA 2001 directs that where there is qualifying expenditure which is incurred by a person carrying on a qualifying activity and the expenditure is partly for the qualifying activity and partly for other purposes, the qualifying expenditure must be allocated to a single asset pool. The wording in subsection (3) makes the position clear. That states:

> If a person is required to bring a disposal value into account in a pool for a chargeable period because the plant or machinery begins to be used partly for purposes other than those of the qualifying activity, an amount equal to that disposal value is allocated (as expenditure on the plant or machinery) to a single asset pool for that chargeable period.

119. CNSL says (in the context of its preferred analysis which argues that there is no disposal event under s61 CAA 2001 on Hive-down and the TWDV is allocated between IRF and ORF pools on the basis of anticipated throughput) that expenditure should be apportioned between the two pools. HMRC says that 100% of the expenditure is added to each pool.

120. It is not necessary for me to decide which case is right on this matter of the allocation to pools. That is because, given the position I have reached, HMRC's analysis results in no further charge on the sale of CNSL. While that sale gave rise to a further disposal event in the IRF single asset pool, this was again at market value capped at historic cost so no further balancing charge arose. Consequently, once it is concluded, as I have, that CNSL inherited Amoco's tax written down value on the transfer of the CATS Pipeline to it, but the use of the CATS Pipeline for ORF activity triggered a £167 million disposal event, CNSL has no reason to challenge the allocation of £167 million to each of the IRF and ORF pools.

121. However, given the dispute about the allocation of the disposal value brought into account as a result of CNSL starting to use the CATS Pipeline for ORF activity, I have decided that it is appropriate to briefly address this allocation issue (which also arises under the alternative analyses) which is likely to be of wider interest. To be clear though, CNSL disputes this analysis and I have not set out all the arguments relied upon by Mr Peacock.

122. I consider that HMRC is correct that there is no legislative basis for an apportionment at the stage of allocating qualifying expenditure to pools (as CNSL seeks to do). Under section 11(4) CAA 2001, expenditure is "qualifying expenditure" if (inter alia) it is capital expenditure on the provision of plant or machinery "wholly or partly for the purposes of the qualifying activity". Although Section 11 CAA 2001 envisages that the expenditure may be wholly or partly for the purposes of the qualifying activity it does not contain any apportionment provision. Section 11(3) directs that plant and machinery allowances must be calculated for each qualifying activity a person carries on, but is silent about apportioning expenditure. I therefore conclude that the qualifying expenditure under s11 CAA 2001 is the total even where it is only partly for the purposes of a qualifying activity.

123. Indeed, when asked by me at the hearing, Mr Peacock confirmed that there was no legislation he could point to specifically directing an apportionment of qualifying expenditure. He relied upon s11(3) CAA 2001 combined with s53 CAA 2001. Section 53 CAA 2001 states that expenditure relating to different activities must not be allocated to the same pool, but that is directing that two pools are set up, not what amounts are allocated to them. Under HMRC's interpretation expenditure is allocated to two pools; it is not expenditure relating to different activities being allocated to one pool.

124. Mr Peacock also relied upon s7 CAA 2001 which says that if an allowance is made under Part 2 (plant and machinery allowances) it must not be made under any other part; but here there is no allowance being made under another part.

125. HMRC relies upon s57 and s206(3) CAA 2001. Section 57 provides that a person's available qualifying expenditure in a pool for a chargeable period also includes any amount allocated to the pool for that period under s206(3) CAA 2001. Section 206(3) directs that if a person is required to bring a disposal value into account in a pool for a chargeable period because the plant or machinery begins to be used partly for purposes other than those of the qualifying activity, an amount equal to that disposal value is allocated (as expenditure on the plant or machinery) to a single asset pool for that chargeable period. Therefore HMRC say that the £167 million disposal value is not only taken into account in the IRF pool but is also treated as qualifying expenditure in the ORF pool. It is then s207 CAA 2001 which sets out provisions for just and reasonable adjustment but that only applies to the calculation of subsequent balancing charges and writing down allowances.

126. To understand how this works in practice I asked HMRC for a worked example, which I set out below as it illustrates that allocating the qualifying expenditure to each of the pools does not cause there to be double allowances.

