



[2021] UKFTT 257 (TC)

**TC08203**

*capital allowances – whether warehouse to store potatoes for crisp manufacture is plant – yes – whether a silo for temporary storage – yes – whether a cold store – yes*

**Appeal  
number:  
TC/2019/04243**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BETWEEN**

**JRO GRIFFITHS LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE IAN HYDE  
SONIA GABLE**

**The hearing took place on 10 February 2021 following a visit to the premises on 4 February 2021. With the consent of the parties, the hearing was a video hearing, with all parties attending remotely, using the Tribunal video platform. A face to face hearing was not held because this was not considered appropriate during the coronavirus pandemic.**

**We were referred to electronic hearing bundles and skeleton arguments from both parties.**

**Charles Bradley, counsel for the Appellant**

**Alex Turnbull, Solicitor's Office and Legal Services, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal concerns the availability of capital allowances on a potato storage facility and whether it attracts capital allowances as plant which constitutes either a silo for temporary storage or a cold store.
2. All references in this decision to sections are to the Capital Allowances Act 2001 unless otherwise specified.

### THE FACTS

3. Extensive witness evidence was given by Mr Robin Griffiths, the owner of the appellant. Mr Griffiths also conducted a very helpful tour of the premises at the site visit. Witness evidence was also given by Mr Ian Wright an officer of HMRC principally limited to production of photographs of aspects of the store taken during a visit but he was also asked in oral evidence about the cold storage issue in this appeal.
4. We found both witnesses to be honest and truthful.
5. We find the facts in this appeal as set out below.

### Background

6. In the accounting period ended 31 March 2015 the appellant incurred capital expenditure of £319,483 on the construction of a warehouse designed and operated as a potato storage facility.
7. The appellant claimed plant and machinery allowances on the expenditure in period ended 31 March 2015 and subsequent years.
8. On 10 June 2016 HMRC opened an enquiry under paragraph 24(1), Schedule 18, Finance Act 1998 (“Schedule 18”) for the period ended 31 March 2015.
9. On 9 November 2017 and 18 May 2018 HMRC opened further enquiries under paragraph 24(1) Schedule 18 for the periods ended 31 March 2016 and 31 March 2017 respectively.
10. Following investigations on 28 November 2018 HMRC issued closure notices under Paragraph 32(1A), Schedule 18 amending the appellant’s corporation tax returns for the accounting periods ended 31 March 2015, 2016 and 2017 disallowing plant and machinery capital allowances in respect of expenditure incurred in the construction of the potato store.
11. Following a review of the matter letter and an internal review by HMRC the appellant appealed to the Tribunal on 11 June 2019.

### The crisping potato industry

12. Mr Griffiths gave evidence both during the site visit and in the hearing as to the crisping potato industry and the issues involved in storing crisping potatoes.
13. The appellant is a private limited company involved in growing specialist crisping potatoes. Each year the appellant grows 28,000 tons of crisping potatoes on some 1500 acres of land which are then sold to crisp manufacturers, principally Walkers, for which it is the largest UK supplier.
14. Growing crisping potatoes is a specialised activity. Walkers and other manufacturers require a constant supply throughout the year and it is fundamental to the appellant’s business that it is able to store potatoes in a controlled environment so that the potatoes maintain a consistent quality from harvesting in September to May or even July the next year, generally accepted to be the end of the season for crisping potatoes.

15. Within those limits, potatoes are stored for as long as required, subject to market conditions and demand from Walkers. Specific varieties are more or less suitable for long storage.

16. Potatoes contain 70-80% water with a cork-like skin containing small pores which allow evaporation to occur. If the potato is not stored correctly it will sprout, wilt (that is lose water) and the condition of the potato will change impacting the sweetness and flavour of the potato.

17. If potatoes are not stored in a controlled environment they will last only a few weeks before they deteriorate to a condition where they are no longer saleable. In a normal commercial warehouse they would last from September to early November. This would be assuming the use of straw bales, plastic sheeting, a lot of labour and, in Mr Griffiths' words, a large amount of luck to store the potatoes successfully, by which we took him to mean it would require a number of things not to go wrong.

18. The condition and storage of potatoes affect the value of the potato to crisp manufacturers such as Walkers who require a supply of potatoes all year round which are consistent and meet their manufacturing standards. Relatively minor reductions in quality would cause Walkers difficulties in their production facilities.

19. The appellant is paid by Walkers a base price but also potentially a bonus. The bonus depends on the level of defects per ton. 5.09 to 8.09 defects per ton attracts a bonus of £10 a ton and 0 to 5.08 defects attracts a £20 per ton bonus. On 20,000 tons a £20 bonus is worth £400,000 a year and at that level represents some 67% of the appellant's profits. It is therefore very important to the appellant to achieve these bonuses.

