Neutral Citation: [2024] UKFTT 1163 (TC)

Case Number: TC09391

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2021/01171

CORPORATION TAX – Sections 11 and 23 Capital Allowances Act 2001 ('CAA 2001') – whether "plant and machinery" capital allowances are available in respect of expenditure incurred on the construction of a quay wall at the Port of Liverpool – yes – identification of the asset – whether the asset functions as plant – yes – whether the expenditure is saved by List C section 23 CAA 2001 – yes – application to partly withdraw agreement on facts – application refused – appeal allowed

Heard on: 29 January to 2 February 2024
Judgment date: 23 December 2024

Before

TRIBUNAL JUDGE KIM SUKUL
TRIBUNAL MEMBER DUNCAN MCBRIDE

Between

THE MERSEY DOCKS AND HARBOUR COMPANY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Jonathan Peacock KC and Edward Hellier of counsel, instructed by Ernst & Young LLP

For the Respondents: Jonathan Bremner KC, Edward Waldegrave of counsel, and Riya Bhatt of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The hearing lasted 5 days. Having considered the likelihood of planned industrial action affecting rail services causing delay or disruption to an in-person hearing, we took the decision to conduct the hearing by video using the Tribunal's Video Hearing Service platform.

2. The documents to which we were referred were contained within the 7,955-page hearing bundle, 3,300-page core bundle, authorities bundle and skeleton arguments from both parties. We were also referred to the video at https://www.youtube.com/watch?v=9R_AfnorMoE which provides a simple overview of the construction of the site which is the subject of this appeal. In addition, we have the benefit of summaries from both parties on their submissions on the facts and copies of the hearing transcripts (totalling 242 PDF pages).

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. The Appellant, The Mersey Docks and Harbour Company Limited ('Mersey Docks') appeals against closure notices issued by the Respondents ('HMRC') on 17 February 2021, which denied their claim for capital allowances in the periods ending 31 March 2015 to 31 March 2018 in respect of expenditure of £57,134,538 incurred on the construction of a quay wall (the 'Quay Wall') at a new deep-water container terminal at the Port of Liverpool (known as 'Liverpool2'). The grounds of appeal are that the expenditure was incurred on the provision of plant and machinery for the purposes of their trade, with the consequence that the expenditure is eligible for plant and machinery capital allowances ('PMAs').

5. Having carefully considered the evidence and the submissions made by both parties, we allow this appeal. In this decision, the legislation and case law are cited so far as relevant to the issues in dispute. Our conclusions regarding the key arguments are set out below.

LEGISLATION

6. Section 1(2)(a) Capital Allowances Act 2001 ('CAA 2001') provides allowances in respect of capital expenditure in respect of, inter alia, plant and machinery.

7. Section 11 CAA 2001 sets out the general conditions as to the availability of plant and machinery allowances:

> "11 General conditions as to availability of plant and machinery 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.
>
> (4) The general rule is that expenditure is qualifying expenditure if—
>
> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
>
> (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
>
> (5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3."

8. Section 22 CAA 2001 provides certain exclusions from the scope of PMAs expenditure as follows:

> "22 Structures, assets and works
>
> (1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on –
>
> (a) the provision of a structure or other asset in list B, or
>
> (b) any works involving the alteration of land.
>
> LIST B – EXCLUDED STRUCTURES AND OTHER ASSETS
>
> …
>
> 5. A dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped.
>
> …
>
> (2) The provision of a structure or other asset includes its construction or acquisition.
>
> (3) In this section –
>
> (a) "structure" means a fixed structure of any kind, other than a building (as defined by section 21(3)), and
>
> (b) "land" does not include buildings or other structures, but otherwise has the meaning given in Schedule 1 to the Interpretation Act 1978.
>
> (4) This section is subject to section 23."

9. Section 23 provides that the section 22 exclusion does not apply in respect of certain items as follows:

> "23 Expenditure unaffected by sections 21 and 22
>
> …
>
> (3) Sections 21 and 22 also do not affect the question whether expenditure on any item described in list C is, for the purposes of this Act, expenditure on the provision of plant or machinery.
>
> …
>
> LIST C – EXPENDITURE UNAFFECTED BY SECTIONS 21 AND 22
>
> 1. Machinery (including devices for providing motive power) not within any other item in this list.
>
> …
>
> 22. The alteration of land for the purpose only of installing plant or machinery.
>
> …
>
> 24. The provision of any jetty or similar structure provided mainly to carry plant or machinery."

POSITION OF THE PARTIES

10. In short, the case for Mersey Docks is that:

(1) The expenditure of £57,134,538 incurred on the construction of the Quay Wall (the 'Quay Wall Expenditure') is expenditure on the provision of plant or machinery for the

purposes of section 11 CAA 2001 and as such satisfies the general conditions imposed by that section.

(2) The Quay Wall is, for the purposes of CAA 2001 section 22 List B Item 5, "A dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped". As such, without more, the Quay Wall Expenditure would be excluded from qualifying as expenditure on the provision of plant or machinery by section 22.

(3) However, section 23 CAA 2001 provides that expenditure on certain items in List C is unaffected by section 22. The Quay Wall falls within one or more of the following items in List C:

(a) Item 1 – Machinery (including devices for providing motive power) not within any other item in this list.

(b) Item 22 – The alteration of land for the purpose only of installing plant or machinery.

(c) Item 24 – The provision of any jetty or similar structure provided mainly to carry plant or machinery.

11. As such, Mersey Docks contends that PMAs can be claimed in respect of the Quay Wall Expenditure.

12. HMRC's position is that PMAs are not available in respect of the Quay Wall Expenditure because:

(1) The expenditure was not "on the provision of plant or machinery" in terms of section 11(4)(a) CAA 2001 (even leaving aside the effects of sections 22 and 23 CAA 2001).

(2) If the expenditure was "on the provision of plant or machinery" (leaving aside sections 22 and 23) then it is common ground that it was, prima facie, excluded from the scope of PMAs by virtue of Item 5 in List B in section 22 CAA 2001. PMAs would therefore only be available to the extent that it is 'saved' by any of the items in List C in section 23 CAA 2001.

(3) Mersey Docks relies on Items 1, 22, and 24 in List C. HMRC submits that none of the Quay Wall Expenditure falls within any of these items.

13. Accordingly, HMRC submits that PMAs are not available in respect of the expenditure and the appeal should be dismissed.

AGREED ISSUES

14. The parties agree that the following issues must be decided by the Tribunal in determining the appeal:

(1) Does the Quay Wall constitute a distinct asset for the purposes of the relevant provisions of the CAA 2001, or does it, together with the "Container Transition Area" (defined below), form part of a larger whole?

(2) Assuming that the Quay Wall should be regarded as a distinct asset, was the Quay Wall Expenditure, in principle, "on the provision of plant or machinery" within the meaning of that expression in section 11(4)(a) CAA 2001?