127. The table illustrates an example where an asset is acquired for £100 with an intention to use it 50% for qualifying activity 1 and 50% for qualifying activity 2. That was in fact the actual use in year 1 but in year 2 the actual use changes to 75% for qualifying activity 1 and 25% for qualifying activity 2.

Year 1	Qualifying activity 1	Qualifying activity 2
Qualifying expenditure	£100	£100
Writing down allowance (18%)	£18	£18
Just and reasonable adjustment (50% each)	£9	£9
Allowances given	£9	£9
TWDV	£82	£82
Year 2		
TWDV	£82	£82
Writing down allowance (18%)	£14.76	£14.76
Just and reasonable adjustment (25/75)	£3.69	£11.07
Allowances given	£11.07	£3.69
TWDV	£67.24	£67.24

128. One can see that the allocation of 100% of the qualifying expenditure to each of the pools does not mean that the taxpayer receives capital allowances twice. The adjustment for use is applied at the level of the allowances.

129. For the reasons briefly noted above, I considered the 100% allocation to each of the IRF and ORF pools to be the correct approach under the legislation.

Share Sale

130. By this stage CNSL had an IRF pool and an ORF pool following either party's case.

131. HMRC maintain that:

(1) on the share sale there was a disposal event under s61(1)(f) as CNSL then ceased all IRF activity. However, the value to be brought into account in the IRF pool is again market value capped at historic cost so that there is no charge;

(2) this leaves a nil value for the TWDV of the IRF pool (agreed to be the result on any of the parties' analyses);

(3) the TWDV for the ORF pool is £167,467,319 because of the allocation of 100% of the qualifying expenditure described earlier.

132. Consequently, HMRC say that there is no balancing charge on the share sale. While disputing the earlier conclusions, this resulting conclusion clearly would not be challenged by CNSL.

THE CATS ELECTION

133. This issue only arises if, as I have, it is decided that there was a transfer of a trade within Part 22 on the Hive-down.

134. The question is whether, as a result of the CATS Election, and following the enactment of CTA 2010, Amoco did not, in fact, carry out a wholly IRF trade at the date of the Hive-down. In essence, should Amoco be considered by virtue of the Election not to be carrying on one IRF trade but an IRF and an ORF trade immediately before the Hive-down such that it transferred two trades to CNSL? If so, CNSL maintains that Part 22 still does not apply as the trades in CNSL are not the same and are not constituted of the same activities as in Amoco. If, however, Part 22 is considered to apply, CNSL maintains that there is still no difference as a result of the Election (as CNSL is unable to carry on the IRF trade). However, under HMRC's analyses there would then be two trades transferred on Hive-down with a balancing charge arising in relation to the partial cessation of the IRF trade by CNSL after that transfer.

The Background and Law

135. Prior to the Hive down Amoco submitted its corporation tax returns on the basis that all of its CATS Pipeline activities formed part of its "ring fence trade" as defined by s277 CTA on the basis that:

> (1) the transportation of hydrocarbons extracted under rights held by it or a company associated with it were treated as "oil extraction activities" and thereby as "oil-related activities" under s272(4) and s274 CTA 2010;
>
> (2) in relation to the transportation of non-group hydrocarbons, Amoco was a deemed participator in the Everest field under s 98(1) and (2) FA 1999 and, as a result, by virtue of s291(6) CTA 2010 its activities in making the CATS Pipeline available in return for tariff receipts were also treated as "oil extraction activities" and therefore "oil-related activities".

136. The Finance Act 1994 introduced rules which enabled the company to make an election so that only tariffs earned in respect of assets used to get hydrocarbons from PRT fields would be liable to PRT. If as in Amoco's case, a pipeline was used to transport hydrocarbons from non-PRT fields such an election would mean that the company would not be liable to PRT on those amounts.

137. As stated in the preamble to the OTA, it is an Act to bring sums received or receivable into charge to PRT.

138. Section 6(2) OTA, so far as relevant, provides:

> "… the tariff receipts of a participator in an oilfield which are attributable to that field for any chargeable period are the aggregate of the amount or value of any consideration… received or receivable by him in that period… in respect of the use of a qualifying asset"

139. Section 6(4) OTA then excludes certain amounts from the s6(2) definition by stating that certain specified amounts do "not constitute a tariff receipt for the purposes of" the OTA.