20. We accept Mr Griffiths' evidence that he and the appellant take very seriously the continued development of improved techniques for storage and maintenance of the quality of the crisping potatoes. The appellant, as a leading supplier, is also consistently included in Walkers' pilot projects aimed at improved storage and also their sustainability programmes.

### **Potato storage**

21. Mr Griffiths gave evidence as to the functions that are needed to be carried out by the potato store, beyond the primary purpose of storage of potatoes.

22. Successful storage critically depends on drying the potato skin when it first comes into storage. Air surrounding a water surface has a relative humidity of 100% and this free moisture must evaporate to the level associated with dry potatoes, about 96%.

23. Once the potatoes are dried and cured the average temperature is lowered. When they are first stored their temperature is between 13 and 18 degrees but they need to be stored at between 6.5 and 11.5 degrees depending on the variety, with a tolerance of 0.2 degrees. The temperature is reduced in such a way that the potatoes lose as little weight as possible. The temperature is therefore lowered gradually, by no more than 0.2 to 0.5% per day. In Mr Griffiths' words, cooling the potato makes it "think" winter has arrived but if it is suddenly warmed it "thinks" spring has come.

24. One objective is to minimise weight loss which is achieved by keeping the temperature constant and preventing temperature differentials in layers of air which can contribute to condensation.

25. Fry colour, the colour of the crisps when the potatoes are fried, can be controlled by adjustments to temperature. The appellant tests by frying sample potatoes and carries out sugar content testing each week to monitor the crop sugar profile and so make decisions about control.

## **The potato store**

26. Mr Griffiths also gave evidence as to the structure, design and function of the store both on the site visit and in oral evidence.

27. The store was designed by the Dutch company Tolsma and built in 2014 in accordance with the Dutch principles of potato storage under which a large amount of air is introduced for a very short period of time. The process is managed by a computerised control system which uses a sophisticated algorithm that manages the air so as to keep the store cooler and using less air than the English system.

28. To a layperson the store looks from the outside like a commercial warehouse being covered in cladding panels on both the sides and the roof.

29. The store is constructed of a steel loadbearing framework set in concrete foundations. The roof and wall cladding are of composite panels with steel outer sheets, polyester coated steel lining sheets and a hydrochlorofluorocarbon-free insulation core offering the required “U” value (thermal transmittance). This cladding is critical to regulating the interior temperature. Joints and corners are sealed to prevent ingress of cold air which might disrupt the storage regime by causing condensation and leakage of preservative gas (CIPC) which is introduced into the storage chamber every two months during storage.

30. The walls are made of pre-cast concrete horizontal panels with internal posts to support pre-cast concrete walling which create two storage chambers. This walling is made of 145mm thick double steel reinforced concrete panels with a slight bow to withstand the sideways lateral thrust of the potatoes when they are piled 4500 mm deep or higher. The panels also act as a storage radiator as they draw out heat from the potatoes when they are initially stored and act as a heat buffer when the weather is cold.

31. A 200mm reinforced concrete floor is laid with a smooth power floated finish to prevent damage to the skin of the potatoes.

32. The volume of the void or roof space above the stored crop determines the amount of condensation generated and the airflows over the crop during ventilation. The ratio of airspace to crop is different for potatoes to that required for grain.

33. To facilitate ventilation of the potatoes in accordance with the Dutch design, a separate room called a mixing or plenum chamber has been created at the end of the store to allow the mixing of air from inside and outside. The size of the plenum has been designed to match the quantity of potatoes planned to be stored. The size of the hatches, number and size of ventilation ducts and corresponding ventilation holes have also been designed with this in mind.

34. The potatoes are stored by blowing air through them in a way that is referred to as “positive ventilation”, that is to say the air has to pass through the crop. The air enters the mixing or plenum chamber through 6 air intake windows where it is mixed with air from inside the store using 6 fans and then passes into the main crop storage area through a series of moveable semi circular hoops or airing ducts that are spaced out on the floor of the store before the potatoes are stored, effectively creating tunnels of decreasing size running from the plenum under the potatoes. The hoops have holes in them through which the air from the plenum filters out into the potatoes and eventually filters up through the crop into the headspace above the potatoes. To ensure the crop is not pressurised there are exhaust windows in the wall of the main chamber.

35. There is a set of 6 fans in the roof of the store to circulate air in the roof space and built in heaters to keep the temperature in the space a little higher than the temperature of the crop so avoid condensation on the top surface of the crop.

36. The system is controlled automatically. Temperature sensors are sited in the crop, in the plenum, in the roof space and outside. The computerised controller constantly reads the temperatures and runs the ventilation, based on the parameters and set-points set by the store manager. The set-points will be determined by the time of year, the condition of the crop and the variety of potato being stored.

