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# Urenco: plant and machinery allowances

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In *Urenco*, the Upper Tribunal held that the First-Tier Tribunal made certain errors in law in deciding to deny the taxpayer plant and machinery capital allowances. The decision is another recent example of the courts being asked to consider the common meanings of words used in the CAA 2001. The UT's conclusion that the term 'building' has a number of ordinary meanings, and each of these should have been considered in the context of the legislation, has given the courts some flexibility in applying the legislation to increasingly innovative assets. The flurry of recent cases in the area may be partly explained by the seven-year gap between the removal of IBAs and introduction of SBAs, which has put increased pressure on the application of the legislation relating to plant and machinery capital allowances to large power generation projects.

In Urenco Chemplants Ltd and another v HMRC [2022] UKUT 22 (TCC) (reported in Tax Journal, 11 February 2022), the Upper Tribunal (UT) ruled that the First-tier Tribunal (FTT) had made certain errors of law in reaching its decision to deny the taxpayer plant and machinery capital allowances in respect of expenditure on a nuclear tails management facility (TMF), a facility dealing with depleted uranium. Following the Court of Appeal decision in HMRC v SSE Generation Ltd [2021] EWCA Civ 105, the UT decision in Cheshire Cavity Storage 1 Ltd & another v HMRC [2021] UT 0156, and even the subsequent FTT decision in Gunfleet Sands Ltd and others v HMRC [2022] UKFTT 35 (TC), it provides a further example of the courts attempting to grapple with the thorny issue of the availability of capital allowances in the context of increasingly complex, technical assets used in the power generation industry.

The result of the UT's decision in Urenco is that the case has been remitted to the FTT to be re-made. The decision contains an interesting discussion around the distinction between findings of fact and the statutory interpretation of legislation. We have now had multiple cases on the interpretation of commonplace words in this context. Why has this area become such a hot topic for dispute between taxpayers and HMRC?

## Findings of fact versus statutory interpretation

The UT's decision in Urenco demonstrates the difficulty faced in interpreting common words used in CAA 2001 ss 21–23. Here, the term under consideration was 'building' and the question was whether a number of assets in the TMF were or were not 'buildings' or items 'incorporated in' or 'connected with' buildings for the purposes of s 21.

If, as the FTT had held, they were, capital allowances would not be available as none of the disputed expenditure was saved by List C in s 23.

The FTT approached the question of determining whether the assets comprising the TMF were buildings or items incorporated in or connected with buildings, by applying a single ordinary meaning of the term 'buildings'. In doing this, the FTT considered the physical characteristics of each of the five facilities comprising the TMF and identified characteristics indicative of the structures being 'buildings'. Each had a floor, four walls, and a roof – the essential characteristics of a 'building' – and were capable of providing protection and shelter. While each asset had specific functions (for example, containment of nuclear material, protection from radiation and seismic qualification), this did not alter the FTT's conclusions when straightforwardly applying a single meaning of 'building'. The UT held that the FTT had erred in law in taking this approach, noting that what constitutes the 'everyday meaning' is not clear; many words have a number of ordinary (or 'everyday') meanings, and the statutory meaning is not necessarily the widest one.

The FTT should, in each case, have considered the range of everyday meanings that could apply to the term ‘building’ and then applied the meaning that best accords with a purposive construction of s 21. The function of the structure was particularly important in this context and its physical appearance less so.

This need to determine the meaning of common words used in ss 21–23 is a rather familiar story. In the line of SSE Generation cases, the FTT, UT and Court of Appeal considered at length whether certain conduits used in a hydroelectric plant were ‘tunnels, aqueducts or bridges’ falling within s 22. It was in this line of cases that LJ Rose discussed ‘chameleon words’ and the possibility for a word to have a number of ordinary commonplace meanings; the approach now followed by the UT in Urenco. Following SSE, Cheshire Cavity Storage and now Urenco, it is clear that there is no single meaning to apply to commonplace words such as ‘building’ or ‘tunnel’ in these statutory provisions.

The UT held that the FTT must re-make its decision considering the full spectrum of possible ordinary meanings of ‘building’ in the context of the TMF, and paying particular attention to the function rather than appearance of the structures. The UT concluded that the question of whether a structure is a ‘building’ is a matter of statutory interpretation, having regard to the context and purpose of the provisions. This has given the courts some flexibility when considering the application of the provisions of ss 21–23 to previously unforeseen assets and technologies and, importantly, leaves the interpretation adopted by a court open for potential taxpayer challenge. Critically, of course, this does not provide any great clarity to taxpayers on what their plant and machinery capital allowances filing position should be. Discussions to the effect of ‘when is a “tunnel” a tunnel?’, or ‘when is a “building” a building?’ therefore look likely to continue to be something that the courts will be asked to consider into the future.

## Why have we ended up here?

The historical context in which ss 21–23 were introduced is helpful in understanding why the terms were not more clearly delineated. The intention of these provisions was to ‘draw a line in the sand’ between what constitutes buildings and structures on the one hand and plant on the other. While these provisions were intended to clear up the significant body of case law that had considered what constitutes ‘plant’ up to that point, we are now at a stage where the courts are having to apply this legislation to assets which were simply not contemplated in 1994.

The emergence of recent case law in this area can also be partly explained by the phasing out of industrial buildings allowances (IBAs), which was completed in 2011. IBAs were introduced shortly after the end of WWII to boost productivity manufacturing and processing industries. Structures and buildings allowances (SBAs) were introduced in 2018, but the seven year gap between the removal of IBAs and the introduction in SBAs coincided with a period of significant change and innovation in the energy industry without corresponding legislative reform. That left expenditure on the kind of structures considered in SSE, Cheshire Cavity Storage and now Urenco hard to place within the legislative framework; they are clearly not held for investment purposes but, nevertheless, not qualifying for depreciation without some debate. It is perhaps not surprising that we are now seeing companies which have invested vast sums in excavating and constructing energy projects looking to claim, and fight for, the maximum amount of plant and machinery capital allowances available in circumstances where the alternative is no tax relief at all.

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