



TC07119

**Appeal number: TC/2015/07219
TC/2016/02980**

INCOME TAX – industrial buildings allowances – partnership formed to acquire land and buildings in development zone – buildings ceased to be used by previous owner – partnership 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 because of partnership’s intention to bring back into use – held not – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MARK SHAW
(AS NOMINATED MEMBER OF TAL CPT LAND
DEVELOPMENT PARTNERSHIP LLP)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE PHILIP GILLETT
JANE SHILLAKER**

Sitting in public at Taylor House, London on 15 and 16 April 2019

**Julian Ghosh QC and Emma Pearce, counsel, instructed by Ashurst LLP, for the
Appellant**

Larissa Mulder, Officer of HMRC, for the Respondents

DECISION

Preliminary Issues

1. The appellant company, TAL CPT Land Development Partnership LLP (“TAL”) appealed against the following closure notices and amendments to the 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

2. The figures shown above relate to the amount of Industrial Building Allowance (“IBA”) and balancing allowances claimed and disallowed in the partnership computation of allowable losses as a consequence of HMRC’s decisions. The consequential effect is to reduce the amount of the partnership’s loss for the periods and as a result reduce the amount of loss that is available to be claimed by the partners (to be set against other taxable income) on their personal returns. This in turn increases the amount of tax payable by the partners. HMRC estimates that the tax at stake is in the region of £5m.

3. The initial statement of case filed by HMRC did not contain any significant pleadings as regards the discovery assessment.

4. On 7 March 2019, HMRC filed an application to amend their statement of case to include pleadings on the discovery issue for 2005-06 and on 15 March 2019, the appellant filed detailed submissions in opposition to this application.

5. On 2 April 2019, the Tribunal issued a Direction refusing to amend the respondent’s statement of case for the reasons set out in the appellant’s submissions opposing HMRC’s application, which were essentially that it was too close to the hearing date to introduce new pleadings for which the appellant would be unable to prepare properly. This naturally led to the outcome that HMRC would be unable to argue their case fully in respect of the discovery issue, in accordance with the decision in *Burgess & Brimheath Developments Ltd* [2015] UKUT 0578 (TCC).

6. Therefore, on 4 April 2019, HMRC made an application to sever the appeal relating to the IBAs, for the years 2004-05 and 2006-07, and that relating to the discovery assessment, for the year 2005-06. These had in fact originally been two separate appeals which had been joined by direction of the tribunal on 2 June 2016.

7. This severance application was heard before the hearing of the substantive appeal regarding the IBAs, at which time the parties came to an agreement that the

two appeals should be severed, subject to certain conditions regarding the extent to which the return for 2005-06 could be reopened.

8. This application is now the subject of separate directions.

9. The remainder of this decision now addresses only the appeals against the closure notices and assessments issued in respect of 2004-05 and 2006-07 and, specifically, the IBAs claimed in the returns for those years.

Introduction

10. TAL claimed capital allowances (specifically, IBAs under the Capital Allowances Act 2001 ('CAA')) in respect of accounting periods ended 31 March 2005 to 31 March 2007. The appellant, Mark Shaw, as nominated member of TAL, filed partnership tax returns for the tax years 2004/5 to 2006/7 in which the partnership's taxable profits were reduced by the IBAs claimed.

11. HMRC disallowed TAL's claims to IBAs on the basis that the buildings in respect of which IBAs were claimed did not meet the definition of 'industrial buildings' in s271 CAA. In particular, HMRC argue that the buildings were not in a state of 'temporary disuse', within s285 CAA, at any time during TAL's period of ownership.

12. Alternatively, HMRC argue that if the buildings were in a state of temporary disuse during TAL's period of ownership, a balancing event occurred in April 2007 in respect of some of the buildings (on their sale), which was after balancing allowances had been withdrawn (on 21 March 2007). Consequently, HMRC argue, on this basis, that the claims for IBAs in respect of the 2004/5 tax year should be allowed, but the claims for IBAs (specifically, balancing allowances) in respect of the year 2006/7 should be disallowed.

13. The appellant contends that the claims to IBAs made on behalf of TAL should be allowed on the basis that the buildings in question were industrial buildings. In particular, that the buildings were in a state of temporary disuse between the time of their purchase and the time at which the buildings ceased altogether to be used. Further, the appellant contends that balancing events took place in respect of each of the buildings before 21 March 2007, when balancing allowances were withdrawn.

The Facts

14. The essential facts of the case were agreed between the parties. In addition we received a witness statement and oral evidence from Mr Shaw, whom we found to be an honest, open and reliable witness, in spite of the passage of time since the events in question.

15. We find the following as matter of fact.

16. The land on which the buildings which are the subject of this appeal were constructed ("the Site") is situated in Eurocentral business and distribution park ("the Park"), located between Glasgow and Edinburgh.

17. On 28 October 1992, North Lanarkshire Local Council granted planning consent in respect of a ‘masterplan’ for the development of the Park and in February 1993, part of the Park became designated as an enterprise zone under the terms of the Motherwell Enterprise Zone Designation Order. Enterprise zones were areas designated by the government to encourage investment in deprived areas, qualifying investment in which afforded enhanced IBAs. This designation order introduced a simplified planning regime for areas within the enterprise zone which effectively granted consent for all development, except certain excluded types.

Purchase and development of the Site

18. In 1991, Scottish Enterprise (a government agency, “SE”) reached an agreement with Chungwa Picture Tubes (UK) Ltd (“CPT Ltd”), the UK subsidiary of a Taiwanese company involved in the production of cathode ray television tubes, to develop the Site. SE awarded CPT Ltd public grants of around £20M to persuade them to invest in the Site.

19. CPT Ltd initially purchased a long leasehold interest in the Site, whilst SE retained the feuhold. It was agreed that when CPT Ltd carried out the anticipated development at the Site, CPT Ltd’s leasehold interests in the areas actually developed could be converted into feuhold interests.

20. CPT Ltd’s plan for the Site was to develop four large production buildings, each with a footprint of 350,000 sq. ft., with an office/canteen building and a range of ancillary buildings providing support services (“the CPT Masterplan”). It was envisaged that this would create over 3,000 local jobs and lead to significant investment in the area. There were four phases to the CPT Masterplan, with one production building to be constructed during each phase.

21. The building work for phase one of the CPT Masterplan commenced in 1996 and was completed in 1998. By that stage, in accordance with phase one of the CPT Masterplan, the following buildings had been constructed (referred to collectively as “the Buildings”):

- (1) One of the four production buildings (“the Production Building”), an industrial building of 350,000 sq. ft.
- (2) A canteen and office building of approx. 60,000 sq. ft. (“the Office”). The Office comprised two wings (one wing containing the office facilities, the other the canteen facilities, with capacity for around 1,000 people) connected by a central link.
- (3) A number of ancillary buildings (collectively, “the Ancillary Buildings”), namely:
 - a) the chemical storage building;
 - b) the water treatment building;
 - c) the salvage building;
 - d) the power house;

- e) the planning and engineering department ('PED') building;
- f) the sprinkler pump house; and
- g) the water building.

