[2021] UKUT 0100 (TCC)

Appeal number: UT/2019 /0108

INCOME TAX– industrial building allowances - buildings ceased to be used by previous owner and sold - new owner intended to let buildings but unable to find a suitable tenant-buildings sold without having been brought back into use -whether or not period of ownership amounted to a period of temporary disuse– ss 271,285 Capital Allowances Act 2001

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARK SHAW **Appellant**
(as nominated member of TAL CPT Land Development Partnership LLP)

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mr Justice Miles
Judge Timothy Herrington

Sitting in public by way of remote video hearing, treated as taking place in London, on 25 March 2021

Julian Ghosh QC and Emma Pearce, Counsel, instructed by Ashurst LLP, Solicitors, for the Appellant

Julian Hickey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant, Mark Shaw, in his capacity as nominated member of TAL CPT Land Development Partnership LLP ("TAL") against the decision of the First-tier Tribunal ("FTT") (Judge Philip Gillett and Member Jane Shillaker) released on 26 April 2019 (the "Decision").

2. The FTT dismissed TAL's appeal against the following closure notices and amendments to TAL's partnership statement:

Year	Description	Date of Issue	Amount (£)
2004-05	Closure notice and amendment	3 Dec 2015	658,846
2005-06	Partnership discovery assessment	19 Nov 2009	2,555,820
2006-07	Closure notice and amendment	3 Dec 2015	10,315,324

3. The figures shown above represent the amount of writing down allowances and balancing allowances (both of which are Industrial Building Allowances ("IBAs") claimed and disallowed in the partnership computation of allowable losses as a consequence of HMRC's decisions.

4. TAL claimed the allowances in question in respect of accounting periods ended 31 March 2005 to 31 March 2007 on the basis that although the buildings concerned were not being used at the time of their acquisition by TAL, the previous owner having ceased to use them following the closure of its business at the site where the buildings stood, TAL nevertheless intended to bring the buildings back into use by finding suitable tenants to occupy them. Accordingly, TAL contended that it should be entitled to the allowances on the basis that the buildings were not to be regarded as ceasing to have been used because they were "temporarily out of use" within s 285 of the Capital Allowances Act 2001 ("CAA 2001") up to the point that TAL decided to cease their efforts to use the buildings and sell them.

5. The respondent ("HMRC") disallowed TAL's claims on the basis that the buildings in respect of which the allowances were claimed did not meet the definition of "industrial buildings" in s 271 CAA 2001. In particular, HMRC contended that the buildings were not "temporarily out of use" within s 285 CAA 2001, at any time during TAL's period of ownership because a period of actual use is required at both ends of a period of temporary disuse. HMRC contend that if, as was the case here, the building

never comes back into actual use, then the period during which it was not being used cannot be considered to be "temporary".

6. The FTT concluded that the buildings ceased permanently to be used as industrial buildings when they stopped being used by the previous owner. Therefore, the FTT held that at the time of their acquisition by TAL, the buildings had ceased to be used as industrial buildings with the consequence that TAL was not entitled to claim allowances in respect of them. This was on the basis that the absence of reuse meant that the disuse of the buildings could not have been temporary. Accordingly, the FTT concluded that TAL had no entitlement to claim allowances in respect of the buildings because they were not industrial buildings at any time during TAL's period of ownership.

7. The FTT granted TAL permission to appeal against the Decision to the Upper Tribunal on 27 September 2019. The only issue before us is whether the FTT erred in its conclusion that the buildings in question were "temporarily out of use" during the material times and were thus deemed to be "industrial buildings" for the purposes of CAA 2001.

The Facts

8. The FTT made detailed findings of fact regarding the successive periods of ownership and development of the site on which the buildings which were the subject of the appeal were constructed and the use of the buildings during the material times. Neither party is challenging those findings. For the purposes of this appeal the following short summary will suffice.

9. References to numbered paragraphs in square parentheses, unless stated otherwise, are references to paragraphs in the Decision.

10. The land on which the buildings which are the subject of this appeal were constructed ("the Site") is situated between Glasgow and Edinburgh. The Site was situated in a business and distribution park which was designated as an enterprise zone ([16] and [17]).

11. In 1991 the UK subsidiary of a Taiwanese company involved in the production of cathode ray television tubes ("CPT Ltd") purchased a long leasehold interest in the Site. CPT Ltd's plan for the Site was to develop four large production buildings, over four phases. The building work for phase one commenced in 1996 and ended in 1998. Phase one was the construction of one of the large production buildings together with an office/canteen building and a range of ancillary buildings providing support services (together the "Buildings") ([18] to [21]).

12. In October 1997 CPT Ltd started manufacturing cathode ray picture tubes at the Site, using all of the Buildings. However, CPT Ltd subsequently halted development at the Site and ceased its activities there due to commercial difficulties. During CPT Ltd's period of ownership, the Buildings were industrial buildings within the meaning of s 271 CAA 2001. The expenditure incurred by CPT Ltd was qualifying expenditure for the purposes of CAA 2001. In or around January 2003 the Buildings fell into temporary disuse within s 285 CAA 2001. Following CPT Ltd's sale of the Site (as described

below) there were residual capital allowances of approximately £14 million ([24] to [25]).

13. On 4 February 2004 TAL agreed to purchase CPT Ltd's interest in the Site. The purchase agreement included an undertaking that two of the Buildings (the office building and the production building) would be brought out of temporary disuse and back into use within 3 years of acquiring the Site. TAL also agree to indemnify CPT Ltd for up to £7 million for any future tax liabilities it could incur if it failed to bring those buildings back into use. The purchase was completed on 2 March 2004, approximately 13 months after the Buildings had fallen into (temporary) disuse while in the ownership of CPT Ltd. TAL then held the relevant interest in the Buildings for the purposes of s 286 CAA 2001 ([32] to [34]).

14. At the time of the acquisition, TAL was not aware of the possibility that it might claim IBAs in respect of their expenditure on the Site and these allowances formed no part of the business plan which they prepared in order to secure loan finance for the purchase ([35]).

15. From the date of the purchase, TAL instructed agents to market the Site to attract potential tenants for the Buildings and from 2 May 2004 extensive active marketing took place. Those efforts ultimately failed. TAL resolved to cease its efforts to use some of the Buildings in November 2005 and those buildings were sold in March 2006. TAL continued to market the remaining Buildings but in October 2006, TAL resolved to carry out a new development which required the demolition of the rest of the Buildings. Those Buildings were sold in April 2007 before the demolition and new development had commenced ([42] to [69]).

The Law

Relevant Legislation

16. The legislation relevant to this appeal was contained in Part 3 of CAA 2001, which provided at the material times for claims to capital allowances to be made in respect of expenditure on industrial buildings. Although this appeal turns solely on the interpretation of s 285 CAA 2001 it is helpful to set out all those provisions of Part 3 of CAA 2001 which assist in putting s 285 into its statutory context.