(3) If so, is the Quay Wall Expenditure "saved" by any of items 1, 22, or 24 of List C in section 23 CAA 2001, it being common ground that the Quay Wall Expenditure is

prima facie excluded from the scope of capital allowances by virtue of item 5 of List B in section 22 CAA 2001?

BURDEN OF PROOF

15. The burden of proof rests with Mersey Docks to show that the closure notice and consequential amendments made by HMRC are wrong. The standard of proof is the civil standard, namely the balance of probabilities.

16. To be successful in their appeal, Mersey Docks must therefore prove that:

(1) the Quay Wall should be regarded as a distinct asset, and

(2) the Quay Wall Expenditure was on the provision of plant or machinery, and

(3) the expenditure falls within the provision for

(a) machinery, and/or

(b) the alteration of land for the purpose only of installing plant or machinery, and/or

(c) any jetty or similar structure provided mainly to carry plant or machinery,

for the purposes of the relevant provisions of the CAA 2001.

EVIDENCE

17. The bundle of documents for the hearing, set out in 6 volumes, comprised of pleadings and procedural documents, tax returns, witness statements and exhibits, documents relating to the Quay Wall, correspondence relating to HMRC's enquiry and appeal correspondence.

18. The bundle also contained the statements of the witnesses, including the unchallenged statement of HMRC officer Jonathan Doyle regarding HMRC's enquiry. The other witnesses were all present at the hearing. We heard evidence on behalf of Mersey Docks from Graeme Charnock, director and the Chief Financial Officer until 1 April 2022; from Mark Patterson, Project Manager for the construction of the Liverpool2 Terminal; and expert opinion evidence on engineering aspects from Tony Neal. We also heard expert evidence from Hugh Corrigan regarding his independent technical report for the Project Liverpool2, prepared on behalf of HMRC. There were various matters agreed by the experts and some points of disagreement. These were set out in their 12-page joint statement.

19. We considered the evidence given by all the witnesses to be credible and of great assistance to us in understanding the background and details regarding the construction of the Liverpool2 Terminal. We have considered any key points of disagreement in determining the facts as set out below.

AGREED FACTS

20. The parties prepared a statement of agreed facts and issues stating the agreed facts as follows:

> "**The Appellant**
>
> 1. The Appellant, the Mersey Docks & Harbour Company Limited ('MDHC'), operates the Port of Liverpool, including acting as the "Statutory Harbour Authority" and "Competent Harbour Authority" for the Port. As a Statutory Harbour Authority and Competent Harbour Authority, MDHC has the right to levy pilotage and ship's dues on all vessels entering the harbour and goods' dues on all goods imported and exported from the Port of Liverpool.
>
> 2. MDHC's income from the Port of Liverpool includes statutory rates and dues, cargo handling (including containers, liquid bulks, bulk solids, agribulks

and roll-on/roll-off vessels including cars), pilotage, mooring, towage and property rental income. MDHC is liable to corporation tax in respect of its income.

3. Between 2013 and 2017 MDHC developed Liverpool2, a new deep-water container terminal at the Port of Liverpool.

4. Liverpool2 is an extension of Liverpool's Seaforth Dock container terminal, which opened in 1971. The new terminal was designed to accommodate the larger container vessels which have become more common globally since work to expand the Panama Canal was completed in 2016. These vessels are referred to as "Post-Panamax" vessels.

Liverpool2 in outline

5. The following elements of Liverpool2 are material in relation to this appeal. The descriptions below are without prejudice to the Parties' contentions as to how the relevant asset(s) should be identified for the purposes of the relevant legislation (and, in particular, are without prejudice to the Respondents' contention that the Quay Wall does not have a distinct identity):

(1) Berthing Pocket: The Berthing Pocket is an area of the riverbed adjacent to Liverpool2, dredged specifically to allow the berthing, unloading and loading of two "Post-Panamax" container vessels at Liverpool2 at all states of the tide.

(2) Quay Wall: The Quay Wall refers to the structure which abuts the River Mersey up to the rear crane rail for the Ship to Shore Cranes (the "STS Cranes").

(3) Container Transition Area: Immediately behind the Quay Wall is the Container Transition Area. The Container Transition Area forms part of the land which was reclaimed from the River Mersey in the course of the construction of Liverpool2, and is used for the storage and handling of containers by the "Cantilever Rail Mounted Gantry Cranes" (the "CRMG Cranes") which have been unloaded from ships or are to be loaded.

(4) Ship-to-Shore Cranes: Containers are loaded onto and unloaded from ships by STS Cranes; five of which were installed as part of the Liverpool2 extension project and a further three in 2020. The STS Cranes overhang the docking area (extending over the water and the ships, adjacent to the Quay Wall). They run on rails founded on the Quay Wall. Containers which are unloaded are transferred by the STS Cranes to lorries which transport them to the Container Transition Area, where they are organised and stored by the CRMG Cranes. Similarly, when containers are loaded, they are transferred to lorries which transport them from the Container Transition Area to the Quay Wall, and then transferred by the STS Cranes to the relevant ship.

(5) Cantilever Rail Mounted Gantry Cranes: Containers are handled within the Container Transition Area by 22 CRMG Cranes. Twelve were include in the Liverpool2 extension project with a further ten added in 2020. The CRMG Cranes run on rails in the Container Transition Area and perform operations such as stacking and organising the containers and loading/unloading them onto/from lorries.

6. There is no dispute between the parties as to the relevant tax treatment of the Berthing Pocket, the Container Transition Area, the CRMG Cranes or the STS Cranes, including the rear crane piles and crane rails referred to at paragraphs 9(3) and 9(8) below[1].

([1]The parties were previously also in dispute as to the timing of the availability of capital allowances in respect of expenditure incurred by MDHC on the cranes at Liverpool2. On the facts of this case, however, HMRC no longer challenges MDHC's claim for capital allowances on expenditure incurred on the provision of the cranes in the accounting periods ending 31 March 2015 and 2016.)

Quay Wall Design

7. The design intent of the Liverpool2 development was a modern container terminal to allow the Port of Liverpool to expand its container operation and to serve large Post-Panamax size vessels at a tidal berth in the River Mersey.

8. Part of the Liverpool2 development project ('Package 2') consisted of the Berthing Pocket and the construction of the Quay Wall.

Quay Wall Overview

9. The design phase resulted in the construction over a period from June 2013 to November 2016 of a long oblong structure running approximately South to North along the eastern bank of the River Mersey at Seaforth, made up of:

(1) 40m long Steel tubular piling at 3.14 metre centres, on the river side of the Quay Wall, these piles, drilled into bedrock 20m and infilled by intermediate sheet piles (the 'Outer Piling').

(2) a 831m long concrete coping beam sitting on the Outer Piling line.

(3) 30m long concrete Continuous Flight Auger ("CFA") piling at again 3.14 metre centres on the landward side of the Quay Wall drilled to bedrock (the 'Inner Piling line').