22. All of the Ancillary Buildings (except for the chemical storage building) were connected to the Production Building by an overhead gantry.

23. This included a small section referred to as the internal quality control (or "IQC") building.

24. By 27 October 1997, CPT Ltd started manufacturing cathode ray picture tubes at the Site, using all of the Buildings. However, CPT Ltd subsequently halted further development at the Site in response to commercial difficulties (ie, advances in flat screen technology).

25. The following points are common ground between the parties:

- (1) During CPT Ltd's period of ownership, the Buildings were industrial buildings within the meaning of CAA, s.271,
- (2) In or around January 2003, during CPT Ltd's period of ownership, the Buildings fell into (temporary) disuse within the meaning of CAA, s.285,
- (3) The expenditure incurred by CPT Ltd was qualifying expenditure within the meaning of CAA, ss.292 and 294,
- (4) Following CPT Ltd's sale of the Site there were residual capital allowances of approximately £14M.

Discussions for the purchase of the Site

26. The Tritax Group (referred to collectively as "Tritax") is and was a group of companies specialising in property investment management. By the early 2000s, Tritax had been involved in investments in enterprise zones across the UK. As part of its investment in Scottish enterprise zones, Tritax held regular meetings with SE throughout the late 1990s and early 2000s.

27. During one such meeting, SE informed Tritax of the problems with CPT Ltd and sought their help in finding an investor to complete the development of the Site. Ultimately, Tritax found a group of investors to purchase the Site.

28. Discussions took place during the summer of 2002 between Tritax, Ryden (as agent for CPT Ltd), CPT Ltd, SE and North Lanarkshire Council with the object of devising a suitable plan for the onward development of the Site. The early stages of the plan would (until a wholly new masterplan for the Park had been devised and approved) have to fall within the parameters of the 1992 Planning Consent.

Masterplan for the Site

29. Ultimately, the parties negotiated and agreed on a plan referred to as Option 12B. Option 12B was divided into (broadly) three phases:

(1) The initial phase – this focused on maximising the Site’s revenue as quickly as possible in order to service the loan required to purchase the Site. This involved generating rental income from the Buildings and selling undeveloped plots of the Site for immediate development.

(2) The intermediate phase – this envisaged selling further areas of the Site for specified construction projects as part of a slow build out phased over ten years. As part of this phase, it was envisaged that some of the Ancillary Buildings would be demolished, eg, one of the cash flow models assumed that the PED building and the power building would be sold and/or demolished in April 2007, the salvage building and pump house would be sold and/or demolished in April 2009 and the chemical store would be sold and/or demolished in January 2011.

(3) The final phase – this phase envisaged the completion of the new developments. It also included the possibility of demolishing the Production Building at some time before February 2013 and constructing new buildings on that part of the Site (depending on future market conditions). The initial cash flow models assumed that the Production Building would continue to generate rent until February 2013.

Purchase of the Site

30. On 24 November 2003, TAL was formed. The members of the TAL included a syndicate of individual investors (“the Eurocentral Land Syndicate”), of which Mr Shaw was a member. The business affairs of TAL were managed by the board of the LLP. At all material times, the board members were Ian Ross, Richard Bostock, Andrew Lapping and Mark Shaw.

31. At the same time, a separate LLP, namely TAL SE LLP, was incorporated for the purpose of purchasing SE’s interests in the Site.

32. On 4 February 2004 TAL agreed to purchase CPT Ltd’s interests in the Site for £17.25M, £2.25M of which would be deferred for two years (“the Deferred Amount”) and TAL SE LLP agreed to purchase SE’s interests in the Site for £5.525M.

33. The purchase agreement included an undertaking that the Office and the Production Building would be brought out of temporary disuse and back into use within three years of acquiring the Site. Further, TAL agreed to indemnify CPT Ltd for up to £7M for any future tax liabilities it could incur if it failed to bring the buildings back into use.

34. On 24 February 2004, the LLPs and Anglo Irish Bank Corporation plc (“AIB”) entered into an agreement for the provision of a loan of £23M to facilitate the LLPs’ purchase of the Site (“the Loan”). As part of the Loan agreement, the individual members of the Eurocentral Land Syndicate provided £2M by way of interest security deposit to be used by AIB to cover any unpaid interest. The purchases completed on 2 March 2004, approximately 13 months after the Buildings had fallen into (temporary) disuse while in the ownership of CPT. TAL held the relevant interests in the Buildings for the purposes of s286 CAA.

35. At this time, TAL was not aware of the possibility that they might claim IBAs in respect of their expenditure on the Site and these allowances formed no part of the business plan which they presented to AIB in order to secure the loan finance.

Joint venture with EPL

36. From 2002, Tritax (later, on behalf of the LLPs) was in discussions with Eurocentral Partnership Limited (“EPL”), a joint venture between AMEC Developments Ltd (“AMEC”), Royal Bank of Scotland (“RBS”) and SE (Lanarkshire), which controlled the remaining part of the Park.

37. The parties intended to market and brand the Park together and share certain costs, eg, costs of stripping out the Production Building. Ultimately this planned joint venture did not materialise. One consequence of this was that the LLPs had insufficient funds to pay the Deferred Amount.

Strip out works

38. In order to maximise rental yields, the Production Building and the salvage building were stripped out and various works were carried out to the other Buildings in order to make them more attractive to tenants.

39. It was initially envisaged that the machinery and equipment in the Production Building at the date of purchase would be sold to cover the costs of the strip out works. However, it transpired that CPT Ltd had removed some of its equipment and damaged other parts (contrary to the terms of the purchase agreement). In addition, EPL’s contribution to the strip out works did not take place following the failure of the joint venture negotiations.

40. The contract for the execution of the strip out works was entered into between TAL, CPT Ltd and AMEC in November 2004 and the works completed in November 2005. The total cost of the works was approximately £1.3M and was ultimately paid for using part of the Loan.

41. The subdivision of the Production Building into five 70,000 square foot units was also considered in order to make the building suitable for multiple tenants. Plans for subdivision were prepared by Parr Partnership and estimates for the cost of the subdivision works were provided by Currie & Brown in April 2004.

Marketing the Site

42. From the date of purchase, TAL instructed Ryden and CBRE to market the Site to attract potential tenants for the Buildings. The board of TAL was looking for high quality tenants who wanted to take a mid to long-term lease over a sizeable area of the Office and/or Production Building and/or the entirety of any of the Ancillary Buildings at a fair market rent. These requirements were intended to produce the secure rental income stream that the LLPs’ investors and AIB required.

