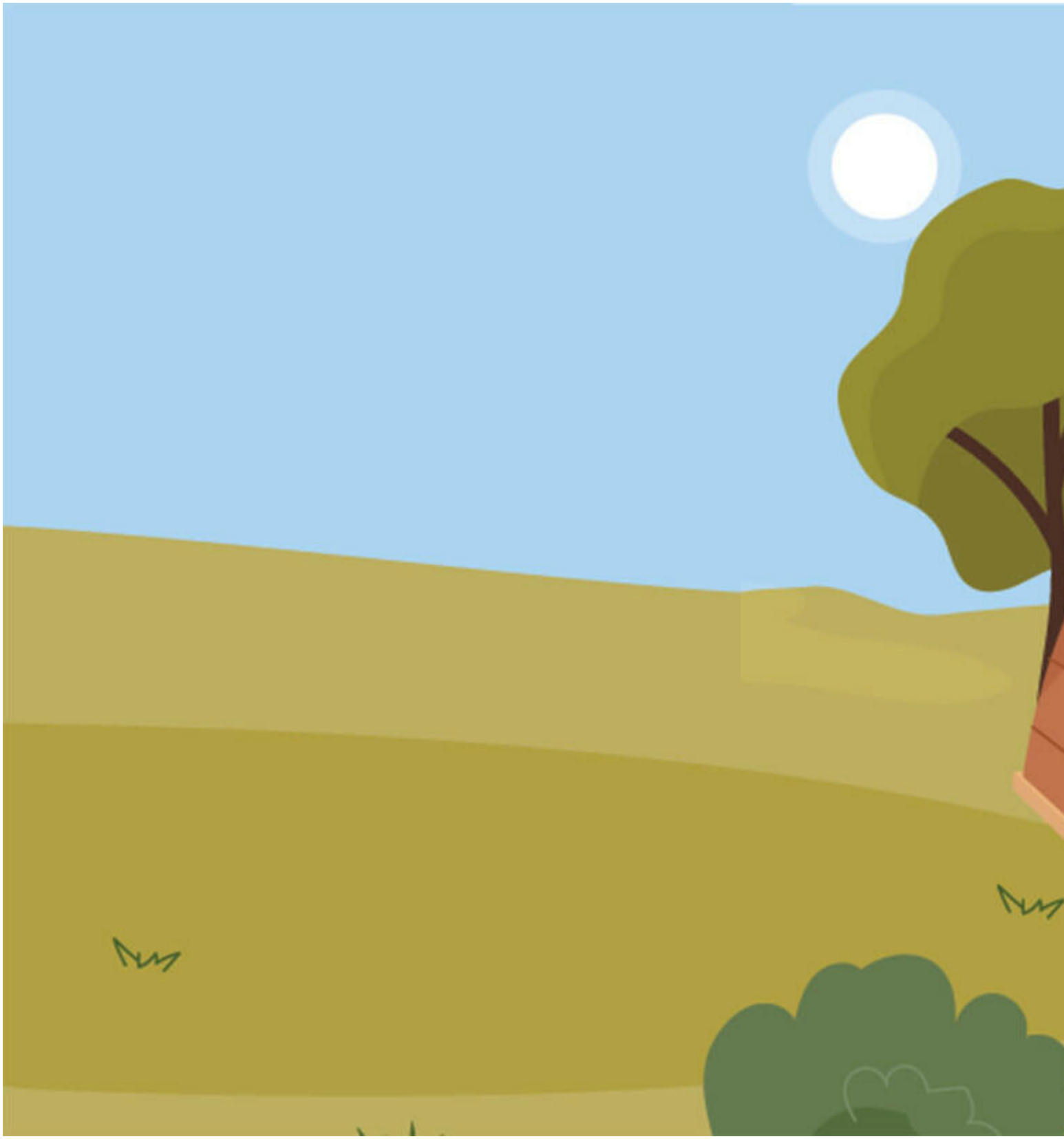
The true meaning of ‘plant’: some core capital allowance issues

Property Tax OMB Large Corporate



19 February 2024

We consider the recent tribunal cases of *Gunfleet* and *Acorn Venture*, which have shed new light on some core capital allowance issues.