(4) A 829m long concrete rear crane beam sitting on the Inner Piling line.

(5) Steel tiebacks from the Outer Piling line to land anchors on the landward side of the Inner Piling line.

(6) Sand infill between the Outer Piling line and Inner Piling line.

(7) A 831m long, 30m wide and 0.3m deep concrete slab sitting above / on the sand infill. The slab provides the upper surface of the Quay Wall.

(8) Crane rails set into the concrete coping beam to accommodate the front and rear wheels of the STS Cranes.

(9) Bollards and fenders cast into the river side coping beam.

Quay Wall Sections

10. The Quay Wall as constructed consists of three sections:

(1) The North Tie-In which forms the transition between the Quay Wall and the existing riverbank.

(2) The main section.

(3) The South Tie-In which forms a return wall between the Quay Wall and the existing Gladstone River Entrance Lock. In the triangular area between the South Tie-In and the Gladstone Lock, rock armour has been installed. The rock armour prevents scour due to possible tidal current eddies and acts as passive resistance to the wall. The sheet pile wall at the South Tie-In is supported by a waling beam which is connected at one side to Gladstone Lock and at the other to a tubular pile providing additional resistance support."

APPLICATION TO PARTLY WITHDRAW AGREEMENT ON FACTS

21. On Day 4 of the 5-day hearing, HMRC made an application to withdraw their agreement at paragraph 6 of the statement of agreed facts.

22. Paragraph 6 states that there is no dispute between the parties as to the relevant tax treatment of the STS Cranes, including the rear crane piles and crane rails referred to at paragraphs 9(3) and 9(8) below. Paragraph 9 states that the Quay Wall is made up of nine parts including, at 9(3), the 'Inner Piling line' and, at 9(8), crane rails set into the concrete coping beam to accommodate the front and rear wheels of the STS Cranes.

23. HMRC argued that the closure notice adjustments disallow capital allowances on all of the expenditure on the Quay Wall, including the expenditure on the rear crane piles and the crane rails. HMRC's pleadings make no distinction between the treatment for the rear crane piles and the crane rails, and paragraph 6 of the statement of agreed facts does not actually record what is the agreement as to the tax treatment. However, it does suggest an agreement that the rear crane piles and crane rails qualify for PMAs because it states that the STS Cranes, which do qualify, include the rear crane piles and the crane rails. This agreement separately identifies and treats differently the rear crane piles and crane rails from the rest of the Quay Wall.

24. HMRC contended that there is a great deal of evidence about how the Quay Wall was constructed and how it performs, which makes it very hard indeed to see why the rear crane piles and the crane rails should be regarded separately from the rest of the Quay Wall and very hard indeed to see how the rear crane piles and the crane rails could possibly be said to be something that is included in the STS Cranes. It may be that if those items were regarded separately, then HMRC would accept that they qualified, but the better analysis is that those items are properly regarded as part of the Quay Wall. HMRC considered that they were not precluded from submitting that the rear crane beams and the crane rails are part of the Quay Wall and if the Quay Wall does not qualify for allowances, then those two items would not qualify either. They submitted that the Tribunal must come to a correct judgment as to the amount of tax due and, looking at the evidence, it is very difficult indeed to see how, where a crane is sitting on top of rails like a train, those rails and piles could sensibly be regarded as being included within the train. HMRC further submitted that if the Tribunal finds that that point has been accepted by HMRC and therefore that rear crane piles and crane rails must qualify, one has to be clear about the basis upon which that has been done and one has to be clear that it does not inform the analysis of the rest of the Quay Wall.

25. With regard to the basis for the agreement, the hearing bundle contained a file note of a teleconference held by the parties on the 18 December 2017 where it was accepted that the "rear crane piles are concrete insitu piles that were steel reinforced and its main use was for the crane rails". We were also referred to a letter between the parties dated 30 October 2019 which stated that in a "telephone conversation on 18 December 2017, all parties agreed that the rear crane piles (which are slenderer than the front crane rail piles as the rear piles have been engineered to take into account balanced sand forces) have been provided for the crane rails (and therefore support the cranes). It was also accepted that the front piles take the dead and live load of cranes but that the overall structure performs a number of functions".

26. Mersey Docks strongly opposed HMRC's application on the grounds that the agreement was clear, it had been reached many years ago, there had been ample opportunity to give notice of such an application yet none had been given, and there would be significant prejudice to them if the application was granted.

27. Having briefly adjourned the hearing to consider this application, we refused HMRC permission to withdraw their agreement to this fact. We disagreed with HMRC's submission

that there was no prejudice to Mersey Docks because there was an abundance of evidence as to how the cranes and Quay Wall operate, and it is appropriate to determine the correct answer. We accepted the submissions made by Mersey Docks that the agreement had been in place for many years, it had been clearly set out in the statement of agreed facts and there had been no prior indication that the agreement would be withdrawn. We also accepted that it would be prejudicial for the basis upon which the proceedings had been conducted so far to be changed by the withdrawal of what was an agreed fact.

28. In determining this application, we were mindful of the overriding objective, as set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to deal with cases fairly and justly. Delivering our ruling during the hearing, we stated our view that all of the proceedings so far had been conducted on the basis of the agreed facts, and we considered it was simply too late for HMRC to withdraw their agreement on any of those facts. We also considered it would be unfair to Mersey Docks to allow the hearing to proceed in those circumstances, and we would only allow HMRC to withdraw from that fact if we were to relist the hearing in its entirety, which we were not prepared to do in the interests of fairness and justice. We therefore ruled that the hearing would proceed on the basis of the agreed facts and refused HMRC's application to withdraw from their agreement.

FINDINGS OF FACT

29. Having carefully considered the evidence adduced in this case, and in addition to the agreed facts, we have reached the following factual findings on a balance of probabilities.

Terminal Operations

30. Around 75% of Mersey Docks' income comes from handling cargo.

31. Larger ships built to exploit economies of scale on the trans-Pacific and Far East-Europe routes, commonly referred to as "Post-Panamax" vessels, can carry up to four times the capacity of "Panamax" vessels, being 380 meters long, 49 metres wide (in the beam), and typically capable of carrying 18,000 to 20,000 'Twenty Foot Equivalent' containers.

32. Before the Liverpool2 project, the existing facilities at the Port could accommodate Panamax vessels, but not Post-Panamax vessels. The older, pre-existing container terminal is the Royal Seaforth Container Terminal ('RSCT') which is accessed by the "Gladstone Lock".

33. The RSCT is still in operation and can operate in tandem with Liverpool2: smaller vessels can access the RSCT for unloading, with the cargo then being loaded onto Post-Panamax vessels for the next leg of its journey by the STS Cranes at Liverpool2.

34. The Liverpool2 Terminal occupies an area (including an area known as the "Seaforth Triangle", which is roughly triangular in shape) which previously formed part of the banks of the River Mersey and the river itself.