37. There is a roller shutter door at the opposite end of the store to the plenum. The potatoes are loaded after harvesting into the stores and over the pre placed half hoop tunnels to a depth of 4500mm. the roller shutter is closed and soil placed against the bottom of the shutter to provide additional security to the door's rubber seals.

38. Regular cleaning takes place to prevent disease contamination between crops.

39. The additional engineering requirements of the store means that the cost per store is approximately £300,000 as against a cost of approximately £55,000 for a general purpose warehouse of the same size.

40. Finally, it is worth noting the evidence of Mr Wright. In examination he was asked about whether in his view the store amounted to a cold store. He expressed concerns that the store could not operate elsewhere in the world, specifically somewhere warmer, as the store relied upon ambient temperature in contrast to a store which could operate mechanically. To the extent Mr Wright was giving witness evidence as opposed to opinion or expert evidence, he has stated what we believe to be uncontroversial, that is the store operates by using external air at ambient temperature with no mechanical refrigeration. Necessarily there would be places in the world where it would not be possible to operate the store in the way intended.

#### **THE CAPITAL ALLOWANCES LEGISLATION**

41. Section 11 provides as follows:

**'11 General conditions as to availability of plant and machinery allowances**

(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.

(2) "Qualifying activity" has the meaning given by Chapter 2.

(3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.

(4) The general rule is that expenditure is qualifying expenditure if—

(a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and

(b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.

(5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3."

42. Sections 21 and 22 provides that expenditure on buildings or structures do not attract plant and machinery capital allowances:

**"21 Buildings**

(1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the provision of a building.

(2) The provision of a building includes its construction or acquisition.

(3) In this section, “building” includes an asset which:

- (a) is incorporated in the building,
- (b) although not incorporated in the building (whether because the asset is moveable or for any other reason), is in the building and is of a kind normally incorporated in a building, or
- (c) is in, or connected with, the building and is in list A.

List A

Assets treated as buildings

1. Walls, floors, ceilings, doors, gates, shutters, windows and stairs.
2. Mains services, and systems, for water, electricity and gas.
3. Waste disposal systems.
4. Sewerage and drainage systems.
5. Shafts or other structures in which lifts, hoists, escalators and moving walkways are installed.
6. Fire safety systems.

(4) This section is subject to section 23 (but any reference in list C in subsection (4) of that section to “plant” does not include anything where expenditure on its provision is excluded by this section).

## **22 Structures, assets and works**

(1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on-

- (a) the provision of a structure or other asset in list B, or
- (b) any works involving the alteration of land.

List B

Excluded structures and other assets

1. A tunnel, bridge, viaduct, aqueduct, embankment or cutting.
2. A way, hard standing (such as a pavement), road, railway, tramway, a park for vehicles or containers, or an airstrip or runway.
3. An inland navigation, including a canal or basin or a navigable river.
4. A dam, reservoir or barrage, including any sluices, gates, generators and other equipment associated with the dam, reservoir or barrage.
5. A dock, harbour, wharf, pier, marina or jetty or any other structure in or at which vessels may be kept, or merchandise or passengers may be shipped or unshipped.
6. A dike, sea wall, weir or drainage ditch.
7. Any structure not within items 1 to 6 other than-
  - (a) a structure (but not a building) within Chapter 2 of Part 3 (meaning of “industrial building”),
  - (b) a structure in use for the purposes of an undertaking for the extraction, production, processing or distribution of gas, and
  - (c) a structure in use for the purposes of a trade which consists in the provision of telecommunication, television or radio services.

(2) The provision of a structure or other asset includes its construction or acquisition.

(3) In this section-

(a) “structure” means a fixed structure of any kind, other than a building (as defined by section 21(3)), and

(b) “land” does not include buildings or other structures, but otherwise has the meaning given in Schedule 1 to the Interpretation Act 1978.

(4) This section is subject to section 23 (but any reference in list C in subsection (4) of that section to “plant” does not include anything where expenditure on its provision is excluded by this section).”

43. Section 23 disapplies sections 21 and 22 in certain circumstances:

**“23 Expenditure unaffected by sections 21 and 22**

(1) ...

(3) Sections 21 and 22 also do not affect the question whether expenditure on any item described in list C is, for the purposes of this Act, expenditure on the provision of plant or machinery.

(4) But items 1 to 16 of list C do not include any asset whose principal purpose is to insulate or enclose the interior of a building or to provide an interior wall, floor or ceiling which (in each case) is intended to remain permanently in place.

List C

Expenditure unaffected by sections 21 and 22

...

18. Cold stores.

...