140. The CTA then picks up the definition of "tariff receipt" in s291(9) which states that "tariff receipt" has the same meaning as in the OTA. That definition is used in section 291 as one of the conditions for amounts to be treated as receipts of these separate ring fence trade under s279 CTA. The condition is set out in s291(2) which, so far as relevant, states that:

"Condition A is that the sum constitutes a tariff receipt…"

141. The election provisions are contained in sections 231-234 Finance Act 1994.

142. Section 231 provides so far as relevant:

> "where… a participator in a taxable field makes… an election with respect of that field by reference to a pipeline –
>
> (a) which is a qualifying asset;
>
> (b) which is used or intended to be used for transporting oil in circumstances which give rise or are expected to give rise to tariff receipts;
>
> (c) which, at the date of the election, is at least 25 km in length; and
>
> (d) for which the initial usage fraction does not exceed one-half.

143. Mr Bremner noted that it was understood that the provisions were specifically directed at the CATS Pipeline.

144. Section 232 FA 1994 then restricts a participator's allowable expenditure on elected assets where the election is made.

145. Section 233 FA 1994 is headed "Tax relief for certain receipts of an electing participator". It then proceeds to say, so far as relevant:

> "(1) If any sum-
>
> (a) is received or receivable by the electing participator on or after the date of an election, and
>
> (b) it is so received or receivable from any person in respect of the use… of an asset to which the election applies or the provision of services or other business facilities of whatever kind in connection with the use, and
>
> (c) would, apart from this section, constitute a tariff receipt attributable to the field to which the election applies,
>
> that sum shall not be regarded as a tariff receipt for the purposes of the Oil Taxation Acts.

146. The Oil Taxation Acts are defined as Parts I and III of the Principal Act, the 1983 Act and any other enactment relating to PRT. Section 234(1) FA 1994 states that expressions used in the Chapter have the same meaning as in the OTA. Section 15(2) OTA defines "the Principal Act" as the Oil Taxation Act 1975.

The parties' cases

147. In essence, Mr Peacock says that where there was a pipeline which was used to transport hydrocarbons from non-PRT fields, an election could be made under provisions introduced by Finance Act 1994 so that sums received from that activity would not be tariff receipts. Under s233 FA 1994 the CATS Election means that Amoco was treated as not receiving tariff receipts. The provision states that the sums received in respect of use in connection with a non-PRT field shall not be regarded as a tariff receipt for the purposes of the Oil Taxation Acts. When the corporation tax provisions are considered the ring fence provisions include tariff receipts as defined by the Oil Taxation Act 1983. Once an election is made such that sums are no longer regarded as tariff receipts then it is also not a tariff receipt for the ring fence provisions in s291 CTA. Consequently once the Election was made Amoco's receipts from transporting hydrocarbons from non-PRT fields were not tariff receipts for ring fence purposes and Amoco had a trade which was partly IRF and partly

ORF. The link between the FA 1994 provisions and the CTA provisions was made clear as a result of the rewrite of the corporation tax rules in 2010.

148. In relation to HMRC's argument that there is greater need for clawback of allowances in CNSL if this is right, as too many allowances would have been given, the amount of tax paid by Amoco would also have been incorrectly inflated. In so far as HMRC seek to rely on a press release issued in relation to the FA 1994, that is impermissible; although even if one did consider the press release it would add little to the debate.

149. Mr Bremner says:

(1) Amoco filed its return as wholly IRF and the analysis should be applied to the subsequent Hive-down and sale on that basis and not a hypothetical basis of what Amoco could have done;

(2) if Part 22 applies then CNSL is treated as inheriting Amoco's position even if that tax position is wrong;

(3) it is not reasonable to adopt CNSL's analysis as more allowances were given than should have been and there is greater reason for them to be clawed back now; and

(4) in any event, and most importantly, s233 FA 1994 does not change the meaning of tariff receipts in the OTA. The amounts are not to be "regarded as" tariff receipts but that does not mean that they are not tariff receipts. The meaning of "tariff receipt" in OTA is that set out in s6(2) OTA as adjusted by s6(4) OTA. Notably the language used in s233 FA 1994 is different from that in s6(4) OTA. The latter says what does not constitute a tariff receipt whereas s233 FA 1994 refers to the amounts not being regarded as tariff receipts. This is supported by the Press Release accompanying the FA 1994 provisions which focussed purely on the PRT position and made no reference to any change to the corporation tax position. The Explanatory Notes to CTA 2010 say that the definition of tariff receipt is included to aid users of the legislation. It cannot have been that Parliament intended, by a side wind, to restrict the scope of the corporation tax ring fence charge in the way contemplated by CNSL. Therefore Amoco had retained one IRF trade after the CATS Election.