Key Points

What is the issue?

Two capital allowances cases reported at the end of last year address technical issues that are perennially relevant for plant and machinery claims, even though few practitioners will be concerned with the particular assets being considered.

What does it mean to me?

Among other issues, the cases address what is meant by expenditure ‘on the provision’ of plant and, when deciding what is plant, whether it is appropriate to look at the single entity or at the constituent parts.

What can I take away?

The cases set out the capital allowances meaning of ‘building’, including the meaning of ‘fixed structure’ and the relieving rules for moveable buildings.

Two capital allowances cases reported at the end of last year address technical issues that are perennially relevant for plant and machinery claims, even though few practitioners will be concerned with the particular assets being considered.

In the Upper Tribunal, the case of *Gunfleet Sands Ltd v HMRC* [2023] UKUT 260 (TCC) concerned expenditure of some £48 million on offshore windfarms, while the First-tier Tribunal case of *Acorn Venture Ltd v HMRC* [2023] UKFT 995 (TC) considered allowances for more modest expenditure on ‘camping pods’.

Between them, these cases shed new light on some core capital allowances issues, including all of the following:

- What is meant by expenditure ‘on the provision’ of plant?
- When deciding if something is plant, is it appropriate to look at the single entity or at the constituent parts?
- What is the capital allowances meaning of ‘building’?
- What is the meaning of ‘fixed structure’?
- How do the relieving rules for moveable buildings work?

This article addresses each of these questions in turn, showing what the two cases have added to our previous understanding of the issues. All statutory references are to the Capital Allowances Act 2001.

Expenditure on the provision of plant

Plant and machinery allowances may be due where a taxpayer incurs capital expenditure ‘on the provision of plant or machinery’ (s 11(4)(a)). The term ‘on the provision of’ is then echoed elsewhere in the Capital Allowances Act 2001.

This term has no statutory definition but has been considered in a number of recent cases.

In the case of *Urenco Chemplants Ltd v HMRC* [2022] EWCA Civ 1587, it was common ground between the parties that expenditure on the provision of plant or machinery included installation costs but did not include

‘expenditure more remote in purpose’.

The *Gunfleet* case – at both the First-tier Tribunal in 2022 and the Upper Tribunal in 2023 – took a close look at the meaning of ‘on the provision of’ in the context of preparatory studies for a large windfarm project. The First-tier Tribunal held that some of these studies qualified but others did not, depending on whether they were fundamental to the functioning of the windfarms or turbines.

After both sides appealed, however, the Upper Tribunal ruled in HMRC’s favour, holding that this interpretation was too broad: ‘We agree with HMRC that “on” does not mean “in connection with” or “directly related to” but signals a closer connection.’

The Upper Tribunal drew a distinction between expenditure on the provision of plant and expenditure on design that merely put the company in the position to provide plant:

‘None of the studies were provision of the plant … in that expenditure on them was not expenditure on the actual making or construction of the plant, its actual installation or actual transport of it. Nor were they expenditure of a similar nature.’

The tribunal held that as the design of the plant happens when ‘the final form and shape of the plant is still to be determined’, it would be odd to refer to that design as being the provision of plant. Drawing together principles from earlier case law, the tribunal summarised the position as follows:

- ‘On the provision of’ may include the installation and transport of plant (and, in principle, of other similar expenditure) so that the plant can be used for the purposes of the trade.
- It can also include construction of the plant.
- However, it is not the case that any expenditure that the taxpayer needs to incur in order for the plant to be provided is automatically allowed.
- It is helpful to ask whether the expenditure was on the provision of plant or (as in *Gunfleet*) on something else.
- The fact that some element of construction might precede the completion of the plant by many years would not be any bar, in principle, to including those earlier construction costs.