28. The provision of-

(a) silos provided for temporary storage... ”

**THE ISSUES IN THIS APPEAL**

44. The conditions for claiming plant and machinery allowances in the current appeal might therefore be summarised as follows:

- (1) The taxpayer carries on a qualifying activity (section 11(1))
- (2) The taxpayer incurs capital expenditure (section 11(1) and (2))
- (3) The expenditure must be on plant or machinery (section 11(4)(a))
- (4) The appellant owns the plant or machinery as a result of incurring the expenditure (section 11(4)(b))
- (5) If the expenditure is on a building or structure it does not qualify (sections 21 and 22) unless it satisfies one of the descriptions in List C (section 23(3) and (4)) being either:
  - (a) a cold store (Item 18 List C)
  - (b) a silo provided for temporary storage (Item 28(a) List C).

45. It is common ground that the appellant satisfies (1), (2) and (4) above. It is also common ground that the potato storage is either a building or a structure for the purposes of sections 21 and 22.

46. The issues in this appeal are whether (3) and (5) are satisfied.

#### PLANT

47. In order to qualify the expenditure by the appellant must be on plant or machinery, section 11(4). The term is not defined but has been the subject of extensive case law.

#### The appellant's arguments

48. Mr Bradley for the appellant argued that the potato store was plant because it carried out a critical function in the appellant's activities, that is to store the potatoes in the right condition until they were needed by Walkers and other crisp manufacturers. This was not merely storage or the setting in which the appellant carried out its qualifying trade but an activity actively carried out by the store as a whole and parts of it could not be separated out.

49. Mr Bradley relied on the Lindley LJ's definition of 'plant' in *Yarmouth v France* (1887) 19 QBD 647 at 658:

'...in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business,— not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business'.

50. Mr Bradley also relied upon Lord Reid's test in *CIR v Barclay, Curle & Co Ltd* (1969) 45 TC 221 at 238-9:

'As the Commissioners observed, buildings or structures and machinery and plant are not mutually exclusive...Undoubtedly this concrete dry dock is a structure, but is it also plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient.'

51. Mr Bradley also relied upon Lord Donovan's comments in the same decision:

"My Lords, if the various components of this dry dock are considered piecemeal, it is easy to regard the concreted basin itself as a structure and not as plant. For then the basin is simply a large hole in the earth the bottom and three sides of which have been faced with concrete. This approach to the problem, however, carries the Crown too far. For such a basin, regarded by itself, would be no use to the Respondents in their trade...Furthermore, I regard the "piecemeal" approach as unreal. The dry dock ought, I think, for present purposes to be regarded as a whole, with all its appurtenances of operating machinery, power installations, keel blocks, tubular side shores, and so on. So regarded, is it "plant" or not?

There is no statutory definition of the word. But it is at least clear from s. 276 of the Income Tax Act 1952 that the terms "plant" and "building or structure" are not mutually exclusive. There may, in other words, be some buildings or structures which can also properly be called "plant". What, however, are the tests which enable one to recognise any such case? These have been left to the Courts to formulate. Lindley L.J. did it in *Yarmouth v France* (1887) 19 Q.B.D. 647 in language which despite the great technological advances since his day is still of great help. Uthwatt J. said in *Lyons & Co. Ltd. v Attorney-General* [1944] Ch. 281 that plant did not include the place where the business was carried on: and Pearson L.J. in *Jarrold v John Good & Sons Ltd.* 2 [1963]

1 W.L.R. 214 spoke of plant being that with which the trade is carried on, as opposed to the place where it was carried on. All these definitions are helpful, but in the nature of things they cannot be exact, and so provide an answer incapable of reasonable dispute in every case....

Thus the dry dock is, despite its size, in the nature of a tool of the Respondents' trade, and therefore, in my view, "plant". I think it differs from a dam, which, for the moment at least, I regard more as a storehouse for water."

52. Mr Bradley also relied on the comments of this Tribunal's decision in *May & anor v RCC* [2019] UKFTT 32 (TC) which, whilst not binding, was a decision on facts very similar to those close of the current appeal. In that decision the Tribunal held that a horizontal grain store was "plant". The Tribunal said:

'[75] ...This facility performs one particular function within the overall activities constituting the Appellant's business, namely the active function of drying the grain after it has been harvested, and then of keeping it conditioned in storage until it has been sold. This function is just one part of a longer process that makes up the Appellant's business.

[76] This particular function of drying and conditioning grain is not performed simply by the movable items located in the main structure of the facility. Rather, the very structure of the building itself is integral to its successful performance. If the structure of the building had been designed differently, the facility would not work. The features of the building that are essential to the successful performance of its function include the height at which the roof is pitched, the power floated concrete floor, the thicker than normal concrete walls and the air inlet and exhaust fan located on the walls. These specific features led to the construction costs being considerably higher, as well as making the building unsuitable for other uses.