DISCUSSION

150. Mr Bremner's submissions included ones addressing essentially matters of fairness in allowing CNSL to depart from a position adopted by Amoco. However, I consider that the heart of the dispute regarding the effect of the CATS Election concerns the interpretation and application of, in particular, s233(1) and the wording that sums (to which the Election applied) shall "not be regarded as a tariff receipt for the purposes of the Oil Taxation Acts".

151. It has been made abundantly clear by the courts that a purposive approach to the interpretation of legislation should be applied. I agree with Mr Bremner that the draftsman has used particular phrasing when using "not be regarded as" rather than simply saying that the amounts would not be tariff receipts for the purposes of the Oil Taxation Acts. I agree that the natural implication of the words "not to be regarded as" is that otherwise the amount would be a tariff receipt. As Mr Bremner submitted, the definition of "tariff receipt" used in s291(9) CTA to identify the amounts which are treated as receipts of a separate (IRF) trade under s279 remains unchanged.

152. To my mind the conclusion that the effect of the CATS Election is confined to PRT is reinforced by the drafting in section 233 FA 1994. Amounts are not regarded as "tariff receipts" <u>for the purposes</u> of the Oil Taxation Acts, and the definition of Oil Taxation Acts is specifically linked to any enactment relating to PRT. That is because the draughtsman has made that clear. "Oil Tax Acts" are defined as "Parts I and III of the principal Act, the 1983

Act and any other enactment relating to petroleum revenue tax." As explained above, "the Principal Act" is the Oil Taxation Act 1975 in which Part 1 sets out the core provisions of PRT and Part III sets out miscellaneous and general provisions dealing with PRT. The OTA is also an act dealing with PRT. The draughtsman limits other references to enactments relating to PRT. Consequently, the draftsman has specifically narrowed the application of the FA 1994 provisions via these references to PRT.

153. Mr Bremner also submitted that references should be made to the fact that the election provisions were contained in Chapter 5 FA 1994 all of which dealt with PRT/oil tax and not in the corporation tax part of FA 1994. I agree that this is also informative.

154. For these reasons I therefore conclude that the provisions introduced in FA 1994 were focused entirely on PRT. There was no reference to provisions dealing with corporation tax on ring fence trades and I see no basis to interpret the election provisions as having a purpose beyond PRT.

155. I would note that Mr Bremner sought to address the Press Release accompanying the FA 1994 provisions as context rather than as an aid to interpretation of the wording, but I consider that there is no need to stray into consideration of a press release. I agree with Mr Peacock on this point that doing so is likely to stray beyond the limits of authorities to which reference should be made in construing legislation.

156. Mr Peacock submitted that the interaction between the Finance Act 1994 provisions and the ring fence trade provisions was only clear following the rewrite in CTA 2010. I note the submission made by Mr Bremner relying upon the explanatory notes to the rewrite that the definition "tariff receipt" had been included as an aid to users of the legislation. As is accepted by both parties the tax law rewrite was not designed to alter the substance of the rewritten provisions and there is nothing to suggest that the definition of tariff receipts in section 291(9) CTA seeks to make any alteration to the scope of the corporation tax ring fence.

CONCLUSION

157. I therefore conclude that:

(1) Issue 1 – Part 22 applies to the Hive-down;

(2) Issue 2 – there was a disposal event giving rise to a balancing charge of £169,197,035 for CNSL, but the sale of CNSL did not give rise to any further charge;

(3) Issue 3 – the CATS Election has no effect on this analysis.

158. As a result the Appellant's appeal is dismissed and the Closure Notice is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

159. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 06th JUNE 2024