43. From May 2004 CBRE were actively marketing the Site, producing detailed weekly reports setting out their progress in respect of the Buildings. There were a

number of parties interested in the Buildings at various stages. Below are some examples of interested parties and their enquiries.

United Freight Distribution (“UFD”)

- (1) UFD first viewed the Production Building during the week ending 28 May 2004 and were interested in taking a lease over 60,000 sq ft. They also showed an interest in taking a lease over the chemical store.
- (2) During the week ending 23 July 2004, UFD requested lease terms for the (then) cleared section of the Production Building.
- (3) In the week ending 6 August 2004, UFD suggested an entry date of late September 2004. It was noted this might not be possible due to the strip out works that were due to take place.
- (4) During the week ending 27 August 2004, a five-year lease term was agreed with UFD.
- (5) During the week ending 3 September 2004, the negotiation of the lease between TAL CPT LLP and UFD had stalled because UFD wanted the rent of the chemical store to be capped at £30,000 instead of the agreed figure of £47,250. UFD said this was a deal breaker.
- (6) During the week ending 10 September 2004, the issue over the level of rent for the chemical store had been resolved and revised terms were issued.
- (7) It was noted during the week ending 17 September 2004 that UFD had issues in relation to their proposed access point to the Production Building.
- (8) During the week ending 8 October 2004, it was noted that CBRE had heard that UFD were considering alternative options because the access point on the north area of the Production Building was sub-standard and therefore the Production Building would no longer be considered.
- (9) In the week ending 15 October 2004, the Board was informed that UFD had signed a 15-year lease at Cambuslang Investment Park with an option to purchase. This was disappointing for TAL.

Amey

- (10) Amey (the civil engineering company) asked for and was issued with heads of terms for a ten-year lease of part of the Production Building during the week ending 18 June 2004.
- (11) Amey viewed the Production Building on 16 August 2004.
- (12) CBRE went to meet Amey during the week ending 24 September 2004. However, the report notes that Amey's board were resisting the idea of leasing the Production Building. CBRE continued to keep in touch, though progress was slow.
- (13) Amey viewed the Production Building again on 5 November 2004 and was thought to be looking for a lease of around 20,000 to 30,000 sq. ft.
- (14) Interest continued into early 2006, with another viewing in January 2006. CBRE prepared plans to show how the Production Building could be divided up

to accommodate a 15-year lease of 120,000 sq. ft. industrial and 40,000 sq. ft. office building requirements at either the west or east end of the Production Building.

(15) The report for the week ending 7 April 2006 stated that Amey's board was having difficulty in accepting a long-term lease.

(16) Lease terms over the Office were submitted to Amey for the week ending 23 June 2006. However, no lease was agreed in the end.

CCL / Screen Recycle Ltd ("CCL")

(17) CCL viewed and requested a lease of the salvage building during the week ending 23 July 2004.

(18) During the week ending 27 August 2004, CCL was awaiting a terms letter. CCL was informed that the salvage building and the water treatment building would be retained and was told that a five year lease for both buildings would be offered along with a stepped rental.

(19) During the week ending 10 September 2004, CCL responded favourably to the terms but had raised issues about the value of the plant and machinery within those buildings and the inclusion of a landlord re-development option.

(20) A meeting was held with CCL on 22 September 2004 during which CCL pushed for changes to the heads of terms including a reduced stepped rental, a rent-free period and to have ownership of any plant and machinery within the building. However, no lease was agreed in the end.

Cash calls on investors

44. However, due to a combination of factors, the ongoing negotiations for the New Eurocentral Masterplan (and, as part of that, the New Site Masterplan), the failure to make any investment sales of the development plots during 2004, the delay in securing planning permission for the hotel (and the consequent delay in marketing that site) and the extended discussions regarding the JV proposal with EPL (which were, in November 2004, still on-going), there was a delay in publicising the steps that had already been taken to market and rebrand the Site. As a result, the LLPs failed to generate any of the expected rental income or investment sales returns to service the interest payments due under the Loan.

45. Consequently, on 30 November 2004, the Board had to make the first of three cash calls on the members of the Eurocentral Land Syndicate, asking them to contribute a further £600,000. The cash call letter raises the possibility of a further cash call of £400,000.

46. Following the failure of the joint venture negotiations, a further cash call was made in October 2005, asking for £400,000.

Investment sales

47. On 5 April 2005, site 20 was sold to an investor, namely the 2004/5 Eurocentral Hotel Syndicate, for the purpose of constructing a hotel (now known as the Dakota

Hotel). This provided the Board with some cash (£723,400) to pay off the interest due under the Loan.

48. In November 2005, the LLPs reached agreements with two separate syndicates of investors for the purchase and development of warehouses on certain parts of the Site, plots 18 and 19, for a total of £1,982,500.

49. As part of these sale agreements, the board of TAL finally resolved to cease its efforts to rent out some of the Ancillary Buildings altogether (namely, the Site water building, the PED building, the salvage building and the power house) and resolved that those buildings would be demolished to make way for the new warehouses.

50. The sales completed on or around 22 March 2006 (plot 19) and 25 March 2006 (plot 18).

Ongoing efforts to market the Buildings

51. At various times during 2004 and 2005, Morrisons had expressed interest in taking a lease of the Production Building. However, by November 2005, Morrisons informed the board that they had changed their requirements and were no longer interested in the Production Building.

52. The LLPs entered into negotiations with various parties to find a new joint venture partner. The most advanced discussions were held with Gladedale. However, ultimately those negotiations broke down in April 2006.

53. After the joint venture negotiations broke down, and in light of increasing financial pressure on the project from AIB, the board began to consider other options, including the possibility (raised by several of the candidates for the potential joint venture) of demolishing the Buildings and creating a new, mixed use development immediately (in contrast to the slow phased development envisaged under the original masterplan). The board therefore asked CBRE to prepare an outline appraisal looking at the prospects of a new development at the Site in mid-May 2006.

54. At that time, the board was still hopeful that Amazon might take a lease of the Production Building. At various times during 2004, 2005 and 2006, Amazon had expressed interest in taking a lease of the Production Building. In particular, in March 2006, Amazon had prepared drawings of the Production Building and in April 2006 Amazon had requested information on demographics and local occupiers.

55. However, on 31 May 2006, Amazon informed CBRE that they were no longer interested in the Site.

The Short Lease

56. As stated above, at the time of the purchase of the Site from CPT Ltd, TAL had given an undertaking to CPT Ltd that the Office and the Production Building would be brought out of temporary disuse and back into use within three years of acquiring the Site. Further, TAL had agreed to indemnify CPT Ltd for up to £7,000,000 for any future tax liabilities it could incur if TAL failed to bring the buildings back into use.