35. The construction of Liverpool2 required the creation of 17 hectares of new land using 2.1 million cubic metres of reclaimed material.

36. In order to enable Post-Panamax vessels to berth at Liverpool2 it was necessary for the River Mersey to be dredged to enlarge the tidal "window of opportunity" during which vessels could reach Liverpool2. There were two separate dredging operations, one to deepen the Mersey River Channel, and one to create the Berthing Pocket.

The STS Cranes

37. The STS Cranes weighing 1,600 tonnes arrived at Liverpool2 fully built and were dragged sideways from the ship which delivered them on to the Quay Wall. The STS Cranes each have sixteen wheels which sit on rails embedded in the Quay Wall. The STS Cranes rest

on the rails, similar to a train, and can move freely along the rails. They are not structurally fixed to the Quay Wall but tied down by the anchor pits.

38. The STS Cranes cannot function without the specialist foundations and supporting infrastructure provided by the Quay Wall.

39. In order for the STS Cranes to function effectively they require:

(1) Their support to be able to take very heavy loading without significant settlement. At the extreme lifting position, the distance between the centre of the furthest container and the rail supporting the seaward leg of the STS Crane can be approximately 65 metres, leading to very heavy loading on the front crane rail.

(2) The landward side of the crane to have significant ballast to ensure that it remains stable when the crane is fully extended, when its boom is lifted, and when subject to extreme winds.

(3) The rails to be kept level. If there is settlement in the STS Crane rails, the rails would have to be removed, the bedding beneath the rails-regrouted, and the rails re-fixed. This would be a lengthy operation which would likely prevent one of the berths being used for a considerable period.

(4) A level interchange area for containers, occupying the width between the front and rear legs of the cranes and extending the full length of the berth. Requirements for maintenance activities of the interchange area that would disrupt operations must be minimised with the paving for this area designed accordingly. This is likely why roller compacted concrete paving was used for the Quay Wall.

(5) A mooring system that enables vessels to be held firmly in position to minimise surge and sway movements (which would reduce the efficiency of the cranes).

(6) Cabling to allow for their operation.

(7) Anchor points and tie downs to stabilise them in high winds.

(8) A high vertical face against which ships can moor. Particularly with a high tidal range (such as there is in the Port) this is necessary to ensure that ships can moor close to the STS Cranes and so limit the distance of the containers from the cranes.

Elements of the Quay Wall

40. There are various elements of the Quay Wall, all of which need to work together for the Quay Wall to do what is required.

41. The functions of the Outer Piling include the following:

(1) It retains the reclaimed land and protects the Liverpool2 site against waves, currents and flooding from the River Mersey. It would however be a very expensive and ill-suited design solely for the purposes of retaining fill or providing protection from the river.

(2) It forms one side of the Berthing Pocket, although the lower part of the side is formed of rock. The berthing line is formed by the fenders at the top and the rock berm at the base.

(3) It supports the legs of the STS Cranes nearest the water by providing a vertical wall which is necessary for the functioning of the STS Cranes in loading and unloading ships, and it holds the Coping Beam in place so as to ensure that the crane rail does not move beyond the allowed tolerances.

42. The functions of the Outer Coping Beam include the following:

(1) It accommodates the rails for the STS Cranes and spreads the concentrated load of the wheels of the STS Cranes.

(2) It acts as a mounting point for fenders and bollards.

(3) It provides support and installation points for utilities and other ancillary equipment essential to the operation of the STS Cranes and determining the width of the beam.

43. The Inner Piling Line supports the inland legs of the STS Cranes.

44. The Steel Tiebacks and Anchors restrain the Outer Piling and so prevent the Outer Piling moving by more than the tolerances that the STS Cranes (and their rails) allow.

45. The sand infill behind the Quay Wall supports the Liverpool2 operating platform i.e. the surface of the Quay Wall and the Container Transition Area ('CTA'). This platform needs to be above the high-tide level, and on approximately the same level as the rest of the Port. The fill also minimises horizontal pressure on the Outer Piling.

Functions of the Quay Wall

46. One of the Quay Wall's functions is to provide access to Post-Panamax vessels when they are berthed. This includes access for lorries which transfer containers to and from the STS Cranes. It is the place where this 'container interchange' happens, providing access to the Post-Panamax vessels necessary in order for Mersey Docks to be able to carry on its activities of loading and unloading them.

47. The Quay Wall provides one side of the Berthing Pocket (above a layer of rock at the bottom of the pocket). The Berthing Pocket allows Post-Panamax vessels to remain moored at all states of the tide, so that they can be loaded and unloaded. The Quay Wall enables up to two Post-Panamax vessels to berth at Liverpool2.

48. The Quay Wall provides the necessary foundation for the STS Cranes. The need to support and ensure the proper operation of the STS Cranes was the driving force behind the Quay Wall's design and significantly impacted the cost of construction.

49. The Quay Wall retains the reclaimed land. Without the Quay Wall, the land would ultimately be washed away.

Predominant Function

50. In his evidence, Mr Corrigan stated his opinion that the primary purposes of the Quay Wall are to retain over 30m depth of reclaimed land on which to build the Terminal and premises of adequate capacity for the purposes of loading and unloading containers and providing a 7m deep berthing pocket and mooring point for 2 post-Panamax vessels. The view given by Mr Neal is that the primary purpose of the Quay Wall is to provide a platform which enables the STS Cranes to operate immediately adjacent to the vessel and, with the chosen form of construction, this requires a retaining wall approximately 30m high.

51. We do not consider the evidence given by either expert regarding the calculations outlined in support of their view to be clear or conclusive. We accept that one of the functions of the Quay Wall is to retain the reclaimed land. However, having considered the totality of the evidence before us, it is our finding that the Quay Wall's primary purposes are to provide mooring and to provide support for the STS Cranes, which are equally important. Both are key functions and are essential to the proper operation of the business.

Container Transition Area

52. The Quay Wall and the CTA were built together in a progressive way. They are adjacent and provide mutual support to one another. There is no physical or "engineering" boundary between the Quay Wall and the CTA. There is an "expansion joint" between the Quay Wall

and the CTA, with no structural connection across this joint. They have different surfaces reflecting their different requirements and function.

53. The Quay Wall must support the very high wheel loadings from the STS Cranes, and this requires piled foundations, whereas the CTA supports the much lower loading from the CRMG cranes which can be supported directly on the ground via sleepers and ballast. There are also different limits on the permitted settlements below surface level between the Quay Wall and CTA related to the differences in loading and to the difficulty and consequences of having to undertake maintenance activities including re-levelling of the rails. The different settlement profiles of each of the 2 zones is a reflection of the types of fill material placed across the zones, one being imported engineering fill (Type A) below the vessel loading/unloading zone and the other being a mixture of imported Type A and lesser quality dredged material (Type B) below the CTA. The two types of fill remain separate and do not merge. There is a graduated transition from Type A to Type B as one moves away from the water's edge. Only Type A fill forms part of the Quay Wall.