17. Section 271 of CAA 2001 set out when IBAs were available and provided as follows:

> "(1) Allowances are available under this Part if –
>
> (a) expenditure has been incurred on the construction of a building or structure,
>
> (b) the building or structure is (or, in the case of an initial allowance, is to be):
> (i) in use for the purposes of a qualifying trade,
> (ii) a qualifying hotel,

(iii) a qualifying sports pavilion, or
(iv) in relation to qualifying enterprise zone expenditure, a commercial building or structure, and

(c) the expenditure incurred on the construction of the building or structure, or other expenditure, is qualifying expenditure.

(2) In the rest of this Part –

(a) *"building"* is short for *"building or structure",* and

(b) *"industrial building"* means, subject to Chapter 2 (which defines terms used in subsection (1)(b) etc.), a building or structure which is within subsection (1)(b).

(3) Allowances under this Part are made to the person who for the time being has the relevant interest in the building (see Chapter 3) in relation to the qualifying expenditure (see Chapter 4)."

18. This provision requires (inter alia) that expenditure incurred on the construction of a building be qualifying expenditure, a condition that was satisfied in this case, because all of the expenditure was incurred in relation to the construction of a commercial building within a qualifying enterprise zone. In that regard, s 281 of CAA 2001 provided a definition of a "commercial building", namely a building which is used (a) for the purposes of the trade, profession or vocation, or (b) as an office or offices (whether or not for the purposes of a trade, profession or vocation), and which is not in use as, or as part of, a dwelling-house. Section 294 of CAA 2001 provided that capital expenditure incurred on the construction of a building was "qualifying expenditure".

19. As set out above, s 271 (3) of CAA 2001 provided that allowances were made to the person who had the "relevant interest" in the building in relation to the qualifying expenditure. That term was defined in s 286 (1) of CAA 2001 as follows:

> "The relevant interest in relation to any qualifying expenditure is the interest in the building to which the person who incurred the expenditure on the construction of the building was entitled when the expenditure was incurred."

Thus in this case, CPT Ltd, as the lessee of the Buildings and the entity which incurred the expenditure in constructing them held the "relevant interest" which entitled CPT Ltd to both an initial allowance under s 305 of CAA 2001 and writing down allowances under s 309 of CAA 2001.

20. A person could make a claim to writing-down allowances ("WDAs") in respect of industrial buildings under s 309 of CAA 2001 which provided as follows:

> "(1) A person is entitled to a writing-down allowance for a chargeable period if –
>
> (a) qualifying expenditure has been incurred on a building,
>
> (b) at the end of that chargeable period, the person is entitled to the relevant interest in the building in relation to that expenditure, and
>
> (c) at the end of that chargeable period, the building is an industrial building.
>
> (2) A person claiming a writing-down allowance may require the allowance to be reduced to a specified amount."

21. In this case, following TAL's acquisition of CPT Ltd's interest in the Buildings in 2004, TAL became the holder of the "relevant interest" and thus became entitled to WDAs going forward provided the Buildings continued to be "industrial buildings". The amount of "qualifying expenditure" in relation to which WDAs could be claimed by TAL was determined in accordance with ss 312 and 323 of CAA 2001, as mentioned below. Those allowances would be written off at the end of the chargeable period for which the allowance is made: see s 334 of CAA 2001. The allowances were given effect in calculating the profits of the trade of the person claiming the allowance by treating the allowance as an expense of the trade: see s 352 of CAA 2001.

22. Sections 311 and 312 of CAA 2001 deal with how allowances are to be calculated after the sale of a relevant interest. In summary, the WDAs are calculated by reference to the "residue of qualifying expenditure", the amount of the WDA for a chargeable period being limited to the residue of qualifying expenditure ascertained immediately before writing off the WDA at the end of the chargeable period (the accounting period of the taxpayer concerned). Section 313 of CAA 2001 defines the "residue of qualifying expenditure" as the qualifying expenditure that has not yet been written off.

23. Thus in this case if the Buildings continued to qualify as industrial buildings when acquired by TAL they would be entitled to WDAs based on the qualifying expenditure incurred by CPT Ltd which had not yet been written off. A calculation would be made to see if "balancing adjustments" needed to be made in respect of CPT Ltd's claims for allowances, in accordance with Chapter 7 of Part 3 of CAA 2001, as described below. Any "balancing adjustments" may affect the amount of the residue of qualifying expenditure on which TAL's right to claim allowances would be based. Section 337 of CAA 2001 provided as follows:

> "(1) This section applies if the relevant interest in the building is sold.
>
> (2) If a balancing allowance is made, the amount by which the residue of qualifying expenditure before the sale exceeds the net proceeds of the sale is written off at the time of the sale.

(3) If a balancing charge is made, the amount of the residue of qualifying expenditure is increased at the time of the sale by the amount of the charge.

(4) But if the balancing charge is made under section 319 (6) (difference between net allowances made and adjusted net cost), the residue of qualifying expenditure immediately after the sale is limited to the net proceeds of sale."

24. Chapter 7 of Part 3 of CAA 2001 contained provisions relating to "balancing adjustments". These were adjustments made following a balancing event (see below) which could give rise to a claim for a balancing allowance or to a balancing charge on the owner of the relevant interest in the building. Section 314 CAA 2001 provided as follows:

"(1) A balancing adjustment is made if -

(a) qualifying expenditure has been incurred on a building, and

(b) a balancing event occurs while the building is an industrial building or after it has ceased to be an industrial building.

(2) A balancing adjustment is either a balancing allowance or a balancing charge and is made for the chargeable period in which the balancing event occurs.

(3) A balancing allowance or balancing charge is made to or on the person entitled to the relevant interest in the building immediately before the balancing event.

(4) No balancing adjustment is made if the balancing event occurs more than 25 years after the building was first used.

(5) If more than one balancing event within section 315(1) occurs during a period when the building is not an industrial building, a balancing adjustment is made only on the first of them."

25. Thus, insofar as CPT Ltd was liable to pay a balancing charge or to receive a balancing allowance the adjustments concerned would take place by reference to the chargeable period, that is CPT Ltd's accounting period, in which the balancing event concerned occurred.

26. Balancing events were described in s 315 of CAA 2001 which so far as relevant provided as follows:

> "(1) The following are balancing events for the purposes of this Part –
>
> (a) the relevant interest in the building is sold;
>
> (b) if the relevant interest is a lease, the lease ends otherwise than on the person entitled to it acquiring the interest reversionary on it;
>
> (c) the building is demolished or destroyed;
>
> (d) the building ceases altogether to be used (without being demolished or destroyed);
>
> (e) if the relevant interest depends on the duration of a foreign concession, the concession ends.
>
> (2) …
>
> (3) Other balancing events are provided for by –
>
> section 328 (realisation of capital value where site of building is in enterprise zone);
>
> section 343 (ending of highway concession);
>
> section 350 (additional VAT rebates and balancing adjustments);
>
> and a balancing event under this section may also occur as a result of section 317 (hotel not qualifying hotel for 2 years)."