57. Mr Shaw explained that TAL had therefore entered into a short lease with a company which wanted to store vintage cars on the Site. This had been done solely in order to avoid incurring any liability under the indemnity clause in the purchase agreement.

58. We were given a copy of a lease document which purportedly grants a lease from TAL to Waterside (NM) Ltd in respect of the Production Building and the Office for the period from 30 March 2006 until 6 April 2006, ie a period of one week. We were however given no evidence as to whether or not any activity was actually carried out at the Buildings during the period of this lease, nor whether or not any such activities which were carried out might be regarded as a qualifying use.

59. HMRC say in their statement of case that whether or not this use amounts to qualifying use is not agreed between the parties. Further, Ms Mulder, for HMRC stated that throughout the period of negotiations between the parties it was agreed that any activities carried out under this lease did not constitute qualifying use for IBA purposes.

60. For the appellant, Mr Ghosh said that it was no part of his case that this lease constituted qualifying use and he did not therefore wish to make any further submissions regarding it.

61. Mr Ghosh did however say that “those behind” him, by which we took him to mean his instructing solicitors, specifically wished to reserve their position on this issue with a view to arguing the point before the Upper Tribunal should it go to appeal. We do not find this a particularly satisfactory approach but, if it does go to appeal, we will leave it to the Upper Tribunal to decide whether or not they wish to hear this additional argument.

62. There remains however a problem in that if the Upper Tribunal wishes to hear this argument then we, as the First-tier Tribunal, did not have any evidence before us which might have enabled us to make a finding of fact as to whether or not the Office and Production Building were used for a qualifying purpose during the period of this lease. This might make it difficult for the Upper Tribunal to reach any decision on this point.

63. We made this very clear to the appellant’s representatives at the hearing but no further evidence or submissions were presented to us.

64. To summarise therefore we are unable to make any finding of fact as to whether or not the Office and Production Building were used for a qualifying purpose during the period of this lease.

New plan developed and implemented

65. On 1 June 2006, the day after Amazon had informed CBRE that they no longer had any interest in the Site, the board of TAL and CBRE arranged to hold a meeting to discuss alternative options before making a further cash call on the investors.

66. From then, the boards of the LLPs and their advisers worked to put the board members in a position to assess the viability of the new “immediate build out” plan and its merits:

(1) On 21 June 2006, CBRE circulated their preliminary discussion paper setting out the merits of an immediate redevelopment of the Site to create a new, mixed use business park, with offices and industrial space.

(2) The board instructed Keppies to produce architectural plans for the new development.

(3) In June 2006, discussions were held with HBOS for funding the new development.

(4) On 18 July 2006, CBRE met with representatives of SE Lanarkshire to discuss the new project.

(5) On 8 August 2006, CBRE circulated a letter setting out some of the major issues that the board would have to consider before reaching a final decision about the future of the Site, eg, securing bank funding.

(6) Throughout August and September, the board continued to work on those issues. For example, in August 2006, Julian Farrar (of Ironside Farrar) was instructed by the LLPs to start negotiating planning permission for the new development with North Lanarkshire Council. He continued those discussions throughout August and September. However, by the end of September the council had indicated that it would support the new development.

(7) Negotiations were held with Scottish Water to reduce their proposed contribution of £20M (purportedly to enable them to extend their system to deal with waste water and drainage in respect of the new development). By December 2006, Julian Farrar had succeeded in negotiating the contribution figure down to £4M.

(8) On 23 October 2006, Tritax (on behalf of the investment syndicate formed for the purposes of purchasing the Site) received indicative terms from Bank of Scotland for a loan of around £300M.

67. By the end of October 2006, the boards of the LLPs had resolved to carry out the new development. Various formalities were still outstanding (eg, securing outline planning permission). However, the board had concluded that this would be the only way to pay off the Loan, make back the investors’ original contributions and create a successful development at the Site, and they had now secured funding in order to realise that project.

68. On 17 November 2006, Andrew Lapping (on behalf of Hamilton Portfolio) wrote to the members of the LLPs to tell them about the change of plan. He set out the boards’ reasons for the change of direction and explained the merits of the new project.

Purchase of the Site and demolition of the remaining Buildings

69. The arrangements for the purchase and development of the relevant part of the Site were as follows:

(1) On 30 March 2007, TAL CPT LLP entered into a contract with Bowmer & Kirkland for the demolition of the Production Building and the Office for a contract sum of £194,000. The start date was to be 30 March 2007 and the completion date was due to be 12 November 2007, although work on the demolition did not commence until after the sale, on 5 April 2007. The parties started negotiating this contract in February 2007.

(2) A unit trust, Tritax Eurocentral EZ Unit Trust (“the Trust”) was set up to purchase the Site.

(3) The Trust purchased the LLPs' interests in the Site, with the benefit of the golden contracts and the demolition contract, on 5 April 2007. The total price paid by the Trust was £330 million, £136.45 million of which was cash from investors and £193.55 million funded by way of loan from the Bank of Scotland. Of that amount, £137,759,602 went towards the construction of the new buildings and £24,881,841 went towards various project costs. £118,668,935 was paid into a rental guarantee account at the Bank of Scotland and used to pay annual rental income to the Trust until occupational tenants were secured for the anticipated buildings; in the event, the entire amount was paid to the Trust. £28,850,384 was paid to the LLPs. Most of that sum (£23,583,937) was used to repay the AIB loan; £1,233,223 each was paid to Northern Edge Ltd and TML to repay their loans to the LLPs (which enabled the LLPs to pay the Deferred Amount) and the remaining £2.8 million was used to repay the cash call amounts paid by the members of Eurocentral Land Syndicate, as members of the LLPs.

Procedural Issues

2004-05 Partnership Tax Return (Closure Notice)

70. On 30 November 2005, HMRC received an unsigned and undated version of TAL's 2004-05 partnership tax return. The partnership tax return contained an IBA claim of £658,846, understood to consist of a WDA claim.

71. An amendment can be made 12 months after the filing date pursuant to s12ABA(2) TMA 1970. The filing date for 2004-05 partnership tax returns was 31 January 2006, and the time limit for amending returns was 31 January 2007.

72. TAL amended the partnership tax return in time on two occasions: on 3 March 2006, HMRC captured a further unsigned and undated partnership tax return, and on 29 August 2006, HMRC received a signed and dated return of 24 August 2006. This contained an IBA claim of £658,846, understood to consist of a WDA claim.

73. In accordance with s12AC(2)(c) TMA 1970, where an amended return is filed, HMRC is entitled to open an enquiry up to the quarter day following the first anniversary of the date that the amendment was made. Accordingly, as there was an amendment to the partnership tax return for 2004-05 received on 29 August 2006, the time limit for enquiring into that amendment was 31 October 2007.