54. The Steel Tiebacks and Anchors which restrain the Outer Piling extend under the CTA.

55. Under the Marine Code of Practice (British Standard 6349-2), it is best practice for a container transition area to be adjacent to the relevant quay wall. A different approach will only be adopted where this is required for a good reason. No such good reason existed in relation to the Liverpool2 Terminal.

56. We agree with the experts in our finding that the Quay Wall and CTA each function as part of the Terminal. Although they do not have the same function, they are both essential to the functioning of the Terminal.

57. They are constructed differently with different design criteria. The Quay Wall enables mooring and provides support for the STS Cranes and the operations associated with these cranes, which are essentially related to getting containers off and on the vessel as quickly and efficiently as possible. The CTA provides an area where containers are stored and sorted, using the CRMG cranes, prior to or after transport on the national road or rail transport systems. They therefore fulfil different functions, with different engineering and construction requirements.

DISTINCT ASSET

58. The first issue is whether the Quay Wall should be regarded as having a distinct identity, or whether it should be regarded as part of a larger whole which includes the CTA.

Legal principles

59. We were directed by both parties to the Upper Tribunal decision in *Gunfleet Sands Ltd v HMRC* [2023] UKUT 00206 ('*Gunfleet*') and we are guided by the principles set out in that decision. The case concerned expenditure incurred when setting up windfarms. The first issue considered in that decision was set out as follows:

> "ISSUE 1 – SINGLE/MULTIPLE PLANT
>
> 15. As to what constitutes plant, as is well-established, and as the Court of Appeal noted in *Cheshire Cavity Storage 1 Ltd v HMRC* (at [32]), there is no statutory definition of "plant" but the meaning of the term has been discussed in a large number of cases. Reflecting the way the parties have argued their cases, we come on to focus on two in particular: *IRC v Barclay Curle Co Ltd* [1969] 1 WLR 675 (expenditure in relation to a dry dock) and *Cole Brothers Ltd v Phillips* [1980] STC 518 (expenditure in relation to electrical installation in a department store).
>
> 16. It is not in dispute that the considerable amount of expenditure on buying the wind turbines is qualifying expenditure and that the wind turbines and

cables are items which are capable of being plant. The relevant issue here is whether each wind turbine and each connected array cable are single items of plant, as HMRC argue, or whether the wind turbines and array cables collectively (the "generation assets") are an item of plant, as the taxpayers argue. This issue may affect the analysis of what study expenditure qualifies under Issue 2 as expenditure "on provision of plant". For instance, expenditure relevant to the general configuration or layout of the wind turbines on the site could more readily be argued by the taxpayers to be "on the provision of plant" if the wind turbines and cabling collectively were a single item of plant.

17. The FTT considered the parties' competing submissions on this issue, which we outline and address in more detail below, concluding (at [112](2)) that the relevant test was that set out in *Cole Bros*. The FTT described the first-instance Special Commissioners decision in that case, (which was upheld by the House of Lords), as being a case where:

"… taking into account the dry dock in *Barclay Curle*, [the Special Commissioners had] indicated that the component (or individual) parts need[ed] to be directed towards a single purpose"

18. The FTT noted the above test was:

"endorsed by Lord Hailsham when he said that the analysis needs to be of the individual components regarding the nature and function of each."

19. Accordingly, the FTT continued (at [112(2)]), that meant that:

"…if, on the evidence, the component parts of the windfarm [were] directed towards a single purpose, then those assets [could] be treated as a single item of plant."

20. The FTT also described the test this way at [112(4)]:

"(4)… the test is whether, taking into account the nature and function of the individual components of a composite item, those components are directed towards a single purpose."

21. Ms Wilson KC, who, along with Ms Parry, also appeared before the FTT, argues on behalf of HMRC that this "directed towards a single purpose" test was wrong and that the FTT therefore erred in its approach. The FTT ought to have adopted the test set out in *Barclay Curle*. That was whether the putative single item was "one integral item of plant" and whether it had a "distinct operational function". HMRC argue the FTT not only *misinterpreted Cole Bros* (which understood properly was doing no more than applying the correct test in Barclay Curle) but then went on to apply an erroneous test of whether there was a single business purpose. HMRC also argue the FTT's approach amounted to "an aggregation test" which had no authority.

22. Mr Jones KC for the taxpayers, who also appeared before the FTT below, argues the test the FTT adopted and applied was the correct test: as set out in the House of Lords' endorsement of the Special Commissioners' decision in *Cole Bros*, the issue was one of fact and degree taking into the account nature and functions of the component parts and whether they were "directed towards a single purpose".

23. As regards the FTT's application of the relevant test to the facts, the taxpayers argue the "generation assets" i.e. the wind turbines and array cables together (but not the onshore substation or cable onshore) were plant, whereas HMRC argue each wind-turbine (and each set of array cables connecting the five or six wind turbines to the offshore substation) were individual items of plant.

> 24. The FTT in fact found at [145] that "each windfarm" was a single item of plant stating, "Their function is to generate electricity, ramp up the voltage of that electricity, and then feed it into the National Grid". Both parties highlight that neither of them invited the FTT to consider whether the windfarm, as a whole, was an item of plant.
>
> 25. However, agreeing with the taxpayers, the FTT also found the "generation assets" (the wind turbines and array cables) comprised a single item of plant at [147], explaining their purpose was "directed to the single purpose of generating electricity". They also went on to make a finding in the alternative that "each wind turbine is an item of plant as, too, are the array cables"."

60. Following their consideration of the judgments in *IRC v Barclay Curle* [1969] 1 All ER 732 ('*Barclay Curle'*) and *Cole Brothers Ltd v Phillips* [1980] STC 518 ('*Cole Bros'*), the Upper Tribunal in *Gunfleet* went on to consider what is the correct test.

61. In our consideration of the decision in *Gunfleet*, we have firstly noted the uncontroversial proposition that the issue of whether something constitutes single or multiple items of plant is one of fact and degree. It will depend on the facts and circumstances and is a question for us to determine as the fact-finding tribunal (see [42]). We also note the test is not a question of whether there is a single business purpose (see [44]).