[77] The Tribunal is satisfied of the following. The building as a whole is kept for permanent employment in the Appellant's business. The building as a whole performs an operation that is essential to the conduct of that business, namely drying and conditioning the grain. There is positive evidence that it is unsuitable for use for various other purposes, and there is no positive evidence that there is any other specific trade purpose for which it would be suitable. The building as a whole was especially designed and built for the specific purposes that it serves.

[78] HMRC argue that the drying and conditioning process would not work if the movable equipment was taken out, suggesting that this means that the main structure of the facility is merely a building in which grain is dried and cooled. However, it is equally the case that the drying and conditioning process would not work if the building did not have the power floated concrete floor, the thicker than normal concrete walls and the air inlet and exhaust fan located on the walls. Both the main structure of the building and the movable parts are thus essential to its functioning. All of these components together constitute the apparatus.'

53. Applying the functional test in the current appeal, Mr Bradley argued that the potato store was a single unit that performs an active function in the appellant's trade because:

- (1) A large volume of air is blown through the potatoes in a very short period of time and this is controlled by an automated computer system running a sophisticated algorithm.
- (2) The potato store cures and dries potatoes when they enter storage, cools them, minimizes water loss, circulates CIPC gas growth suppressant and manages fry colour.

(3) These functions are essential to the appellant's trade. The functionality of the potato store enables the appellant to provide customers with a constant supply of potatoes in a consistent condition that meets the requirements for crisping potatoes and also enables the appellant to earn significant bonuses.

(4) The structural elements of the potato store are essential to the performance of these functions, for example the automated air ingress and egress louvres, the plenum chamber, the design of the walls, the cladding panels and sealing on the roof and walls and the smooth power-floated finish to the concrete floor

(5) Storing the potatoes in a conventional agricultural shed would render them no longer saleable within a few weeks. The potato store enables the appellant to maintain supply between harvest in September until as late as July the following year.

### HMRC's arguments

54. Mr Turnbull for HMRC argued that the potato store is not the apparatus with which the trade is carried out, but premises or a setting for the appellant's trade. Storage is generally not considered to be plant. All buildings perform a function in that they protect from the elements and they may be designed and built for a particular purpose but that can still be the setting in which the qualifying activity takes place rather than plant.

55. Thus in *Commissioners of Inland Revenue v Barclay, Curle & Co Ltd* [1969], 45 TC 221 Lord Donovan drew a distinction between a dry dock and a dam which is a storehouse for water. Further, Lord Donovan said:

"At the end of the day I find the functional test propounded [in *Yarmouth v France* (1887) 19 QBD 647] to be as good as any, though, as was said in *Jarrold v John Good & Sons*, some plant may perform its function passively and not actively. But in the present case this dry dock, looked upon as a unit, accommodates ships, separates them from their element and thus exposes them for repair; holds them in position while repairs are effected, and when this is done returns them to the water. Thus the dry dock is, despite its size, in the nature of a tool of the respondent's trade and, therefore, in my view 'plant'"

56. The function of buildings was discussed in *Attwood v Anduff Car Wash Ltd, CA, [1997] STC 1167* where it was held that:

"The fact that the site was purpose-designed as a whole could not turn a site which functioned as premises into plant. Accordingly, it was impossible to say the entire site was a single unit of plant"

57. In *Carr v Sayer* [1992] STC 396 Sir Donald Nicholson said (at 402-3):

"...buildings, which I have already noted **would not normally be regarded as plant**, do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity. Such a distinction would make no sense

...one of the functions of a building is to provide shelter and security for people using it and for goods inside it. That is a normal function of a building. A building used for those purposes is being used as a building. Thus a building does not partake of the character of plant simply, for example, because it is used for storage by a trader carrying on a storage business. This remains so even if the building has been built as a specially secure building for use in a safe-deposit business. Or, one might add, as a prison." (emphasis added)

58. In *Benson v Yard Arm Club Limited* [1979] STC 266 the Court of Appeal held that a ship which had been converted into a floating restaurant did not constitute plant because its only

function was to serve as the premises of the restaurant. It made no difference in that regard that it constituted an attractive venue for customers.

59. See also *St John's School v Ward* [1974] STC 69 where Templeman J held, in a decision approved by the Court of Appeal [1975] STC 7, that a pre-fabricated school laboratory and gymnasium, did not constitute plant notwithstanding that they had been purposely built for such uses.

60. Mr Turnbull also referred to *Bradley v London Electricity plc* [1996] STC 1054 where Blackburne J considered the structure for an underground electricity substation. He identified the “essential question” as concerning whether the “structure” can reasonably be called apparatus with which [London Electricity’s] business is carried on as opposed to the premises in which it is carried on” (1081-1082).

61. Mr Turnbull distinguished the decision of this Tribunal in *May* as having been decided on its own facts and in any event it did not bind this Tribunal.