74. On 22 October 2007, HMRC issued a notice of enquiry pursuant to s12AC Taxes Management Act 1970 into the partnership return, ie, within the extended time limit.

75. Then, after the date for amending partnership tax returns of 31 January 2007, TAL purported to make further amendments to the partnership tax return, as follows:

(1) Received on 6 February 2009 (signed by Mr Ian Ross on 14 January 2009); and

(2) Submitted on 3 December 2009 (signed by Mark Shaw 3 December 2009).

76. On 3 December 2015, HMRC issued a Closure Notice in respect of the Appellant's partnership tax return for 2004-05 pursuant to s28B(1) & (2) TMA 1970.

77. The 2004-05 Closure Notice amended the partnership loss figure from £2,126,200 to £318,821. This was now based on the loss figure of £977,677 and disallowed the IBA claim therein consisting of a WDA claim of £658,846, giving a revised loss of £318,821.

78. On 17 December 2015, TAL appealed this decision to HMRC.

79. On 18 December 2015, TAL notified the Tribunal of this appeal.

2006-07 Partnership Tax Return (Closure Notice)

80. On 14 September 2007, HMRC received TAL's 2006-07 partnership tax return. This was sent back to TAL as it was missing three of the partners' UTR numbers and was logged and first captured by HMRC on 18 October 2007. This was before the statutory filing date of 31 January 2008 pursuant to s12AA TMA 1970.

81. As above, an amendment can be made 12 months after the filing date pursuant to s12ABA(2) TMA 1970. The filing date for 2006-07 returns was 31 January 2008, and the time limit for amending this partnership tax return was 31 January 2009.

82. TAL filed one in time amended partnership tax return under s12ABA TMA 1970 which was received on 27 August 2008 (signed by Mark Shaw 19 December 2007).

83. As above, pursuant to s12AC(2)(c) TMA1970 where an amended return is filed, HMRC is entitled to open an enquiry up to the quarter day following the first anniversary of the date that the amendment was made. Accordingly, as there was an amendment on 27 August 2008, the last day that HMRC could open an enquiry was 31 October 2009. HMRC opened a notice of enquiry on 22 October 2008, being within the extended time limit. This partnership tax return contained an amendment to the amount of IBAs claimed from £567,553 to £12,853,691, which appears to include a claim to a balancing adjustment claim.

84. Then after the date for amending returns of 31 January 2009, TAL CPT LLP purported to make further amendments to the return, as follows:

(1) Received on 6 February 2009 (signed Ian Ross 14 January 2009); and

(2) Submitted on 3 December 2009 (signed Mark Shaw 3 December 2009).

85. The original partnership tax return captured on 18 October 2007 included a claim for IBAs of £567,553. This did not include any balancing adjustments. The amendment of 27 August 2008 included a claim to IBAs of £12,853,691 including a balancing adjustment.

86. On 3 December 2015, HMRC issued a Closure Notice in respect of the appellant's partnership return for 2006-07 pursuant to s28B(1) & (2) TMA 1970. The 2006-07 Closure Notice amended the partnership loss figure from £11,075,986 to £760,661. This was based on a loss figure of £11,075,986 and disallowing the IBA claim therein of £10,315,324 giving a revised loss of £760,661.

87. On 17 December 2015, TAL appealed this notice to HMRC.

88. On 18 December 2015, TAL notified the Tribunal of the appeal.

The Law

89. At all material times, the relevant legislation was contained in CAA, Part 3, which provided for claims to capital allowances to be made in respect of expenditure on industrial buildings.

90. Section 271 CAA set out when IBAs were available:

“271. Industrial buildings allowances

(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).”

91. For the purposes of investment in enterprise zones, s281 CAA defined a commercial building as follows:

“281. Commercial buildings (enterprise zones)

For the purposes of this Part as it applies in relation to qualifying enterprise zone expenditure, “commercial building” means a building which is used –

- (a) for the purposes of a 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.”

92. A person could make a claim to writing down allowances in respect of industrial buildings under CAA, s.309:

“309. Entitlement to writing-down allowance

- (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.”

93. Part 3, Chapter 7 of CAA contained provisions relating to balancing adjustments. These were adjustments to be made to the capital allowances following a balancing event (defined 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:

“314. When balancing adjustments are made

- (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”

94. Balancing events were set out in s315 CAA as follows:

“315. Main balancing events

(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).”

95. Section 285 CAA provided that where a building was temporarily not in use (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:

“285. Cessation of use and temporary disuse of buildings

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.”

Submissions for appellant

96. It is the appellant’s position that:

(1) The Buildings were industrial buildings within the meaning of s271 during TAL’s period of ownership. In particular, they were deemed to be industrial buildings throughout the period of temporary disuse which began during CPT Ltd’s period of ownership and ended when the board of TAL CPT LLP resolved that each of the Buildings should cease altogether to be used.

(2) Consequently, TAL’s claims to both writing down allowances and balancing allowances in respect the Buildings should be allowed.

(3) The balancing event in respect of four of the Buildings occurred in or around November 2005 when the board of TAL resolved to cease its attempts to use those Buildings altogether, such that they “ceased altogether to be used” for the purposes of s315(1)(d). Alternatively, the balancing event occurred in March 2006 on the sale of those Buildings. Consequently, TAL’s claims to balancing allowances in respect of those four Buildings should be allowed.

(4) The balancing event in respect of the remaining Buildings sold in April 2007 occurred when the board of TAL resolved to cease its attempts to use those buildings, in or around the end of October 2006, such that they “ceased altogether to be used” for the purposes of s315(1)(d). Consequently, the claims to balancing allowances in respect of those Buildings should be allowed.

Temporary disuse

97. It is the appellant’s case that the Buildings were in a state of temporary disuse during TAL’s period of ownership. This is on the grounds that:

(1) The expression “temporary disuse” does not require subsequent re-use of any kind; and

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

98. In contrast, in their statement of case, HMRC argue that where a building falls out of use and it subsequently transpires that the building is never brought back into use, the building ceased altogether to be used on the last date of actual use. It follows

from this approach that the provisions regarding the temporary disuse of a building can only be conclusively applied with the benefit of hindsight.

Statutory interpretation

99. Where words are not defined by the relevant statute they must be given their ordinary meaning in the general context of that statute.

100. Tax legislation must be interpreted purposively and in a way that promotes the coherence of the overall legislative scheme: *Barclays Mercantile v Mawson* [2004] UKHL 51 and *Billingham (Inspector of Taxes) v Cooper* [2001] STC 1177.