62. We are mindful that the correct approach to be taken is set out as follows:

> "51. The correct approach therefore is one of ascertaining the facts and circumstances. In doing that it is relevant to look at the function of the item(s) under consideration. Whether that is described as "distinct operational function" or the item being "directed towards a single purpose" does not matter. The real point of difference between the parties here is, we consider, therefore about the level at which the purpose or function test is applied. This is revealed by the way Ms Wilson put her submission. She argued the FTT's analysis (at the level of the trading operation as the sale of usable electricity to National Grid) was at too high a level. In her submission, the FTT started to err by seeing the test as a separate test for single/multiple items when there was just one test – "is it plant?". She also submits that the way in which the FTT expressed the purpose of the plant actually shows there were multiple purposes: the FTT referred to purposes that wind turbines generate / array cables transport, substations step-up or transform, export cables export.
>
> 52. These submissions highlight the perhaps unrealistic aspiration of trying to encapsulate something the authorities acknowledge is a matter of fact, degree and impression in a single unifying test. Whether the item under consideration has a distinct operational function, or whether it is "directed towards a single purpose" are important questions to ask but they are not definitive.
>
> 53. With both formulations there is the potential to "aggregate up" or "disaggregate down" in that any plant of any complexity will have components with "distinct operational functions". Seemingly multiple items of plant may similarly be viewed as directed towards a single purpose when the purpose is the same or articulated as a higher-level purpose.
>
> 54. At the level of principle, it also seems arbitrary that the granularity of the vocabulary which the tribunal can summon to describe the function should drive the definition of a question of fact. A person with a more technical eye might look at the components within those purposes and discern an even more distinct operational function. A wind turbine might be said to have the multiple different purposes of its component parts. It also begs the question what is an operational function? In *Barclay Curle* the fact components within

> the dry dock could be broken down into more distinct operational functions did not stop the analysis that the dry dock was a functional whole.
>
> 55. HMRC also criticise the FTT for applying this single purpose test as a matter of principle because it does not exclude the substation (which may or may not have been premises) as the FTT ought to have done per *a Barclay Curle* analysis. We agree with Mr Jones, this submission is wrong as a matter of principle. Whether the whole thing is plant on proper analysis was the very point in *Barclay Curle* (if one had isolated the concrete basin then that would be premises). We consider that if there are missing steps in the analysis, as Ms Wilson suggests, that does not follow from the test (however it is described) but from the fact any test is not exhaustive. That an item can be described by a "single purpose" or "operational function" is not the end of the analysis but part of it. In any case, as a plant/premises point also underlay *Cole Bros* it would be odd if the House of Lords had thought the "directed to a single purpose test" was deficient. *Cole Bros* was not saying something different from *Barclay Curle*.
>
> 56. Similarly, the "directed towards a single purpose" test (when deployed non-exhaustively) is no more prone to give odd results than a distinct operational function test. HMRC's submissions made use of an example (given by the High Court of Australia in *Wangaratta Woollen Mills Ltd v Federal Commissioner of Taxation* [1969] 2 All ER 771) of a tractor and mower unit. That was clearly two separate items of plant despite being used together for the single purpose of providing gardening services. However, the distinct operational function of the two items together could equally be described as cutting grass and constituting the two items together as a single item. Again, the point is that the test is not definitive.
>
> 57. The "directed towards a single purpose" test does not entail a principle that one must keep aggregating to the highest level susceptible to a linguistic description or disaggregating to the lowest level of detail. The appropriate level lies in the skill and evaluative judgment of the first instance panel hearing and seeing all the evidence. Case-law establishes this is a matter of fact and degree."

63. HMRC submits that the Quay Wall should be considered as part of a larger whole which also includes the CTA. We accept the submission that there is a degree of physical integration between the Quay Wall and the CTA, as they were built as part of a construction sequence, on the same reclaimed land and the tie bars and anchor blocks of the Quay Wall extend from its foundations into the fill beneath the CTA. There is however an "expansion gap" between the two, and the two surfaces differ in appearance. There is a gradual transition between the Type A fill used closest to the river needed to meet the requirements for the Quay Wall, and the Type B fill in the areas furthest from the river, which had been dredged from the river because the CTA required a lower quality fill beneath the surface.

64. We disagree with the submission that the Quay Wall and the CTA are functionally integrated simply because there is a single operating platform encompassing them both, and the overarching purpose of the Terminal is generally to load and unload containers. Both the Quay Wall and the CTA may be viewed as directed towards the single higher-level purpose of the Terminal to load and unload containers, but we do not consider their distinct activities can be said to be operationally integrated for these purposes simply because they support the performance of the overarching function of the Terminal. We have noted above that the test we are required to consider is not a question of whether there is a single business purpose.

65. There are different activities which occur within the CTA and the Quay Wall areas, in that the function of the CTA is to store, organise, and move containers and the functions of the

Quay Wall are to allow the berthing and mooring of Post-Panamax vessels and to support the STS Cranes that load and offload containers. We consider that the Quay Wall performs a highly specified and different function from the CTA.

66. Having considered the evidence adduced, the relevant legal principles, and the specific circumstances and facts as we have found them, we have concluded that the CTA and the Quay Wall are separate items for the purposes of this appeal. It is therefore our finding on the facts that the Quay Wall constitutes a distinct asset for the purposes of the relevant provisions of the CAA 2001.

THE PROVISION OF PLANT OR MACHINERY

67. Mersey Docks contends that the Quay Wall Expenditure was incurred on the provision of plant or machinery. HMRC's position is that the Quay Wall is merely a specialised structure. It is not plant and does not function as such.

Legal principles

68. There is no statutory definition of "plant". Lord Justice Lindley commented in *Yarmouth v France* (1887) 19 QBD 647, at 658, that it "includes whatever apparatus is used by a business man for carrying on his business".

69. HMRC submits that a helpful and convenient summary of the key principles is set out in the Court of Appeal judgment in *Urenco Chemplants Limited v HMRC* [2022] EWCA Civ 1587 ('*Urenco*') at [28] to [46]. We agree that the main relevant principles can be summarised as follows:

(1) The concept of plant excludes the premises or place in or upon which the business is conducted (see *Cheshire Cavity Storage 1 Ltd v HMRC* [2022] EWCA Civ 305 ('*Cheshire Cavity*') [82]-[83]).

(2) The fact that two things may perform the same function does not mean that both are plant. One thing may function as part of the premises and the other as part of the plant (see *Cheshire Cavity* at [60]).

(3) It is possible for a large structural item to constitute plant, such as the dry dock in *Barclay Curle*.

(4) A building or structure does not fall to be regarded as plant simply because it is "purpose-built for a particular trading activity" (see *Gray v Seymour* (1995) 67 TC 401 at 413).

(5) In determining whether a given item is plant or premises, the correct approach is to ask whether it is "more appropriate" to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted (see *Cheshire Cavity* at [24]).

(6) It is not sufficient for a taxpayer merely to establish that the item performs "any plant-like function" (see *Cheshire Cavity* at [24] and [81]-[83]).

(7) As Lewison LJ noted in *Cheshire Cavity* at [3]:

> "Since the question whether something is or is not plant is a question of fact, or a question of fact and degree, it is necessary to pay close attention to the facts of previous cases. In some cases the court has upheld the decision of the fact-finding tribunal on the basis that it was entitled to find as it did. In such a case, it does not follow that the fact-finding tribunal would have made an error of law if it had decided the question differently."