Single entity or constituent parts

There can often be uncertainty about whether the test (‘Is it plant?’) has to be applied to an entire asset or to its consituent parts.

In *Gunfleet*, the practical relevance of the point was explained by the Upper Tribunal as follows:

'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.’

The First-tier Tribunal had found that the ‘generation assets’ (more clearly defined by the Upper Tribunal to mean the wind turbines and the connecting cables collectively) constituted a single item of plant. The Upper Tribunal was critical of many aspects of the First-tier Tribunal decision but ruled that as the fact-finding tribunal, it had been entitled to reach its conclusion on this point.

The author's view is that HMRC is too keen to break assets down in this way. In relation to ticket barriers at a large transport hub, for example, the author has seen HMRC seeking to separate out the physical gates from the mechanical works that cause those gates to open when a passenger presents a ticket. Yet a car (to give a different example) is clearly plant, and it would be absurd to apply the plant test separately – perhaps to the roof of the car, the steering wheel, the floor covering, and so on. It may well be that further case law will be needed to provide greater clarity on the correct approach.

The meaning of building

The question of whether a given asset is a building is of fundamental importance for capital allowances purposes, most obviously for structures and buildings allowances but also for the purposes of claiming plant and machinery allowances. Our focus here is only on the latter.

Section 21 states that 'expenditure on the provision of plant or machinery does not include expenditure on the provision of a building'. It then gives a broad definition of 'building' to include certain specified assets (e.g. walls and floors) but also any asset that is incorporated in a building, or that is in the building and is of a kind normally so incorporated.

So the definition is very wide. It is, however, subject to s 23, which provides a whole host of exceptions, and which therefore allows substantial plant and machinery claims for property fixtures.

In *Acorn Venture*, the First-tier Tribunal had to consider whether two different types of 'camping pod', used by a company providing adventure holidays, constituted plant or machinery. Most of the pods were for children and were fairly basic, with an electric hook-up but no plumbing. The remaining pods, for the teachers accompanying the children, did have some plumbing facilities.

In deciding (narrowly) that the more basic pods were not buildings, the First-tier Tribunal noted the following:

- They did not have walls and roofs in a traditional sense, and did not look like a conventional building (looking, rather, 'like an upturned boat').
- They did not provide living accommodation as such, but rather offered 'only a very crude place to sleep, such that whilst they provide shelter in a basic sense, in our view the shelter offered whilst greater than a tent is not significantly so'.
- They performed the same function as canvas tents, being 'non-permanent accommodation akin to the tents in which the children otherwise sleep'.
- The provision of electricity did not change this conclusion (not least because the tents also had electricity).

However, the tribunal reached ('on balance') the opposite conclusion in relation to the teacher pods, as:

- They were fixed to the ground because of the plumbing.
- They provided more facilities for living with a greater level of comfort (fewer occupants and additional facilities, including a basic kitchenette).
- The substance of the shelter offered to the occupants was therefore far greater, such that these pods were 'all but living accommodation providing sufficient security and shelter'.

By comparing and contrasting the two types of camping pod in this case, and by jumping narrowly to opposite conclusions on the two, the First-tier Tribunal has provided some useful indicators of where tax tribunals may draw the line between what is and is not a building.

Structures and fixed structures

The same case also considered whether the pods were fixed structures. This is relevant as s 22 provides a bar on claiming plant and machinery allowances for most fixed structures, though again subject to the relaxing provisions of s 23.

The First-tier Tribunal was clear that both types of camping pod were structures, being (as the tribunal put it) 'assembled from parts to form a solid object'. (That is not a statutory definition, however, and little weight should be given to it: a watch or a laptop would meet that definition but neither would be a structure. Nevertheless, it was apparently uncontroversial in this case that all the camping pods were structures.)

The question of whether the pods were *fixed* structures was more difficult. Once more, the First-tier Tribunal reached different conclusions in relation to the teacher pods and the children's pods, and it is again instructive to see what led to those different outcomes.