Meaning of temporary

101. The word temporary is not defined for the purposes of Part 3, CAA. The ordinary meaning of the term, according to the Shorter Oxford Dictionary, is “lasting or meant to last for a limited time only”.

102. There is no requirement in the legislation that in order to be temporary a period of disuse must be followed by a period of use. Section 285(b) simply stipulates that a building must be an industrial building immediately before a period of temporary disuse. There is no equivalent requirement for the building to be used after the period of temporary disuse.

How to determine whether a building is in a state of temporary or permanent disuse

103. The question of whether a building is in a state of temporary (as opposed to permanent) disuse is one of fact. For the purposes of claiming IBAs, that fact must be ascertained by assessing objectively the circumstances in the relevant chargeable period.

104. On behalf of the appellant, Mr Ghosh argued that when assessing those circumstances, particular weight should be given to the intention of the owner of the relevant interest in the building and that it was the owner’s intention for the building at any given time, ascertained by an objective assessment of the evidence, that determines whether or not a building has ceased to be used altogether or temporarily. Temporary disuse cannot be ascertained simply by looking at the physical condition of the building.

105. Further, he argued, unless otherwise specified, a person’s entitlement to IBAs should be assessed at the end of a given chargeable period and/or immediately before a balancing event (where relevant), and not by reference to any subsequent events:

- (1) Section 309 provides for a person’s entitlement to a writing down allowance to be calculated by reference to a particular chargeable period and to the circumstances at the end of that chargeable period.
- (2) The section provides that a person is entitled to a writing down allowance ‘for a chargeable period’ where (inter alia) ‘at the end of that chargeable period’
 - (i) a person is entitled to the relevant interest in the building and
 - (ii) the building is an industrial building.

(3) Section 314(3) provides that a balancing allowance or charge is made to or on the person entitled to the relevant interest in the building immediately before the balancing event.

(4) The legislation makes clear that in certain circumstances (not relevant to these appeals) IBAs awarded must be withdrawn by reference to subsequent events: s306 grants IBAs to a person who has incurred qualifying enterprise zone expenditure in respect of a building which “is to be an industrial building”; s307 then provides that the IBAs so granted will be withdrawn if it subsequently transpires that the building is not used as an industrial building.

106. Where the owner of the relevant interest in the building is a LLP (a body corporate), it is the intention of the controlling mind of the LLP that should be assessed for the purposes of determining whether or not a building is in a state of temporary or permanent disuse. The controlling mind of TAL was the board of the LLP, of which the appellant was a member.

Legislative scheme

107. The appellant’s interpretation of the legislation is, it was submitted, consistent with a coherent scheme of granting capital allowances.

108. The purpose of the CAA is to provide a surrogate for depreciation. Capital allowances are granted to recognise the decline in value of certain assets held by businesses on a long-term basis.

109. Capital allowances for industrial buildings were originally introduced in 1945. These allowances ‘reflect a general legislative policy...to encourage industrial activity...’: *Maco Door & Window Hardware (UK) Ltd v HMRC* [2008] UKHL 54 at [19].

110. It is therefore, Mr Ghosh submitted, entirely consistent with the legislative purpose to grant allowances in respect of an asset held by a business where, although the business is not currently using the asset, the business intends to retain it for future use. The asset so held still depreciates in value throughout the time that it is held unused by the business.

111. Moreover, HMRC’s interpretation of the legislation would require a taxpayer to submit returns on a provisional basis and to amend those returns if it transpired (perhaps many years later) that a period of temporary disuse had become permanent. This would be contrary to the legislative aim of the self-assessment system, namely to simplify and bring early finality to the taxpayer’s liability to tax. HMRC’s attempts to reconcile this difficulty highlight the weakness of their argument.

112. In their manuals and in correspondence with TAL, HMRC have claimed that where a taxpayer submits a claim for IBAs on the basis of their genuine intention that the building would be used again (i.e. their genuine belief that the building is in a state of temporary disuse), the IBA claims would be allowed. However, in the event that the building is not in fact used again, on a subsequent balancing event (e.g. the sale of the building) the IBAs claimed would be clawed back through a balancing adjustment.

113. There is nothing to support this in the legislation. There are prescriptive provisions for calculating balancing adjustments, including those which adjust the balance to reflect any period during which the building has not been an industrial building (see s319 CAA). There is nothing in these provisions which permit one to ignore the s285 deeming which requires one to treat a building in temporary disuse as an industrial building.

114. In this case HMRC argue that the balancing event in respect of some of the Buildings did not occur until after IBAs were withdrawn. Consequently, HMRC would not be able to make any balancing adjustment and so would not be able to claw back any IBAs claimed. To circumvent this problem, HMRC are arguing that the IBAs were not available at all.

Conclusion on temporary disuse

115. The appellant therefore argues that TAL's claims to IBAs should be granted on the basis that throughout its period of ownership until around November 2005 in respect of four of the Buildings and in or around the end of October 2006 (in respect of the remaining Buildings) TAL intended to bring the Buildings back into use, such that the Buildings were in a state of temporary disuse.

Balancing allowances

116. It is the appellant's case that balancing events occurred when the board of TAL resolved to cease its attempts to use the Buildings permanently, such that the Buildings ceased altogether to be used either (i) within the meaning of s315(1)(d) CAA or (ii) as a balancing event not expressly described within s315 CAA.

117. In particular, the appellant contends that:

- (1) in respect of four of the Buildings (those sold in March 2006), the balancing event occurred in or around November 2005 when the Appellant resolved to cease its attempts to use those buildings; alternatively, the balancing event occurred in March 2006 on the sale of those buildings; and
- (2) in respect of the remaining Buildings, the balancing event occurred in or around October 2006, when the Appellant resolved to cease its attempts to use those buildings.

118. HMRC's primary argument is that, on the facts, the Buildings ceased altogether to be used, within the meaning of s315(1)(d), at the start of TAL's period of ownership.

119. Alternatively, HMRC contend that for s315(1)(d) to be engaged, a building must cease to be capable of use. Consequently, the only possible balancing events were the sales of the Buildings. In respect of the Buildings sold in April 2007, sale took place after balancing allowances had been withdrawn on 21 March 2007.

Meaning of 'ceasing altogether to be used'

120. The appellant argues that a building can cease altogether to be used within the meaning of s315(1)(d) without becoming physically incapable of use:

(1) Section 285 operates to prevent a balancing event occurring where a building has fallen temporarily out of use. Absent this provision, a building would be regarded as ceasing altogether to be used where it ceases temporarily to be used. These states are differentiated only by the intention of the owner of the relevant interest and not by the physical state of the building.

(2) Section 315(1)(d) draws a clear distinction between a building which has ceased to be used and one rendered physically incapable of use: s.315(1)(d) applies to a building which has ‘ceased altogether to be used (without being demolished or destroyed)’.