62. On the facts in this appeal, Mr Turnbull argued:

- (1) The appellant had not demonstrated that the store functioned as plant.
- (2) From the outside the store was indistinguishable from other buildings.
- (3) It is the plant and machinery that performs the function of maintaining the potatoes at the correct temperature not the building as a whole.
- (4) The building would be suitable for storage of other commodities.
- (5) The functionality of the walls and the roof is no more than protection from the elements.
- (6) The floor is no more than a floor even if polished.

### **Decision on plant**

63. We agree with the appellant that the potato storage is “plant” for the purposes of section 11.

64. The functions that are carried out by the structure and equipment integrated into the potato store satisfy Lindley LJ’s test in *Yarmouth v France* of being the “apparatus...used by a businessman for carrying on his business”. We accept Mr Griffiths’ evidence that it is central to the appellant’s business of growing and selling crisping potatoes to Walkers and other crisp manufacturers. In order to so do the potatoes must be stored until Walkers need them, potentially as late as May following the harvest the previous autumn, and that during that time they do not deteriorate. To achieve that – and so to be a supplier to Walkers at the prices the appellant wishes to charge– the potatoes need to be treated in the way the potato store is designed to achieve. The potatoes need to be dried and quality maintained by being kept at a precise temperature with no condensation or variation in sugar content. This treatment enables the potatoes not only to be kept for longer than would otherwise be the case, but also at a quality that means Walkers will both buy them and pay the significant quality related bonuses. Each item of machinery integrated into the store functions as part of the whole. The store is not the setting for the appellant’s trade but an integral part of how the appellant carries out its qualifying activity.

### **SILO FOR TEMPORARY STORAGE**

65. Even if the potato store is plant, if it is a building or a structure then it is excluded from allowances by section 21(1) or section 22(1) respectively unless it satisfies any of the definitions in List C in section 23. It is common ground that the store is a building or a structure and so for the appellant to be entitled to capital allowances the store must fall within one of the

items in List C. The appellant argued the store was either a “cold store” within item 18 or a “silo provided for temporary storage” within item 28(a).

### **The appellant’s arguments**

66. Mr Bradley for the appellant argued that there was no definition of the expressions ‘silo’ and ‘provided for temporary storage’ in the legislation, and sought to adopt the argument and, by analogy, the decision in the Tribunal decision in *May*.

67. Mr Bradley submitted this Tribunal should, as a matter of judicial comity follow the finding of law by the Tribunal in *May* as to the meaning of ‘silos provided for temporary storage’. Indeed, the facts in this appeal are, if anything, stronger than those in *May*. The Tribunal considered the same arguments as are being made by HMRC in this appeal and HMRC did not ask for permission to appeal in *May* (see *Patel & others v RCC* [2019] UKFTT 620 (TC) at [27]). It is not appropriate for HMRC to fail to bring an appeal to the Upper Tribunal on a point of law decided by the First-tier Tribunal and then seek to litigate the same point repeatedly at first instance.

68. Thus, as in *May* the word ‘silo’ should be given its ordinary meaning, as found in the Shorter Oxford English Dictionary (“the Shorter OED”), of:

‘A pit or underground chamber used for storing grain, roots, etc; spec. one in which green crops are compressed and preserved for fodder as silage. Also, a cylindrical tower or other structure built above ground for the same purpose’ (at [46]).

69. Thus the store was a “silo” in that it was a structure built above ground for the purpose of storing roots (i.e. potatoes). It is specifically designed to perform the functions of drying and conditioning the crops.

70. The Tribunal in *May* held that the word ‘temporary’ should also be given its ordinary meaning of:

‘Lasting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need’ (at [59]).

71. The storage is temporary in the current appeal in that the potatoes are put into the store in September and taken out for delivery by June at the latest. On the facts of *May* the Tribunal held that the storage lasted from harvest in September to the following May and that the timing of the storage was known at the time the grain store was constructed. In those circumstances the Tribunal found that the storage was “temporary” ([69]).

72. Mr Bradley objected to HMRC’s construction of the definition as being limited to the storage of grain and not tubers such as potatoes. The ‘etc’ in ‘grain, fodder etc’ allows for the inclusion of other crops and it cannot have been Parliament’s intention to discriminate between different silos depending on which particular arable crop they are intended to contain.

73. Mr Bradley also rejected HMRC’s argument that Item 28(a) had been introduced to preserve allowances for grain silos covered by the decision in *Schofield v R & H Hall Ltd* (1974) 49 TC 538, being dockside grain silos in which imported grain was stored for up to seven days. HMRC’s submission was not based on the words of the statute and does not derive from any legitimate process of construction. A comparison with *Schofield* was rejected by the Tribunal in *May*:

“[62] HMRC argue that storage for [a period of up to nine or ten months] is long term, and is not “temporary”. HMRC seek to contrast the circumstances of the present case with those in *Schofield*, in which grain was stored in silos for only 7 days.