70. HMRC submits that it is more appropriate to describe the Quay Wall as part of the premises at which the business is carried on, than as apparatus with which the business is carried on. In particular, they argue, the function of supporting the cranes is an ordinary premises function, an ordinary function of a purpose-built structure is to support any equipment that is to be placed upon it. Even if the provision of support could, in this case, be "a plant-type" function, the Quay Wall has numerous other functions which are functions of premises and which substantially outweigh any plant-like function that the Quay Wall may have, including the retention of the reclaimed land on which the CTA and the top of the Quay Wall stand, and the provision of support and mounting points for bollards used to secure vessels, and fenders. HMRC contend that the Quay Wall has undoubtedly been designed to meet the particular requirements of the business, but this is not enough to make the Quay Wall plant.

71. HMRC also referred to four cases noted in *Urenco* as "instructive examples of cases where purpose-built structures of a specialised nature have been held to fall on the premises side of the line".

72. The first case was *Gray v Seymours Garden Centre (Horticulture) (a firm)* (1995) 67 TC 401, which concerned a 'planteria' at a garden centre. The structure housed ornamental plants and protected growing plants from the weather. It also created an environment in which plants would grow and maintain their quality of growth, which could not be achieved in any other structure. The Court of Appeal concluded that the only true and reasonable view of the matter was that the planteria was part of the premises in which the taxpayer's business was carried on and even though the planteria had a functional aspect, that did not mean that it was plant.

73. The second case was *Bradley v London Electricity plc* [1996] STC 1054, which concerned an electricity sub-station that was in effect a specially designed underground concrete box holding electrical equipment. In that case, it was considered necessary to identify the overall function of the item in question, and although the structure in question was carefully designed to accommodate the equipment within, that did not alter the conclusion that it was plainly the premises in which the activity was conducted.

74. The third case was *Attwood v Anduff Car Wash Ltd* (1997) 69 TC 575 (CA). This concerned a car wash which encompassed the machinery inside the wash hall. Outside the wash hall each site was covered in tarmac or a similar material and was laid out with signs and bollards to ensure the smooth progress of customers' cars from the entrance, round the site, through the wash hall and back to the entrance/exit. The wash hall, in which cars were washed, dried and waxed, contained a lobby, a toilet, a pump room, an inspection area and a store room. The Court of Appeal held that it was not possible to regard the whole of the car wash as a single item of plant and that neither the tarmac areas nor the wash hall (taken as a whole) qualified as expenditure on plant. The fact that the site was purpose-designed as a whole could not turn a site which functions as premises into plant. It was held that the wash hall as a whole was not apparatus functioning as plant and even if the wash hall were a single unit of plant, it was impossible to say that the entire site was a single unit of plant.

75. The fourth case was *Shove v Lingfield Park 1991 Ltd* (2004) 76 TC 363 where the Court of Appeal held that an all-weather race track at a racecourse was not plant as it functioned as premises for horse racing, as did the grass racecourse running parallel with it. It would be an inaccurate use of language to describe them as the means, apparatus, equipment or tool by which or with which Lingfield's trade is carried on. It was more accurate to describe them as a place or premises, or part of a place or premises, on or in which the trade of organising and promoting horse racing was carried on.

76. Having carefully considered HMRC's submissions, it is our view that the facts in this appeal fall on the other side of the line with the relatively small number of cases where a

complex structure, viewed as a whole, has been held to function as plant in the taxpayer's business, and thus passes the premises test, *Barclay Curle* being the classic example of this in the English authorities (see *Urenco* at [35]). We agree with Mersey Docks that the reasoning in *Barclay Curle* applies directly to the facts in this appeal.

77. In *Barclay Curle* Lord Reid stated, at 738:

> "My Lords, during 1965 and earlier years the Respondents installed a new dry dock at their shipyard at Elderslie. The cost has been divided into three parts. Preliminary excavation cost some £187,000; concreting cost some £500,000; and ancillary plant cost some £243,000.... The Crown admit the claim with regard to the £243,000 for ancillary plant but maintain that only the smaller allowance is due in respect of the excavation and concreting. The Special Commissioners held that the larger allowance was due in respect of the concreting but not the excavation. The First Division held that the larger allowance was due for both.
>
> I can summarise the facts found by the Commissioners. The dock had to be made at the right level adjacent to the Clyde, and some 200,000 tons of earth had to be removed to make room for it. The walls and bottom of the dock had to be strong and impervious to water, so that some 100,000 tons of concrete had to be used. The gate included in the ancillary plant is of a falling leaf type. It is opened, and when the dock is full of water at high tide the ship to be inspected or repaired is caused to enter the dock. The gate is then closed, the water pumped out, and the ship properly supported so that work can proceed on the outside of the hull. When the work is finished the process is reversed and the ship can at high tide re-enter the river. From the findings of fact I need only quote the following:
>
> 'The function of a dry dock is to lower ships into a position where they can be securely held exposed out of the water and inspected and repaired, and to raise them again to a level where they are free to sail away. The No. 3 dry dock could only be used for this purpose. The dock acted like an hydraulic chamber in which a volume of water variable at will could be used to lower and raise a ship. The valves and pumps could not be used to lower or raise ships without the remainder of the dock. The dock could not be used to repair ships without the valves and pumps. The dock could not have fulfilled its purpose unless there had been excavated a depth sufficient to enable ships of the contemplated draught to enter and leave it. The valves, the machinery for the provision of electricity and the pumps were an integral part of the dock as a functioning entity. The remainder of the dock would have been useless to the Company without them, and similarly they would have been useless without the remainder of the dock.'"

78. It is worth noting here that in *Barclay Curle* the cost had been divided into three parts, being preliminary excavation cost, concreting cost, and ancillary plant. The Crown admitted the claim with regard to the ancillary plant leaving the matters regarding excavation and concreting costs to be determined. The facts found included that the dock had to be made at the right level adjacent to the Clyde, and some 200,000 tons of earth had to be removed to make room for it. The walls and bottom of the dock had to be strong and impervious to water, so that some 100,000 tons of concrete had to be used. The dock could not have fulfilled its purpose unless there had been excavated a depth sufficient to enable ships of the contemplated draught to enter and leave it. We consider these circumstances to be analogous to the appeal before us. The relevant cost has been divided into the costs of the STS Cranes and the costs of construction of the Quay Wall. HMRC admit the claim with regard costs of the STS Cranes. We have found

that the STS Cranes could not have fulfilled their purpose unless the Quay Wall was constructed in accordance with its detailed specifications.

79. We therefore do not accept HMRC's submission that no analogy can be drawn with the dry dock in *Barclay Curle* because Lord Reid described the dry dock as "massive and complicated equipment" (i.e. to remove ships from the water) and the Quay Wall cannot be characterised as a "tool" or "apparatus" in any comparable way. In this appeal, it is the STS Cranes which can be described as "massive and complicated equipment" and the Quay Wall costs are comparable with the excavation and concreting, which also cannot be characterised as a "tool" or "apparatus".