121. HMRC’s interpretation provides no more certainty (in terms of fixing the specific time of the balancing event) than the appellant’s. HMRC’s argument appears to require one to carry out physical inspections of the building to establish precisely when it became incapable of use.

Submissions for HMRC

122. Ms Mulder, for HMRC, contended that s271 prescribes that, for allowances to be available in relation to qualifying enterprise zone expenditure, the building or structure must be a commercial building or structure.

123. Section 281 includes within its definition of a “commercial building” in relation to qualifying enterprise zone expenditure, a building which is used for the purposes of trade, profession or vocation.

124. At the time TAL acquired the Buildings on 2 March 2004 they had been out of use for at least 13 months and did not come back into use during TAL’s ownership, nor after its ownership. HMRC accept that immediately preceding the Buildings falling out of use, in or around January 2003, during CPT Ltd’s ownership they were “commercial buildings” and, therefore, “industrial buildings”.

125. To qualify for WDAs the Buildings must be an “industrial building” at the end of the chargeable period. To qualify for a balancing allowance, the Buildings need to have been an “industrial building” at some point during the relevant period of ownership by the Appellant.

126. Section 285 states that a building is not to be regarded as “ceasing altogether to be used” merely because it falls temporarily out of use. Additionally, if the building is an industrial building immediately before a period of temporary disuse, it is to be treated as being an industrial building only during the period of temporary disuse.

127. Accordingly, it is common ground that that the buildings will qualify for WDAs if the Tribunal finds that the buildings were only ‘temporarily’ out of use. This is because if, when the buildings fell out of use, they merely fell temporarily out of use, the Buildings would fall to be treated as industrial buildings during TAL’s period of ownership.

128. Therefore, HMRCs submits that the first issue for the tribunal to determine is the meaning of the term ‘temporarily out of use’ in the context of Part 3 CAA 2001.

Meaning of 'Temporary'

129. The terms 'temporary' or 'temporarily' are not defined in the CAA. HMRC submits that given 'temporary' is not defined it should take its ordinary dictionary meaning in the absence of any guidance in the legislation, ie, lasting for only a limited period of time, not permanent.

130. Firstly, HMRC submit that if a building is capable of use but is never in fact used again, that period of disuse cannot be considered to be 'temporary'. The Buildings here were never actually in fact put back into use, despite being capable of use.

131. If a period of disuse was followed by a period of use, it is submitted that the period of disuse was only a period of temporary disuse. In such a case, the period where the building was not in use, was only for a limited period of time, before use commenced again therefore rendering that period temporary. HMRC therefore submit that disuse of a building is temporary if the disuse occurs between two periods of use.

132. Secondly, HMRC submit that in this case when the Buildings first fell out of use they "ceased altogether to be used" and therefore the buildings do not fall to be treated as industrial buildings during TAL's ownership of them. In this case, when CPT Ltd ceased using the buildings in or around January 2003 this was not temporary, in other words for a limited time only. Rather the buildings permanently ceased being "used".

133. The buildings therefore cannot be treated as eligible for IBAs during TAL's ownership. The buildings as a matter of fact were never brought back into use during TAL's ownership nor after the buildings were sold. The balancing event pursuant to s315(1)(d) therefore occurred during CPT Ltd's ownership of the buildings.

134. HMRC submit that s285(a) fulfils the function of preventing a s315(1)(d) balancing event taking place on the occasion of a building failing temporarily out of use. HMRC also submit that it is a proviso to the s315(1)(d) catch-all balancing event and in theory should only fall to be applied if there is an event that would otherwise be a s315(1)(d) balancing event. This, they say, can be drawn from the use of the phrase 'ceased to be used altogether', which is present in both sections. The IBA legislation makes it possible for a person who holds a relevant interest in an industrial building to claim WDAs under s309. If a balancing event under s315 occurs, s314 provides for a balancing adjustment to be made.

135. The point of s315(1)(d) is to create a balancing event when a building has "ceased altogether to be used". In this case, HMRC submit the building "ceased altogether to be used" on the last day it actually was in use, in or around 15 January 2003, during CPT Ltd's ownership. Therefore, the building fell permanently out of use during CPT Ltd's ownership and cannot be considered to have been in temporary state of disuse during TAL CPT LLP's ownership of the buildings, which commenced on 2 March 2004.

136. Ms Mulder argued that, reading these two sections together, especially in light of the other balancing event specifically mentioned in s315, it is clear that balancing events are one off events. Sub-sections (1)(a) and (b) of s315 relate to the cessation of the person's relevant interest in the building. Sub-section 1(c) relates to the building itself and occurs if the building is demolished or destroyed. As the description "balancing events" prescribes, all these events are one-off events, in respect of which the date of the event, is in theory, capable of ready identification.

137. Any building which was only in a 'temporary' state of disuse cannot be said to create a final balancing event, but if the building is never in fact used again, then the disuse can only be described as permanent not temporary. Section 285(a), can only prevent a s315(1)(d) event if the period of disuse is for a limited time only. HMRC submits that the end of actual 'use' is what s315(1)(d) envisages as creating a balancing event.

Should intention be relevant to the 'temporary' test?

138. HMRC argue that the test put forward by the appellant is incorrect and the intention of the relevant interest holder cannot be considered relevant nor determinative in defining a period of 'temporary' disuse. The test for whether a building is in a state of 'temporary' disuse must be drawn from the actual physical events in relation to the use of the buildings themselves, not the subjective intent of those who hold the relevant interest in the buildings. HMRC submit that if a building falls 'temporarily' out of use, it remains so until it comes back into an actual physical state of 'use' with reference to objective facts. If it never comes back into actual use, then the period cannot be considered to be 'temporary'.

139. HMRC submits that the legislation would be difficult to apply if balancing events were capable of being triggered or affected by taxpayer's intentions, rather than by observable and fixed events taking place. A taxpayer's intention is potentially ever changing. A construction that promotes certainty of application should be preferred to one that may result in uncertainty, even if the same would result in a genuine claim later turning out to be non-qualifying. This is particularly so considering that there is a workable mechanism to enable that such a claim can be later corrected by reducing or increasing a balancing charge.

140. HMRC say that the facts in this case show that the building 'ceased altogether to be used' creating a balancing event on the date it was last used, prior to TAL's ownership. The fact that that may not have been what CPT Ltd or TAL intended at the time is irrelevant, as a qualifying s315 balancing event has already occurred. This mechanism provides for a balancing charge to recover any allowances which have been given. In computing the balancing adjustment, the building is not at that point in temporary disuse and so s285(b) does not deem it to have been an industrial building.