27. Here the "balancing event" was the sale by CPT Ltd of its interest in the Buildings to TAL.

28. Where a building was used and then sold, the subsequent owner's relevant period of ownership began on the day after that sale and ended with the day on which the balancing event in question occurred: see s 321 CAA 2001.

29. Where the building had been an industrial building throughout the relevant period of ownership, s 318 of CAA 2001 applied to calculate the balancing adjustment.

30. Where the building in question had not been an industrial building for part of the period of ownership, s 319 of CAA 2001 provided that the balancing adjustments were calculated to reflect the proportion of the period of ownership during which the building had been an industrial building as follows:

> "(1) This section provides for balancing adjustments where the building was not—

(a) an industrial building, or

(b) used for research and development

for a part of the relevant period of ownership.

(2) A balancing allowance is made if—

(a) there are no proceeds from the balancing event or the proceeds are less than the starting expenditure, and

(b) the net allowances made are less than the adjusted net cost of the building.

(3) The amount of the balancing allowance is the amount of the difference between the adjusted net cost of the building and the net allowances made.

(4) A balancing charge is made if the proceeds from the balancing event are equal to or more than the starting expenditure.

(5) The amount of the balancing charge is an amount equal to the net allowances made.

(6) A balancing charge is also made if—

(a) there are no proceeds from the balancing event or the proceeds are less than the starting expenditure, and

(b) the net allowances made are more than the adjusted net cost of the building.

(7) The amount of the balancing charge is the amount of the difference between the net allowances made and the adjusted net cost of the building."

31. The "adjusted net cost" referred to in s 319 of CAA 2001 was calculated in accordance with s 323 which provided:

"The amount of the adjusted net cost is—

$(S - P) \times I / R$

where—

S is the starting expenditure,

P is the amount of any proceeds from the balancing event,

> I is the number of days in the relevant period of ownership on which the building was an industrial building or used for research and development, and
>
> R is the number of days in the whole of the relevant period of ownership."

32. The "net allowances" referred to in s 319(3) were calculated in accordance with s 324 which provided as follows:

> "For the purposes of this Chapter, the amount of the net allowances made, in relation to any qualifying expenditure, is—
>
> (I + WDA + RDA) − B
>
> where—
>
> I is the amount of any initial allowances made to the person in relation to that qualifying expenditure,
>
> WDA is the amount of any writing-down allowances made to the person for chargeable periods ending on or before the date of the balancing event giving rise to the balancing adjustment,
>
> RDA is the amount of any allowances under Part 6 (research and development allowances) made to the person for such chargeable periods, and
>
> B is the amount of any balancing charges made on the person for such chargeable periods."

33. Where the person who owns the relevant interest did not incur the qualifying expenditure, the "starting expenditure" referred to in s 323 is the residue of qualifying expenditure (i.e. qualifying expenditure which has not been written off under Chapter 8 of Part 3 of CAA 2001) at the beginning of that person's period of ownership: see ss 313 and 322(3) of CAA 2001.

34. Section 285 of CAA 2001 made provision for the situation where a building was temporarily not in use as follows:

> "For the purposes of this Part –
>
> (a) a building is not to be regarded as ceasing altogether to be used merely because it falls temporarily out of use, and
>
> (b) if a building is an industrial building immediately before a period of temporary disuse, it is to be treated as being an industrial building during the period of temporary disuse."

35. The effect of s 285 is that (i) no balancing event would be triggered (specifically the balancing event in s 315(1)(d)) and (ii) it would still be regarded as an industrial building during the period of temporary disuse (thus preserving the entitlement to IBAs).

36. From 2007 provision was made for the gradual withdrawal of IBAs over four years. Part of that withdrawal included restrictions on balancing adjustments made by the Finance Act 2007 ("FA 2007").

37. Section 36 of FA 2007 stated (so far as relevant) as follows:

> "(1) No balancing adjustment is to be made under Part 3 of CAA 2001 (industrial buildings allowances) if—
>
> > (a) the qualifying expenditure in question is not qualifying enterprise zone expenditure for the purposes of that Part, and
> >
> > (b) the balancing event in question is a post-commencement balancing event,
> >
> > and in paragraph (b) "post-commencement balancing event" means any balancing event for the purposes of that Part which occurs on or after 21st March 2007, but does not include an event which occurs before 1st April 2011 in pursuance of a relevant pre-commencement contract (see subsection (7)).
>
> (2) For the purposes of section 311 of that Act (calculation of allowance after sale of relevant interest) the amount of the residue of qualifying expenditure immediately after a post-commencement relevant event is taken to be the amount of the residue of qualifying expenditure immediately before that event.
>
> (3) In subsection (2)—
>
> > "qualifying expenditure" does not include any expenditure which is qualifying enterprise zone expenditure for the purposes of that Part, and
> >
> > "post-commencement relevant event" means any relevant event within the meaning of section 311 of that Act which occurs on or after 21st March 2007, but does not include an event which occurs before 1st April 2011 in pursuance of a relevant pre-commencement contract.
>
> …

> (7) For the purposes of this section a contract is "a relevant pre-commencement contract" if—
>
> (a) the contract is a contract in writing made before 21st March 2007,
>
> (b) the contract is unconditional or its conditions have been satisfied before that date,
>
> (c) no terms remain to be agreed on or after that date, and
>
> (d) the contract is not varied in a significant way on or after that date."

Authorities

38. As Mr Hickey submitted the Court of Appeal in *Eynsham Cricket Club v HMRC* [2021] EWCA Civ 225 [at 43-46], has recently repeated that the correct modern approach to the interpretation of tax statutes is that the court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. In this regard, controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole.

39. This approach is derived, in particular, from the summary of position in *Barclays Mercantile Business Finance Ltd v Mawson* [2005) STC 1 where the House of Lords said at [36]:

> "Cases such as these gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, para 35:
>
> > "[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

40. Section 285 of CAA 2001 is a deeming provision in that an industrial building is to be treated as such during a period of temporary disuse. The correct approach to construing deeming provisions was recently set out in *Fowler v HMRC* [2020] UKSC 22 where Lord Briggs said at [27]:

> "(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real."

41. The purpose of the capital allowances legislation was described by Lord Walker in the House of Lords in *Maco Door & Window Hardware (UK) Ltd v HMRC* [2008] STC 2594 *("Maco Door")* where he said at [18] and [19]:

> "18. Capital allowances have a long and complex history. They are a relief afforded by Parliament partly as compensation for the non-allowance of depreciation as a deduction in computing trading profits for tax purposes, and partly as a policy of providing differential tax incentives in order to encourage particular forms of economic activity. Parliament's perception of the need for incentives changes from time to time and there is not therefore any very regular or coherent pattern in the way that capital allowances have been granted over the years. Allowances for industrial buildings were first introduced by the Income Tax Act 1945. The legislation was consolidated, as amended, by the Capital Allowances Act 1968, and reconsolidated, with further amendments, by CAA 1990, which (with a few further amendments) was in force in 1999 and 2000. Since then Parliament has enacted the Capital Allowances Act 2001 ("An Act to restate, with minor changes, certain enactments relating to capital allowances") as part of the tax law re-write programme.
>
> 19. Despite repeated amendment and consolidation the provisions enacted in 1945 remain essentially intact. They reflect a general legislative policy, formed in the very difficult economic conditions at the end of the second world war but still continuing half a century later, to encourage industrial activity by according to industrial buildings advantages not accorded to shops and offices. But the precise extent of the advantages depends on the correct construction of the legislation, and in particular the terms of section 18 of CAA 1990 (definition of "industrial building or structure")."

