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SSE Generation: when is a tunnel a tunnel?

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The Supreme Court has dismissed HMRC's appeal in respect of the approach to the statutory interpretation of the words 'tunnel' and 'aqueduct' in CAA 2001 ss 21–23. To determine the applicable ordinary meaning of a word, it is right to consider the relevant statutory context. Uncertainty remains, but do not expect legislative reform any time soon.

In *HMRC v SSE Generation Ltd* [2023] UKSC 17 (reported in Tax Journal, May 22, 2023), the Supreme Court dismissed HMRC's appeal in respect of the availability of capital allowances on expenditure incurred by SSE Generation Ltd (SSE) in connection with the construction of certain 'conduits' used for transporting water. The decision is the latest in a line of cases (*Cheshire Cavity Storage 1 Ltd and another v HMRC* [2021] UKUT 156 (TCC), *Urenco Chemplants Ltd and another v HMRC* [2022] UKUT 22 (TCC), and *Gunfleet Sands Ltd and others v HMRC* [2022] UKFTT 35 (TC)) looking at the tricky issue of the availability of capital allowances in respect of increasingly novel technologies used in the power generation industry.

Which is the appropriate 'ordinary meaning'?

The Supreme Court started with considering the ordinary meaning of the words. Holding that the terms 'tunnel' and 'aqueduct' had multiple ordinary meanings, the Supreme Court confirmed that the correct approach to interpretation is to give the ordinary meaning that is appropriate given the statutory context in which the words sit. Concluding that it was reasonable for the Court of Appeal and tribunals to conclude that those terms were grouped together with other items in s 22 List B item 1 on the basis of a shared theme of structures related to the construction of transportation routes or ways, the Supreme Court held that where used in s 22 List B item 1:

- A 'tunnel' is not simply 'any subterranean passage' as HMRC contended, but means a subterranean passage through an obstacle for a way to pass through; and
- An 'aqueduct' is not simply any form of water conduit, but, noting that it is listed immediately after 'bridge, viaduct' and in the same grouping as 'tunnel', 'embankment' and 'cutting', means a bridge-like structure for carrying water, including but not limited to carrying a canal.

Applying the statutory context, the disputed expenditure was in respect of neither a 'tunnel' nor an 'aqueduct' and was therefore allowable. Consequently, there was no need for the Supreme Court to go on to consider the application of s 23 List C.

Where does this leave us?

It is helpful for taxpayers relying on ss 21 and 22 to see the Supreme Court confirm that the words used should not take their widest possible meaning as HMRC had contended, but rather should be viewed in their statutory context. As a clarification to the approach to statutory interpretation, it does of course also have some general application when considering potential ordinary meanings of words used in statute.

The recent spate of cases in this area is perhaps partly explained by the phasing out of industrial buildings allowances (IBAs) in 2011 and the subsequent introduction of structure and buildings allowances (SBAs) in 2018. During the intervening period taxpayers have had to rely on plant and machinery capital allowances as their only option for tax relief on capital expenditure on novel projects, putting more pressure on a distinction that was less significant when IBAs were available.

While the introduction of SBAs is unlikely to have put an end to taxpayers seeking to claim plant and machinery allowances given the difference in rates, the fact that some tax relief may be available for structural items not qualifying for capital allowances means that this pressure is now perhaps not as great as it was historically.

Sections 21–23 were introduced in 1994 to consolidate the case law prior to that date, and with the intention of drawing a line in the sand between what constitutes plant, and what constitutes buildings and structures for capital allowances purposes. Despite this intention, this case and the other cases referred to above suggest that this has not been entirely successful. Such an approach to legislative drafting is always vulnerable to changing technologies. While there remains some inherent uncertainty in leaving it to the courts and tribunals to determine what is the appropriate ordinary meaning of a word used in ss 21–23, this may in fact be preferable to a further rewrite of the capital allowances code following these cases.

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