80. Lord Reid continued at 740:

> "The taxpayer company say that the whole dock was part of their plant used by them for the purposes of their trade. "Plant" is nowhere defined in the Act, and they rely chiefly on what was said by Lindley L.J. in *Yarmouth v France* and on the statement of the question by Pearson L.J. in *Jarrold v John Good & Sons Ltd*:
>
> "… whether the partitioning is part of the premises in which the business is carried on or part of the plant with which the business is carried on?"
>
> As the Commissioners observed, buildings or structures and machinery and plant are not mutually exclusive, and that was recognised in *Jarrold's* case. Undoubtedly this concrete dry dock is a structure, but is it also plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient.
>
> Here it is apparent that there are two stages in the Respondents' operations. First, the ship must be isolated from the water and then the inspection and necessary repairs must be carried out. If one looks only at the second stage it would not be difficult to say that the dry dock is merely the setting in which it takes place. But I think that the first stage is equally important, and it is obvious that it requires massive and complicated equipment. No doubt a small vessel could be got out of the water by the use of comparatively simple plant and machinery, but clearly that is impossible with a very large vessel. It seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or plant with which, the operation is performed."

81. It is also apparent to us in this appeal that there are two stages in the operations. First, the ship must be moored close to the STS Cranes and then the STS Cranes are used to load and offload containers. If one looks only at the first stage it would not be difficult to say that the Quay Wall is merely the setting in which it takes place. But we think that the second stage is equally important, and it is obvious that it requires massive and complicated equipment. No doubt a small vessel could be loaded and unloaded by the use of comparatively simple plant and machinery, but clearly that is impossible with a very large vessel. It seems to us that every part of the Quay Wall plays an essential part in getting large vessels into a position where loading and unloading can take place, and that it is wrong to regard any part of the Quay Wall

as a mere setting or part of the premises in which this operation takes place. The whole Quay Wall is, we think, the means by which, or plant with which, the operation is performed.

82. As stated at [28] above, we have refused HMRC permission to withdraw from their agreement that the parts of the Quay Wall that include the rear crane piles and the crane rails qualify for PMAs. We agree with the submissions made by HMRC during that application that it is very hard indeed to see why the rear crane piles and the crane rails should be regarded separately from the rest of the Quay Wall. This supports our finding that the whole Quay Wall qualifies for PMAs. However, if we were wrong to refuse HMRC's application to withdraw their agreement, we would still find that the whole Quay Wall qualifies for PMAs following our analysis of the decision in *Barclay Curle*.

83. In these circumstances, we consider it is "more appropriate" to describe the Quay Wall as apparatus rather than "premises". It is our conclusion that the Quay Wall Expenditure was, in principle, "on the provision of plant or machinery" within the meaning of that expression in section 11(4)(a) CAA 2001.

EXCEPTIONS TO EXCLUSION

84. It is common ground that the Quay Wall Expenditure is excluded from the scope of PMAs by virtue of section 22 CAA 2001 List B Item 5 being expenditure on a "dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped."

85. However, section 23 CAA 2001 provides that expenditure on certain items is unaffected by section 22.

86. We must therefore consider whether the Quay Wall Expenditure falls within one or more of the following items in List C. The relevant items are:

(1) Item 1 – Machinery (including devices for providing motive power) not within any other item in this list.

(2) Item 22 – The alteration of land for the purpose only of installing plant or machinery.

(3) Item 24 – The provision of any jetty or similar structure provided mainly to carry plant or machinery.

Machinery

87. HMRC accepts that the STS Cranes constitute "machinery" but contend, on the basis of the arguments we have considered and rejected above, that the Quay Wall Expenditure cannot be seen as having been on the provision of the STS Cranes. They argue that the most that can be said is that specific elements of the Quay Wall were incorporated into the design because of the need to support the STS Cranes, but it is unsustainable to say that the Quay Wall as a whole was constructed as part of the provision of the STS Cranes because the Quay Wall has functions which predominate over the need to support the STS Cranes, including in particular the retention of the reclaimed land.

88. We do not agree with HMRC's submissions. We accept Mersey Docks' contention that the Quay Wall Expenditure must be incurred before the STS Cranes can be provided and that the expenditure is a cost necessarily incurred on the provision of the STS Cranes themselves.

89. We note the remark made by the Upper Tribunal in *Gunfleet* at [121]:

> "In summary therefore, *Barclay Curle* does not impose a necessity test but makes the point that "provision of plant" may cover more than the cost of plant itself or its actual supply. It can also cover expenditure on installing the

> plant on the basis that without installation the plant cannot be said to have been provided for the purposes of the trade."

90. In our view, the Quay Wall Expenditure is expenditure on installing the machinery, namely the STS Cranes, on the basis that without installation the machinery cannot be said to have been provided for the purposes of the trade. We have therefore concluded that the expenditure is "saved" by item 1 of List C in section 23 CAA 2001.

Alteration of Land

91. Having concluded that the Quay Wall Expenditure is "saved" by item 1 of List C in section 23 CAA 2001, it is unnecessary to consider the other relevant items of List C to determine this appeal.

92. However, for the purposes of completeness, we would simply say that if we were required to consider this provision, we would not have been satisfied that the expenditure properly falls within Item 22 in List C. This Item refers to the "alteration of land for the purpose only of installing plant or machinery". We accept HMRC's submission that the Quay Wall was not constructed (altering the land) for the purpose only of installing the STS Cranes, as it was also constructed for the purpose of providing a berth where vessels can be safely moored.

Any Jetty or Similar Structure

93. Again, for the purposes of completeness, we would simply say that if we were required to consider this provision, we would not have been satisfied that the expenditure properly falls within Item 24 in List C.

94. This Item refers to the "provision of any jetty or similar structure provided mainly to carry plant or machinery". We do not consider the expenditure could rightly be said to be on the provision of any jetty or similar structure when considering the ordinary meaning of the term "jetty" (Mersey Docks referred to the Oxford Dictionary of English 3rd Edition 2010 definition of a "jetty" as "a landing stage or small pier at which boats can dock").

95. We also do not consider the expenditure could rightly be said to be on the provision of any jetty or similar structure when considering the concept of a "jetty or similar structure" interpreted in its statutory context (HMRC referred to the Item 5 in List B in section 22 exclusion on the provision of a "dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped". We agree that in List C Item 24, Parliament has chosen not to remove from that exclusion any of the other excluded items in Item 5 of List B such as a "wharf" or "pier" and the term "jetty" is not, in this context, apt to describe the Quay Wall).

CONCLUSION

96. Having considered the issues to be determined in this appeal, we have therefore concluded that:

(1) The Quay Wall does constitute a distinct asset for the purposes of the relevant provisions of the CAA 2001.

(2) The Quay Wall Expenditure was, in principle, "on the provision of plant or machinery" within the meaning of that expression in section 11(4)(a) CAA 2001.

(3) The Quay Wall Expenditure is "saved" by item 1 of List C in section 23 CAA 2001.

97. For the reasons set out above, we allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

98. 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.

Release date: 23rd DECEMBER 2024