42. The Upper Tribunal (Zacaroli J and Judge Richards) in *R (on the application of Cobalt Data Centre 2 LLP and another) v Revenue and Customs Commissioners* [2020]

STC 23 *("Cobalt")* commented on the statutory code for Enterprise Zone Allowances, and the statutory purpose of the code. The Tribunal said at [15]:

> "It was common ground that Parliament enacted the EZA regime in order to provide incentives for investment in areas perceived as disadvantaged. It did so by including within the regime that provides industrial buildings allowances ("IBAs") for "qualifying expenditure" incurred on industrial buildings, an entitlement to generous EZAs (described in the legislation as "initial allowances") equal to 100% of that expenditure in relation to buildings located within enterprise zones…"

43. We were referred to no authority which deals with the interpretation of the term "temporary disuse" in s 285 of CAA 2001 and the term is not defined in the statute. The ordinary meaning of "temporary", as found in the Shorter Oxford English Dictionary, 1993 is "lasting or meant to last for a limited time only." Where words are not defined by the relevant statute they must be given their ordinary meaning in the general context of that statute: see *R v Environment Secretary ex parte Spath Holme Limited* [2001] 2 AC 349 at page 397B.

44. It therefore appears to us that the correct approach to take in this case as to the interpretation of the term "temporary disuse" is to start with the ordinary meaning of the term and consider its application in the context of the statute as a whole and its purpose and then consider whether, viewed realistically, the period under question in this case falls within the scope of the statutory provision.

45. An HMRC manual gave some internal guidance as to the meaning of "temporary disuse". Among other things, this guidance said:

> "The taxpayer must genuinely regard the building as temporarily out of use. This will not be the case where the taxpayer decides, for example, to let the building go to rack and ruin because he has redevelopment plans in mind. Then the building will cease altogether to be used and there will be a balancing event.
>
> Disuse of the building is temporary if the disuse occurs between two periods of use. It is implicit that the benefit of treating the building as being in temporary disuse is only available provided that the building is, in fact, used again. So a building will not be temporarily disused where, say, it is left empty for three years and then demolished.
>
> …
>
> The period of disuse can be protected by the Section 285 legislation if the next period of use is by the next owner of the relevant interest."

46. As we shall see later, in support of his arguments against HMRC's interpretation of s 285 of CAA 2001, Mr Ghosh QC submitted that HMRC's interpretation would cause practical difficulties with the application of the system of self-assessment. As we have indicated in our review of the legislation set out above, claims for industrial building allowances are made in a taxpayer's self-assessment return on a tax year by tax year

basis. Mr Ghosh submitted that HMRC's interpretation could in effect require self-assessment returns of previous years to be altered if it was right that a period of temporary disuse in respect of which a claim for allowances was made earlier could, with hindsight, become a period of permanent disuse in respect of which no claim for allowances could have been made. Mr Ghosh observed that because of the limited circumstances in which a self-assessment return could be amended that would not be practicable in many cases.

47. It is therefore helpful at this point to set out a brief summary of the mechanics of the self-assessment system and the scope for alteration of a previously filed self-assessment return.

48. In *HMRC v Inverclyde Property Renovation LLP and another* [2020] STC 1348 the Upper Tribunal (Lord Tyre and Judge Raghavan) provided a succinct summary of the self-assessment regime in relation to partnerships (which includes limited liability partnerships) at [10] and is [11] of the decision as follows:

> "10. The tax returns, and enquiries into the returns, of partnerships are governed by TMA sections 12AA to 12AD. Section 12AA(2) empowers an officer of HMRC to give notice to the partners requiring a person identified in the notice (usually the nominated partner) to submit a partnership return. The return must, in terms of section 12AB, include a partnership statement showing the amount of income that has accrued to the partnership, and each partner's share of that income. Each partner must then, under section 8(1B), include that share in his personal tax return.
>
> 11. The partnership return having been submitted, TMA section 12AC empowers an officer to enquire into it if, within the time allowed (normally 12 months), he gives notice of enquiry to the partner who delivered the return. Any such enquiry is completed, according to section 28B, when an officer, by a closure notice, informs the person to whom notice of enquiry was given that he has completed his enquiry and states his conclusions. The closure notice must either state that no amendment to the return is needed, or make the amendments required to give effect to the officer's conclusions. If the partnership return is amended, the officer must also give notice amending each partner's personal or (as the case may be) company tax return so as to give effect to the amendments of the partnership return. Any conclusion stated or amendment made by a closure notice under s 28B is subject to a right of appeal under s 31 to the FTT."

49. The obligations of the taxpayer to take care in completing his self-assessment were summarised by the Upper Tribunal (Morgan J and Judge Brannan) in *HMRC v Hicks* [2020] STC 254 in the context of considering the powers of HMRC to make a discovery assessment pursuant to s 29 of the Taxes Management Act 1970 in circumstances where HMRC alleged carelessness on the part of the taxpayer in completing his return. The Tribunal said this at [121]:

> "The issue as to carelessness must be considered and decided in the relevant context. The context in the present case is the delivery of a self-assessment tax return pursuant to sections 8 and 9 TMA. Under section 8(2), the person

> making the return is required to declare that to the best of his knowledge, the return is correct and complete. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809 at [17]-[18], the taxpayer's self-assessment constitutes the final determination of his liability subject to three circumstances (namely, an amendment to the return, an enquiry by HMRC or a discovery assessment). Thus, a taxpayer making a self-assessment must take care to get the assessment right. He must take care to get it right both as to matters of fact and matters of law. Even if he gets it wrong and in his favour, it may turn out that his wrong figure will constitute the final determination of his liability. If the taxpayer gets the assessment wrong and in his favour, he will lose the benefit of that assessment being final and in his favour if there is a discovery assessment. The normal time limit for an assessment imposed by section 34 is extended by section 36 where the insufficiency in the self-assessment is brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. In summary, the question of carelessness arises in the context of a taxpayer being denied the benefit of a wrong self-assessment which is in his favour where the insufficiency in the assessment is brought about by the carelessness of the taxpayer or a person acting on his behalf."