[63] The Tribunal accepts that the item “silos provided for temporary storage” may have been included in List C with the case of *Schofield* specifically in mind...and on that basis it can be concluded that in the particular circumstances in *Schofield*, the silos were for “temporary” storage within the meaning of s 23 CAA. However, in *Schofield* the question whether the storage was “temporary” or not was not one of the issues that the court was called upon to decide, and is not dealt with in the judgment. The facts of *Schofield* are therefore not of assistance in determining precisely which other factual circumstances would fall within that expression, and which would not.”

### HMRC’s arguments

74. Mr Turnbull for HMRC argued that the potato store was not a ‘silo’ and took the ordinary meaning of the term from what we took to be the online version of the Oxford English Dictionary (“the online OED”) as follows:

“1. A pit or underground chamber used for the storage of grain, roots, etc.”

“2. spec. A pit or an air- and water tight chamber, in which green food is preserved for fodder by ensilage; also, a cylindrical tower or other structure erected above ground for storing grain, fodder, etc.”

75. Mr Turnbull argued that this definition is not met for a number of reasons.

76. First, as it is not underground, for the appellant to succeed it must fall within the second part of the definition, that is a “structure erected above ground” but, that being the case, the appellant must fail because it is a structure for storing potatoes not “grain, fodder, etc”. The appellant’s argument amalgamates the two different definitions, as it is only pits and underground chambers that are used for storing roots.

77. In any event, a potato is in fact a tuber and not a root. Further, the reference to “roots” should be understood within the context of the OED definition of silage:

“green fodder preserved by pressure in a silo or stack”

78. Thus it is referring to roots such as beets, which are more commonly used in animal feed. The storage of potatoes for resale is not analogous to the storage of silage within a silo.

79. The appellant relied upon a different definition, that is in effect a “structure built above ground [and] used for storing roots”. However, sections 21 to 23 should be interpreted in accordance with the intention of Parliament. The purpose of item 28(a) was to save from the exclusions assets similar to the assets in *Schofield*. Thus the exception was not designed to apply to buildings, but was designed to apply to other structures.

80. Further, it is also apparent that by ‘temporary storage’ the legislators had in mind considerably shorter periods than those at issue in the present case. In *Schofield*, the silos were apparatus to facilitate the process of unloading and distribution. Finally, the product being stored in *Schofield* (and indeed in *May*) was grain and therefore the facts were distinct from the facts in this present case.

81. In any event the 6 to 9 months that the potatoes are stored in the structure cannot objectively be said to be temporary and contrasts with what in accordance with *Schofield* should constitute temporary, being 7 days.

82. Finally *May* was decided on its particular facts and in any event, as it was heard by the First-tier Tribunal, the decision is not binding.

### **Decision on silos for temporary storage**

83. We find that the potato store in this appeal amounts to a silo provided for temporary storage within Item 28(a) in List C.

84. In doing so we have found the decision in *May* of assistance and note the principles of judicial comity as summarised by Judge Brooks in *Patel* at [27]:

“Although, as a decision of the First-tier Tribunal *DDR* is not binding, as I said in *Ardmore Construction Limited v HMRC* [2014]SFTD 1077 at [19] such decisions do:

“... constitute persuasive authorities which would be expected to be followed by the FTT. For example in *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) the Tax and Chancery Chamber of the UT, in relation to the decision of one High Court Judge on another (but equally applicable in the case of any persuasive authority), said, at [82]:

“... although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a High Court Judge ought to be followed by another [High Court] judge unless that judge thinks that the earlier decision was clearly wrong”

As Lord Goddard CJ put it in *Huddersfield Police Authority v Watson* [1947] KB 842, at 848:

“I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity.”

85. However, we would in any event, irrespective of the decision in *May*, find that the potato store in the current appeal amounts to a silo for temporary storage.

86. As to the meaning of “silo”, there is no statutory definition and we adopt the definition in the Shorter OED, as did the Tribunal in *May*, being:

“...a cylindrical tower or other structure built above ground for [storing grain, roots, etc]”

87. However, in doing so we do not see any advantage to HMRC in preferring the online OED definition cited by HMRC as it includes the following definition which is also met on the current facts:

“...a cylindrical tower or other structure erected above ground for storing grain, fodder, etc”

88. We do not accept that these dictionary definitions are susceptible to the kind of precise interpretation applied by HMRC. In our view both definitions are sufficient to confirm that the ordinary meaning of “silo” encompasses the current facts, being an above ground storage facility for potatoes.