In relation to the children's pods, the tribunal referred back to the Court of Session ruling in *Anchor International Ltd v CIR* [2004] ScotCS 281. The *Anchor* case had found that a huge synthetic carpet on a five-a-side football pitch was plant, upholding the decision of the Special Commissioners that the carpet was not a fixed structure:

'Whatever "fixed" means in the context of the definition of structure, a carpet resting on the ground, however heavily weighed down with sand, is not fixed to anything. The fact that it cannot be moved as a whole or even in the same size rolls in which it was installed does not mean that it is fixed.'

In *Acorn Venture*, the First-tier Tribunal found that the children's pods were not fixed as they were 'considerably less "fixed" than the pitches in *Anchor'*:

'It is right that they are heavy, but they rest under their own weight on concrete block and beams and are anchored only for safety… From the pictures, we saw it was possible to see under the pods from all angles and any anchor was considerably less substantial than [the weight of sand holding down the synthetic carpet in *Anchor*].'

The teacher pods, by contrast, were fixed as a consequence of their plumbing facilities. Each was securely attached to a foul water drain, which meant that each had to be in a fixed place with access to the underground drain 'and then attached in a way which had a degree of permanence'.

Moveable buildings

If an asset is a building or structure, caught by s 21 or s 22 respectively, allowances will be denied unless the asset is rescued by one of the exceptions in s 23. Section 23 is broad in its scope, including in particular relaxations for integral features (e.g. electrical, water and heating systems) and for a wide range of particular assets given in 'List C'.

For the children's pods, the relieving provisions of s 23 were not needed. The First-tier Tribunal had already determined that the pods were not buildings (and were therefore not caught by s 21) and were not fixed structures (and were therefore not caught by s 22). Expenditure on these pods could therefore qualify for plant and machinery allowances as long as the pods were plant on ordinary case law principles (which define the

concept of plant very widely) without having to rely on s 23.

The teacher pods, by contrast, had been held to be fixed structures, and were therefore caught by s 22. It followed that expenditure on these could only qualify if the s 23 restrictions came to the rescue. The First-tier Tribunal had also held that the teacher pods were buildings, which had a double effect: on the one hand, it meant that allowances were also barred by s 21 (the restriction for buildings); but on the other hand, it meant that item 21 at List C could be considered, potentially overriding both restrictions. Item 21 applies to 'moveable buildings intended to be moved in the course of the qualifying activity'.

Although the First-tier Tribunal had found that the teacher pods were fixed structures, it saw no contradiction in finding that they were also moveable buildings. The tribunal found that planning permission to move them would almost certainly be given, and the fact that costs would be incurred did not affect the question of whether they were moveable. The fact that the sanitary drainage connection would need to be removed was not 'sufficient to preclude a conclusion' that the pods were moveable. Furthermore:

'Nor do we consider the fact that the pods required a forklift truck to move them short distances and a lorry and trailer to move them further precludes a conclusion that they are moveable. HMRC accept that a builder's Portakabins will be moveable. We can see no material difference in the complexity of the requirements and cost of movement of a builder's Portakabin to the movement of a teacher pod."

On this basis, the teacher pods were held to be moveable.

HMRC nevertheless won the appeal on the teacher pods on different grounds, persuading the First-tier Tribunal that there must be (emphasis added) 'an evidenced intention to move moveable buildings in the course of a qualifying activity *in the period of claim*'. This wording is ambiguous but from the context it seems clear that what is required in the period of claim is the intention to move; there is no requirement that actual movement should take place in that period. The company had demonstrated no such intention during the period, so its claim for annual investment allowances was denied.

HMRC did concede, however, that a later claim to writing-down allowances could succeed if the intention demonstrably changed in future.

(A later claim for annual investment allowances would not be possible, as s 51A(2) requires claims to be for the period in which the expenditure was incurred.)

Finally, and rather incidentally, HMRC sought to argue that there was a distinction between an intention 'in the course of' and 'for the purposes of' the qualifying activity. The First-tier Tribunal was not persuaded by this, finding it difficult to discern a substantive difference between the two expressions.