50. Thus it can be seen that in the absence of HMRC opening an enquiry into the taxpayer's return within 12 months (which happened in this case) HMRC are reliant on their limited powers under s 29 of the Taxes Management Act 1970 to make a discovery assessment. Under that provision, HMRC is permitted to issue a discovery assessment outside a return's enquiry period (subject to the relevant statutory time limits) if they make a discovery (such as a new fact) which leads them to conclude that the assessment to tax made by the return is insufficient and the return does not contain anything which would make a hypothetical officer aware of an insufficiency to tax or where the return declares an insufficiency of tax due to deliberate or careless behaviour on the part of the taxpayer.

The Decision

51. The FTT observed at [165] that the appeal turned on the meaning of "temporarily", as used in s 285 of CAA 2001. The FTT identified the issue as whether (i) that term is determined solely by reference to what actually happened to a building physically (HMRC's case) or (ii) by reference to the intentions of the person holding the relevant interest in the building (the LLP's case).

52. At [168] the FTT recorded that the parties agreed that the effect of s285 is:

> (1) To prevent a balancing event taking place if a building is only temporarily out of use, and
>
> (2) To continue to give the owner of the relevant interest the benefit of capital allowances while it is temporarily out of use.

53. At [172] the FTT speculated as to what the position would be if s 285 did not exist. It said:

> "In trying to ascertain the intended purpose of s 285 we wondered if it might be useful to examine what would happen in the absence of this provision. In the absence of this provision, if an industrial building were to fall temporarily out of use then this would crystallise an immediate balancing event which, in the absence of any sales proceeds, would crystallise a full balancing allowance equal to the remainder of the unutilised expenditure. This might be a very attractive proposition to the owner of an industrial building, especially given that WDAs on an industrial building were at one time given only at the rate of 2% of the expenditure incurred per annum, although this was subsequently increased to 4%. An owner might therefore be tempted to choose to bring about a period of temporary disuse intentionally, in order to crystallise a full balancing allowance. If this analysis is correct then s 285 might have been originally intended to be an anti-avoidance provision."

54. At [174] the FTT said that there was nothing in the legislation or case law which refers to the intention of the taxpayer being a determinative factor in deciding whether a building has fallen into temporary disuse within s 285 CAA of 2001.

55. At [175] the FTT said that HMRC's interpretation of s 285, namely that a period of actual use is required at both ends of a period of temporary disuse would not necessarily be "an inviolable rule which would apply to all circumstances, but…makes a great deal of sense as a simple matter of construction of English".

56. At [176] the FTT referred to HMRC's submission that one problem with applying s 285 by reference to intention is that a person's intentions can change easily and could result in the status of the buildings changing multiple times, which the FTT said would provide a "tax avoider's charter".

57. At [178] the FTT observed that HMRC's "wait and see" approach might produce the correct amount of IBAs for the period of ownership "but the timing of any allowances would not strictly be in accordance with the legislation, particularly bearing in mind the year by year basis on which tax is levied, and around which the legislation is structured…".

58. At [182] the FTT said that in order to adopt TAL's interpretation, it had to assume that the draftsman had envisaged the problem with temporary disuse and anticipated that it could be resolved by considering the intentions of the taxpayer at the time the building fell into disuse. It said that had this been the case, the draftsman would have inserted specific provisions indicating that the taxpayer's intention should be a key element in determining whether or not a building had fallen into permanent or merely temporary disuse. The FTT said at [183] that it was more likely that the draftsman did not anticipate that there might be a prolonged period of disuse in practice and that it would be readily apparent within a short period of time whether or not a building had fallen into permanent disuse.

59. The FTT went on to say at [183] that there was a possibility – for which it had found no evidence – that s 285 was intended as an anti-avoidance provision to ensure that an owner could not stop using a building for a brief period of time and then claim

the full amount of the unused expenditure as a balancing allowance. In that case, the FTT said, "the prime purpose of s 285 would be to act as a deterrent to such a plan, and how it would operate in practice as regards an actual period of temporary disuse was not uppermost in the draftsman's mind".

60. The FTT said at [185] that it preferred HMRC's approach. Its reasoning was :

> "…we should determine whether or not a building is temporarily disused by considering when the building was actually used as an industrial building and as a simple matter of fact, when the building actually ceased permanently to be so used. This inevitably involves a degree of hindsight but we do not think that any alternative approach makes sense in the context of this legislation."

61. Accordingly, the FTT held at [186] and [187]:

> "186. In our view the building ceased permanently to be used as an industrial building in or around January 2003, when it stopped being used by CPT Ltd. At the time of its acquisition by TAL therefore it had ceased to be used as an industrial building and TAL were not therefore entitled to claim IBAs in respect of their expenditure on the building. We would note in passing that this is precisely in line with the expectations of TAL when they purchased the building. Mr Shaw, in his evidence, stated that TAL did not expect to obtain IBAs on its expenditure and that the availability of any such allowances did not form any part of its business plan as presented to the lending bank.
>
> 187. It follows therefore that when TAL subsequently sold the various buildings no balancing events arose such as to give rise to a balancing allowance or a balancing charge."

62. As Mr Ghosh observed this reasoning expresses the FTT's legal conclusion that the absence of reuse meant that the disuse of the Buildings could not have been temporary.

Grounds of Appeal and issues to be determined

63. As we have said, the only issue before us is whether the FTT erred in its conclusion that the buildings in question were "temporarily out of use" during the material times and were thus deemed to be "industrial buildings" for the purposes of CAA 2001.

64. TAL says that the FTT erred in holding that:

(1) the application of s 285 of CAA 2001 in a given chargeable period should change by reference to events in subsequent chargeable periods; and

(2) the intention of the owner of the interest in the building is irrelevant when determining whether a building is in a state of temporary disuse.

65. TAL contends that the Buildings were in a state of temporary disuse during TAL's period of ownership. This is on the grounds that:

(1) temporary disuse does not require subsequent re-use; and

(2) whether a building is in a state of temporary (as opposed to permanent) disuse must be established by objectively assessing all relevant circumstances, including the intention of the owner of the relevant interest in the building.

66. HMRC say the FTT made no error of law. It made clear findings of fact that were open to it, drew appropriate inferences from those facts, applied the law to those facts, and reached conclusions that were open to it on those facts.

67. HMRC contend that TAL never used the Buildings for a qualifying purpose (i.e. a trade) and the necessary inference is that there was a permanent discontinuance at the time of sale by CPT Ltd. The full period of disuse on these facts is both material and significant, which clearly raises the question how on any objective view such a long period of disuse could be temporary as contended by TAL.

Discussion

Submissions

68. TAL's case, as submitted by Mr Ghosh, can be summarised as follows:

(1) The FTT erred in holding that the application of s 285 of s CAA 2001 in a given chargeable period should change by reference to events in subsequent chargeable periods. The scheme of the legislation indicates that a person's entitlement to IBA's must be assessed at the end of a given chargeable period or (in the case of a balancing event) within a chargeable period, and not by reference to events and the subsequent chargeable period unless specified.