89. We were taken to a number of definitions in the course of the hearing by both counsel but we do not accept HMRC’s attempts to distinguish the type of crop being stored, particularly given both definitions use of “etc’ in the definition making plain that the list of crops is not exhaustive.

90. As to the meaning of “temporary storage”, we reject HMRC’s argument that Item 28(a) must be construed narrowly in accordance with the decision in *Schofield*. Had Parliament

intended such a result it could have imposed a clear definition, for example defining temporary storage as being for periods of up to 7 days but it did not do so and in our view such a limitation cannot be read into the legislation. Further, we do not accept a short period such as 7 days is a natural reading of “temporary”. On the facts of this appeal the potatoes were stored temporarily by the appellant. The intention when the potatoes were put into the store in September was that they would be removed, at the latest in the following July, which amounts to temporary storage.

#### **COLD STORE**

91. As we have found that the potato store amounts to a silo provided for temporary storage within Item 28(a) in List C, it is unnecessary for us to consider whether it is a cold store within Item 18 but we shall do so for completeness.

#### **The appellant’s arguments**

92. Mr Bradley argued in the alternative that the potato store was a ‘cold store’ within the meaning of item 18. The expression ‘cold store’ is again not defined and so should take its ordinary meaning.

93. Mr Bradley could not find a definition in the Shorter OED but produced some other dictionary definitions:

“a building or room which is artificially cooled so that food can be preserved in it” (Collins)

“a refrigerated compartment or building for keeping foods, furs, etc., in cold storage” (Dictionary.com)

“a building for cold storage” (Merriam-Webster).

94. Mr Bradley highlighted Mr Griffiths’ evidence that one of the functions of the potato store was to cool the potatoes down after harvest and then maintain them at a specific temperature of between 6.5 and 11.5 degrees Celsius depending on the variety. That cooling is done artificially in order to preserve the potatoes.

95. Mr Bradley rejected HMRC’s submission that to be a ‘cold store’ the facility must be ‘objectively cold’, a test that according to HMRC is not satisfied here because for much of the time the potatoes are in store (i.e. during winter) the temperature in the potato store is not colder than the outside temperature. ‘Objective’ coldness of the potato store should not be demonstrated by reference to a relative measure, that is whether it is colder than outside temperature.

96. A temperature of 6.5 to 11.5 degrees is objectively cold. To the extent that a relative measure is needed, the relevant comparator is the condition of the food had it not been put into the putative cold store, for example if the potatoes had simply been put into a general-purpose shed after harvest. In this case the potatoes would have been well above the required temperature and would, as explained above, relatively quickly have deteriorated into unsaleable condition.

#### **HMRC’s arguments**

97. Mr Turnbull for HMRC argued that the potato store does not meet the requisite criteria to be a cold store within Item 18.

98. The store was not objectively cold. It was not necessary for the temperature to always be lower than the outside temperature, but if the temperature is not usually kept below the ambient temperature then the building is not functioning as a cold store. Here the premises is not functioning as a cold store but rather as a building or structure which during certain periods the internal temperature is able to be kept reasonably constant.

99. HMRC argued that the average store temperature, as indicated by the data, is not objectively cold but instead, maintains a relatively constant temperature in order for the potatoes to be kept in optimum condition, not an objectively cold temperature.

100. HMRC submitted that the premises is not a refrigerating chamber, following the OED definition of a cold store.

101. HMRC submitted that no artificial cooling took place at the store, but it simply took air at the ambient temperature and introduced it into the store.

#### **Decision on cold store**

102. In our view, the potato store operated as a cold store within Item 18 in List C.

103. The potatoes are cooled on being put into storage, primarily by the operation of the walls functioning as radiators dispersing the heat and the air being blown through the crop. Having done so the purpose of the store is to maintain the ideal temperature to enable the potatoes to be stored and for their condition to be maintained. However, it is necessary for these purposes that the potatoes are stored between 6.5 and 11.5 degrees depending on the variety. In our view that is sufficiently cold.

104. We do not consider it necessary for a store to be mechanically refrigerated in the sense of a conventional refrigerator, although we do note that the walls extract heat by performing as a radiator. Further, it is irrelevant whether the store could be operated in other parts of the world. The issue is whether the potato store operated as a cold store in the UK and its ability to do so in warmer parts of the world is irrelevant.

#### **DECISION**

105. For the reasons set out above, we find that the expenditure incurred by the appellant was on plant or machinery within section 11(4)(a) and further the potato store amounts to a silo provided for temporary storage within the meaning of Item 28(a) in List C in section 23. If necessary we also find that the potato storage is a cold store within the meaning of Item 18 in List C.

106. We therefore allow this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

107. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**IAN HYDE  
TRIBUNAL JUDGE**

**RELEASE DATE: 12 JULY 2021**