(2) The difficulties caused by the FTT's error are clear on the facts of this case. On its interpretation, subsequent events in the 2005/6 and 2006/7 tax years (namely the sale and demolition of the Buildings without reuse) meant that there was a balancing event in January 2003 when CPT Ltd ceased to use the Buildings. This means that CPT Ltd's tax returns would have been incorrect insofar as they indicated that a balancing event took place on the sale of the Buildings in 2004.

(3) The result of the FTT's interpretation is that a vendor must wait for subsequent events occurring during its purchaser's ownership to determine the purchaser's tax liability and where those subsequent events take place many years later, no adjustment may be possible.

(4) The FTT erred in holding that the intention of the owner of the interest in the building is irrelevant when determining whether a building is in a state of temporary disuse for the following reasons:

(a) The status of a building should be determined on an objective assessment of all relevant facts made during a given chargeable period. Whether a building is in a state of temporary disuse may be difficult to ascertain by reference only to the physical state of the building and accordingly the owner's intention should be given due and proper weight.

(b) There is no difficulty in determining the status of the building by reference (in part) to the owner's intention. The burden of proof is on the taxpayer to show that they had a particular intention at a given time on an objective assessment of the facts.

(c) The fact that there is no express reference in the legislation to the intention of the taxpayer does not mean that intention is irrelevant when applying s 285 CAA 2001.

(5) The Buildings were in a state of temporary disuse during TAL's period of ownership for the following reasons:

(a) Temporary disuse does not require subsequent re-use and whether a building is in a state of temporary (as opposed to permanent) disuse must be established by objectively assessing all relevant circumstances, including the intention of the owner of the relevant interest in the building.

(b) The ordinary meaning of the term "temporary", that is "lasting or meant to last for a limited time only", indicates that the question of intention is embedded in the term. The evidence before the FTT established TAL's intentions during the relevant period which were to find a tenant for the Buildings. The fact that a temporary state of affairs turns into a permanent state does not mean that they were never temporary.

(c) TAL's interpretation of the legislation is consistent with a coherent scheme of capital allowances and the purposes of the legislation as demonstrated from the passages in *Maco Door* and *Cobalt* set out above.

69. HMRC's case, as submitted by Mr Hickey, can be summarised as follows:

(1) The FTT rightly concluded that temporary disuse in s 285 CAA 2001 is identified as being between two periods of actual use. That conclusion is consistent with the legislation as a whole, its purpose and the lack of a reference to intention in s 285.

(2) Section 285 specifically references the "use" of the building, and to fall within the scope of the provision the building needs to be "used". The period of temporary disuse has to be "book ended" by periods of use.

(3) TAL's interpretation produces a result that enables the benefit of IBA to be claimed without ever actually making use of any buildings purely on the basis of the vagaries of intention. That could not have been the intention of Parliament in terms of how the valuable reliefs under the IBA code were provided to taxpayers and only to taxpayers who make use of actual buildings. The authorities demonstrate that the IBA code is premised on actual investment in particular types of building and s 285 interacts with the other provisions of the code by reference to the "use" of those buildings.

(4) A period of temporary disuse is ended upon the occurrence of a balancing event in relation to a taxpayer, such as a sale of the building. The tax code applies specifically to what a taxpayer does in terms of the acquisition of a building

acquiring the relevant interest and what it does with that building. There is no "bridge" under s 285 which enables a period of temporary disuse commenced under the ownership of taxpayer A, to continue if there is a balancing event consequent upon the sale of the building to taxpayer B.

(5) Consequently, none of the difficulties with the self-assessment regime identified by Mr Ghosh would arise because there is no question of the actions of taxpayer B subsequent to its acquisition of the building affecting the tax position of taxpayer A, which will be determined definitively as a result of the balancing event which occurred on the sale of the building. In any event, HMRC's interpretation of s 285 works with the self-assessment regime because the taxpayer is required to make a consideration as to whether an IBA claim involving temporary disused buildings is appropriate and that is easily determined. If the temporary disuse straddles two tax years, as demonstrated by the facts of this case, HMRC can open an in time enquiry and amend the relevant tax returns and anything that arises outside the enquiry period can be dealt with by the issue of a discovery assessment, within the appropriate time limits.

(6) As the FTT found, the legislation would be difficult to apply if balancing events were capable of being triggered or affected by the taxpayer's intentions rather than by observable and fixed events taking place, as the taxpayer's intention is potentially ever-changing. It does not make sense to allow intention to be the second "bookend" for the purposes of s 285. Whether a period of disuse is temporary is determined by reference to the objective facts and circumstances and accordingly disuse of a building is temporary only if the disuse occurs between two objectively identifiable periods of use. If the draftsman of s 285 had wanted to permit the intention of the taxpayer to be a relevant factor, he would have done so expressly, in effect requiring an election on the part of the taxpayer.

(7) The FTT found on the facts of this case (at [186]) that the building ceased permanently to be used as an industrial building in January 2003 when it stopped being used by CPT Ltd, thus giving rise to a balancing event at that time.

Conclusions

70. We start with Mr Hickey's submission that as a matter of principle a balancing event, such as a sale, results in the disapplication of s 285 of CAA 2001. If Mr Hickey is right in that submission, it seems to us that TAL's appeal must fail because on the facts of this case there was no period of use of the Buildings during TAL's ownership: either a period of actual use or a period which was deemed to be actual use as an industrial building according to the terms of s 285.

71. Mr Hickey's submission was a new point which it appears had not been argued either before the FTT, in HMRC's Respondent's Notice to this appeal or in Mr Hickey's skeleton argument. Mr Ghosh would have been justified in objecting to the point being raised at this late stage, but, generously, he did not do so and responded to it.

72. In our view there is nothing in the relevant legislation which suggests that a balancing event, such as a sale, interrupts a period of temporary disuse falling within s 285. In our view, the focus of the legislation is on the building itself and the use to which it is being put rather than on the circumstances of the particular taxpayer in question.

73. For example, s 271 of CAA 2001 talks about allowances being available if expenditure has been incurred on the construction of a building or structure, without reference to the taxpayer. Section 309 CAA 2001 permits a WDA to be claimed where "qualifying expenditure has been incurred on a building" in circumstances where at the end of the chargeable period in question the person claiming the allowance "is entitled to the relevant interest in the building in relation to that expenditure". Again, the reference is to the status of the building during the chargeable period in respect of which the claim is made rather than the circumstances of the particular taxpayer.

74. Furthermore, our analysis of ss 311, 312 and 337 (set out in [22] and [23] above) demonstrates that WDAs are calculated by reference to the residue of expenditure made by the previous owner which has not yet been written off. Therefore, in respect of those allowances the circumstances existing as a result of the expenditure of the previous owner are the starting point for the calculation of the amount of the claim that the new owner can make.

75. There is nothing in those provisions that suggests that on a balancing event there is a "clean break" between taxpayers which is created simply because the previous owner has to complete his tax computation to take account of the balancing charge that arises as a result of the sale. This is consistent with the wording of s 285 itself, which again focuses on the state of the building itself without any suggestion that the period in question which is determined to be of temporary disuse according to the terms of s 285 comes to an end because a balancing event occurs during the relevant period.

76. As Mr Ghosh submitted, Mr Hickey's proposition seems to be that because the seller and buyer have different tax computations to make upon the occurrence of a balancing event, the building cannot continue to be in temporary disuse following the sale. That is a non sequitur.

77. Furthermore, somewhat unattractively, the proposition is in clear conflict with HMRC's own guidance as set out in the extract from the manual set out at [45] above. That guidance states clearly that the period of disuse can be "protected by the Section 285 legislation if the next period of use is by the next owner of the relevant interest." Mr Hickey made no submissions regarding that guidance.

78. We turn now to the essence of HMRC's case, which is that a period of temporary disuse has to be "book-ended" by two periods of actual use. That point is closely connected to the question as to whether the intention of the taxpayer is a relevant factor in considering whether the disuse of the building is temporary or permanent. We will therefore take the two points together.

79. It seems to us that the key point is whether s 285 envisages that a period of temporary disuse can be followed by a period of permanent disuse without affecting the status of the earlier period or, if a period of temporary disuse turns out, as events unfold, to be permanent because of a change of use of the building or another balancing event, such as a sale or destruction of a building, then the earlier period can no longer be regarded as a period of temporary disuse. If that were the case, the start of the earlier period of temporary disuse would, with hindsight, become the start of the period of permanent disuse.

80. In agreement with Mr Ghosh's submissions, we prefer the first of those alternative interpretations for the following reasons.

81. First, such an interpretation is consistent with the ordinary meaning of the word "temporary". That indicates that a period is to be regarded as "temporary" if it was meant to last for a limited period of time. We take the example of an industrial building that falls empty because the tenant ceases its manufacturing activities there and the owner of the building immediately instructs property advisers to market the building to find tenants who will continue to use the building as an industrial building. The owner is advised that the market for such tenants is good and that a tenant should be secured within a reasonable time. In those circumstances, it is difficult to see how at the outset of that period the period of disuse could be described as anything other than "temporary". It was meant only to last for a limited period of time because the new owner wanted it to be occupied by a tenant whose activities would enable the building to continue as an industrial building. That analysis is consistent with the statement in HMRC's manual set out at [45] above where it says "The taxpayer must genuinely regard the building as temporarily out of use…."

82. Let us suppose in the example given above, the building fell empty in January 2019 and a new tenant was secured who took occupation of the building in May 2020. Thus the period during which the building was empty would straddle two chargeable periods for the purposes of the capital allowances legislation. The owner would claim writing down allowances for the first of those periods on the basis that the disuse of the building was temporary. If an enquiry was undertaken in relation to the taxpayer's return the taxpayer would presumably justify the claim on the basis that it was trying to find a tenant and would provide evidence of its marketing efforts. That would also be the case for the following tax year where the allowance could be claimed on the basis that for part of the period the building was empty only on a temporary basis and when it was occupied it was being used as an industrial building. In that case, the evidence concerned would be both the marketing efforts and the fact that they had come to fruition. Clearly, the claim for the allowance is easier to establish in a case where the building subsequently is occupied, but that is simply a question of the evidence available to establish the claim.

83. Nevertheless, in respect of both chargeable periods in the example given above, the intentions of the taxpayer are clearly a relevant factor in determining whether the claim for allowances on the basis of temporary disuse can be properly established.

84. Now suppose that halfway through the second chargeable period, the taxpayer is advised that there is no prospect of finding a tenant due to a collapse in the market for the kind of tenant that would be suitable for the building. As a result of this advice, the owner decides to seek planning permission for the building to be converted into residential accommodation, thus precluding it from qualifying as an industrial building.

85. In those circumstances, the position as regards the first chargeable period remains exactly the same. The legislation requires the position to be looked at chargeable period by chargeable period and on the basis of the evidence in respect of the whole of that chargeable period the disuse must been regarded as temporary because of what the owner meant to do with the building, as established by all the available evidence.

86. On HMRC's interpretation, because the building ultimately ceased to be used permanently as an industrial building without a further period of use as such, the taxpayer's computation for the earlier period is open to review.

87. Aside from the difficulties that could arise from that result in terms of the operation of the self-assessment regime, as identified by Mr Ghosh and with which we agree, in our view such a result would not be consistent with one of the key features of the legislation, which is that the claims for allowances should be determined by reference to the circumstances prevailing in the chargeable period in which the allowance is claimed.

88. We are also of the view that adopting the ordinary meaning of the word "temporary" so as to include the intentions of the owner of the building is consistent with the purposes of the legislation. It was common ground that the purpose of the legislation, as demonstrated by *Maco Door* and *Cobalt*, was to encourage particular forms of economic activity by according to industrial buildings or (in relation to buildings in an Enterprise Zone, commercial buildings) advantages not accorded to other business premises. It seems to us that by allowing allowances to continue to be claimed in a period where the owner clearly means the building to be used as an industrial building and is undertaking active marketing activities to that end is consistent with that purpose. Otherwise, there could be a disincentive on owners to make that effort since they could end up suffering a financial disadvantage.

89. Mr Hickey submits that the focus of the legislation is on providing allowances for buildings that are actually used and that it is inconsistent with the purpose of the legislation to give allowances to the owner of a building which has never actually been used during their period of ownership.

90. We accept that the facts in this particular case are extreme, but in our view they do not give rise to an absurdity or would otherwise question whether, viewed realistically, s 285 operated so as to permit allowances to be claimed in this situation.

91. We observe that s 285 operates as a deeming provision in two respects. First, it deems the industrial building to still be in use, notwithstanding the fact that it is empty, and secondly as long as it was an industrial building immediately before it became empty it is to be treated as being an industrial building during that period of time. In

other words, Parliament has decided that the building is still being "used", consistent with the purposes of the legislation which is to encourage the use of certain buildings as industrial buildings. It follows from that analysis, that we must reject any suggestion that s 285 is an anti-avoidance provision. It does no more than preserve the status of the building and avoids a balancing event arising simply because the building becomes empty temporarily.

92. As we indicated at the hearing, HMRC's approach could result in surprising results. That is illustrated by the following example. An industrial building is being used for offices. The tenancy comes to an end on 1 January and the owner then spends the next 6 months refurbishing it and marketing it. On 1 July, a new tenant comes in and takes over the offices. That would be treated as a period of temporary disuse, both on HMRC's approach and on TAL's approach. However, if exactly the same things happened, and by the end of June a tenant had been secured to occupy the properties, starting on 1 July, but on 30 June the building was destroyed by fire, on HMRC's case the period from 1 January to the end of June would not be treated as a period of temporary disuse because there would be a balancing event caused by the fire. On HMRC's case, because there was no subsequent period of use, the period of temporary disuse must now be regarded as being permanent. That could operate in circumstances where the fire happened at the end of the 25 year period during which capital allowances could be claimed so as to prevent the taxpayer claiming allowances in respect of the period during which the building was empty.

93. In our view, the correct approach to be followed in order to establish whether, in relation to any particular chargeable period where an industrial building is not being used for any part of that period, that period of disuse is temporary, is to look at all the relevant circumstances and not only the physical state of the building. That inevitably means establishing why the building is empty and what the owner intends to do with it. Those matters need to be looked at objectively by reference to the available evidence. Simply because the owner says that he intends that the building be used as an industrial building is not going to be sufficient. It has to be tested by reference to the other available evidence, such as the efforts being made to bring the building back into use and how it is intended to be used.

94. Consequently, we do not believe, contrary to Mr Hickey's submissions, that if intention is to be a factor in the question of whether the allowances are available depends on the "vagaries of intention". The expressed intentions of the taxpayer have to be tested objectively (along with the other circumstances) and we see no difficulty in carrying out that test simply because the taxpayer's intentions may change. Those expressed new intentions again have to be tested against the evidence. The fact that s 285 does not refer to intention in our view is immaterial; as we have said the ordinary meaning of the word "temporary" in the context of the use (or disuse) of a building includes what the owner means to do with it.

95. The FTT is used to deciding the outcome of appeals on the basis of the taxpayer's intention. For example, in relation to penalty appeals or discovery assessments it has to ascertain the state of the taxpayer's mind when considering whether particular actions were "careless" or "deliberate".

96. It follows from our analysis that the question of whether the disuse of a building in any particular period was "temporary" can be established by means other than by establishing that the period occurred between two periods of actual use. Establishing those facts does of course demonstrate that the period in between was "temporary" but it does not preclude other evidence establishing the same result by reference to the taxpayer's intended use of the building. It follows that a period of permanent disuse can follow a period of temporary disuse, as a result of a change of circumstances from those prevailing at the time that the period of disuse began, without that affecting the characterisation of the earlier period of temporary disuse.

97. Consequently, the FTT erred in its conclusions by determining that the question of the taxpayer's intention was not a relevant factor in determining whether s 285 applied to a period of disuse and also erred in holding that the application of s 285 of CAA 2001 in a given chargeable period could change by reference to events and subsequent chargeable periods.

98. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision, and that, if it does set it aside, it must either remit the case to the FTT with directions for reconsideration, or remake the decision.

99. We have identified that the FTT made errors of law in its approach to the interpretation of s 285 of CAA 2001. In our view, those errors were material and we should therefore exercise our discretion to set aside the Decision.

100. We consider that it is not necessary to remit the matter to the FTT and we can remake the Decision by applying the correct test to the facts found by the FTT.

101. In that regard, there is a dispute between the parties as to whether the FTT made a finding of fact at [186] that the Buildings ceased permanently to be used as industrial buildings in January 2003 when they stopped being used by CPT Ltd. Were that to be the case, then clearly the period during which the Buildings were empty during TAL's ownership could not qualify as industrial buildings on the basis that they were owned during a period of temporary disuse.

102. However, we do not accept Mr Hickey's submission that what the FTT said at [186] amounted to such a finding. We accept Mr Ghosh's submission that what the FTT said at that paragraph was a legal conclusion based on its view that where a temporary period of disuse became permanent because the Buildings were not subsequently used as industrial buildings, then the period of permanent disuse *must be* regarded as having commenced when CPT Ltd ceased to use the buildings in January 2003. Otherwise, it can be seen that the conclusions [186] are inconsistent with the FTT's factual finding at [25] that in or around January 2003 the Buildings fell into temporary disuse within s 285 of CAA 2001.

103. In our view, the evidence before the FTT clearly indicates that HMRC had recognised that the Buildings were in temporary disuse for some 13 months from

January 2003 until the sale to TAL in February 2004. We were shown two letters that HMRC wrote to TAL's advisers in 2009 and 2010. In the first of those letters HMRC stated that the Buildings "had been in temporary disuse for some 13 months when purchased by TAL". In the second letter, HMRC stated that the Buildings were purchased by TAL in February 2004 "at which time each of the buildings had already been in temporary disuse for some 13 months".

104. The transcript of the proceedings before the FTT shows that the FTT was referred to those letters during the course of Mr Ghosh's submissions. HMRC did not take issue with the statements contained in the letters. Therefore, insofar as it is necessary to do so, in remaking the Decision we find that at the time of the acquisition by TAL the Buildings remained in temporary disuse and therefore, on the basis of our analysis of s 285, that period was capable of continuing under TAL's ownership without being terminated as a result of the change of ownership and the balancing event which then occurred in relation to CPT Ltd.

105. We therefore need to decide whether the evidence demonstrates that, as contended by TAL, the period of temporary disuse continued up to the point at which it decided to cease its marketing efforts in November 2005 in relation to some of the Buildings, and in or around October 2006 when it resolved to cease its attempts to use the remaining Buildings. as found by the FTT.

106. In our view, the findings of fact made by the FTT clearly demonstrate that to be the case. It was in our view entitled to make those findings on the basis of the evidence before it. The FTT made extensive findings at [42] and [43] of instructions given by TAL to its advisers to market the site and it found that the advisers were actively marketing the site, producing detailed weekly reports setting out their progress in respect of the Buildings. It also found at [51] that there were ongoing efforts to market some of the Buildings during 2004 and 2005 until November 2005. At [67] the FTT found that TAL decided to cease to use the remaining Buildings.

107. The FTT also found at [33] that at the time of the purchase from CPT Ltd, TAL had given an undertaking to CPT Ltd that certain of the Buildings would be brought out of temporary disuse back into use within three years of the acquisition. Further, TAL had agreed to indemnify CPT Ltd for any future tax liabilities it could incur if TAL failed to bring the Buildings back into use.

108. In his unchallenged evidence before the FTT, Mr Mark Shaw said that TAL had no problem in giving that undertaking because it was the intention to bring the Buildings back into use immediately. Clearly, the undertaking provided a clear incentive for TAL to endeavour to obtain tenants for the Buildings.

109. On this basis, we find that the period of temporary disuse for the purposes of s 285 continued, in relation to the Buildings referred to at [47] to [49] and [51] until TAL ceased its marketing efforts in November 2005 and in October 2006 in relation to the remaining Buildings. During that time, TAL wanted the Buildings to be used as industrial buildings and that intention was evidenced by its marketing efforts and the

incentive provided by the undertakings it gave in the acquisition agreement it entered into with CPT Ltd.

110. When those respective events occurred the Buildings ceased to be industrial buildings because TAL no longer wanted them to be used as such. The temporary period of disuse then ceased and the Buildings ceased to be used permanently as industrial buildings.

111. On the basis of those findings, TAL's appeal against the closure notices must be allowed and we remake the Decision accordingly.

Disposition

112. The appeal is allowed.

Signed on Original

MR JUSTICE MILES

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGES

RELEASE DATE: 28 April 2021