Legislative Scheme

141. HMRC submit that defining 'temporary' as being between two periods of actual use is consistent with the legislation as a whole. It is submitted that there is no reference in the legislation to the taxpayer's intention to use the building which it is

submitted would be expected to be specified clearly if Parliament had intended for this to be considered.

142. Industrial Buildings are defined by s271(2)(b) in relation to qualifying enterprise zone expenditure as being “commercial buildings”. Section 281 defines a “commercial building” as a building which “is used” for one of purposes set out at (a) and (b). HMRC submits that this reflects the purpose of the IBA legislation, namely to give benefits to a building which “is used” for a qualifying purpose. HMRC submit therefore that the extension of this benefit to buildings in a state of temporary disuse, as set out at s285, should be read in light of this and in the context of IBA’s (Part 3, CAA) as a whole.

143. The appellant submits that their interpretation is consistent with a coherent scheme of granting capital allowances and that the purpose of the CAA is to provide a surrogate for depreciation. In doing so the appellant cites *CIR v Anchor International Ltd* [2005] 1 SC 76 at [18] and also *Maco Door and Window Hardware (UK) Ltd v HMRC* [2008] UKHL 54 at [18]-[19]:

“Capital allowances...are a relief afforded by Parliament partly as a 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”.

144. HMRC submits that the CAA deals with many capital allowances of which some have nothing to do with depreciation. This is reflected in the quote cited as it concedes that CAs are partly compensation for non-allowable depreciation and partly to deliver policy incentives. HMRC submit that when considering tax policy/incentives, it is quite normal that relief is targeted in a way that means that taxpayers do not always get the relief. Here, HMRC submit Parliament wanted to provide relief only for periods of qualifying use, but not penalise taxpayers for periods of temporary non-use. Therefore the relief is given and is then able to be clawed back after the event to reflect the facts under the s319 mechanism.

145. Further, the appellant submits that “It is entirely consistent with the legislative purpose to grant allowances in respect of an asset held by a business where, although the business is not currently using the asset, the business intends to retain it for future use. The asset so held still depreciates in value throughout the time that it is held unused by the business.” HMRC submits that there is a clear purpose in the IBA legislation to limit allowances even though the asset continues to depreciate in value. For example the legislation does not give relief for all buildings, limiting it to those in use for specific trades and purposes listed in s271(1)(b). Further, even when considering otherwise qualifying buildings, there are a number of limitations, such as those in s277(1). Lastly, even once all the other hurdles are passed, a building that fails to be an industrial building throughout the relevant period of ownership is subject to a different computation of the balancing adjustment than would apply if it had been used throughout.

Appellant’s criticism of HMRC interpretation regarding mechanism to claw back

146. HMRC understands that the appellant is critical of HMRC's interpretation of 'temporary' disuse as meaning that the test can only be applied with the benefit of hindsight, whether a taxpayer brings the building back into use or not.

147. HMRC accepts that a building may at first appear to be in a state of temporary disuse and that a taxpayer would be able to claim the benefit of s285. Later, that period of disuse could turn out to not be 'temporary', if the building is as a matter of fact never actually brought back into use.

148. In such cases the period of 'temporary' disuse previously claimed would strictly be non-qualifying. However, HMRC submit in such a case that when a balancing event takes place the computation of any balancing adjustment will take into account the fact that the taxpayer was not entitled to the allowance it was claiming throughout the period of disuse. HMRC submits this adjustment enables recovery for any vacant periods via a balancing charge, in order to reflect the actual facts of the building's use. Actual or fluctuating intention is irrelevant.

149. The appellant suggests that such an interpretation would require a taxpayer to submit returns on a provisional basis and later amended those returns. HMRC are not suggesting this, rather a taxpayer is given relief in respect of expenditure on an industrial building in full when it is understood that the building is temporarily out of use, then later clawed back if it turns out as a matter of fact to have not been a period of temporary disuse.

150. In the case of a balancing event, the balancing adjustment ensures that the taxpayer only gets tax relief for the net cost to them of the asset. Allowances given in respect of the expenditure covered by any disposal or similar proceeds are repaid to HMRC (the logic being not to give relief for the expenditure covered by disposal or similar proceeds). The adjustment takes place at the end of the life of the asset's ownership and/or use in the trade or other activity, which means the taxpayer will have funds available to cover any balancing charge. A taxpayer therefore has a predictable relief over the period that they own the asset.

151. The appellant suggests that there is nothing in the legislation to support this claw back. HMRC submit that this is not correct. As the appellant suggests "There are prescriptive provisions for calculating balancing adjustments" including those which adjust the balance to reflect any period during which the building has not been an industrial building (see CAA, s319)." HMRC submits that this is the very clawback mechanism described in HMRC Guidance.

152. The appellant submits that there is nothing in the provisions which permits s285 to be ignored. HMRC agrees that s285(b) means that a building in temporary disuse is deemed to be an industrial building, meaning that there can be no s319(1)(a) balancing adjustment because s285(b) has deemed the building to be an industrial building, but only "during the period of temporary disuse". This point however hinges on the meaning of 'temporary'. If HMRC are correct in that temporary requires the building to come back into actual use again for the period to be temporary, then s285(b) has not been triggered, and the s319(1)(a) balancing adjustment will proceed to claw back relief given for the periods of non-temporary use.

If the buildings were in a state of 'temporary' disuse pursuant to s285 CAA 2001, when did the balancing event occur?

153. If the Tribunal disagrees with HMRC's interpretation of 'temporary' and deems that the buildings were in a state of 'temporary' disuse, then the next question for the Tribunal to determine is when the relevant balancing events occurred pursuant to s315.

154. The appellant claims two balancing events occurred either (i) under s315(1)(d) or (ii) as a balancing event not expressly described under s315. The appellant claims the two balancing events were:

(1) in respect of four of the Buildings (those sold in March 2006), the balancing event occurred in or around November 2005 when the appellant resolved to cease its attempts to use those buildings; alternatively, the balancing event occurred in March 2006 on the sale of those buildings; and

(2) in respect of the remaining Buildings, the balancing event occurred in or around October 2006, when the Appellant resolved to cease its attempts to use those buildings.

155. Firstly, HMRC disagree with the appellant's contention that a balancing event could be triggered by a balancing event not expressly described within s315. Here, the appellant contends that a decision to change "strategic intention regards the buildings" is a balancing event in its own right (even though it is not listed as such in s315). HMRC submit that there is no scope for balancing events listed beyond those in s315(1) and (3). Balancing adjustments under s314(1) require a "balancing event". Section 315(1) lists "balancing events for the purposes of this Part" and s315(3) lists "other balancing events" by reference to four specific sections of the CAA.

156. Secondly, HMRC submit that a change in intention could not form a s315 balancing event. HMRC does not accept that balancing events in respect of four of the buildings took place in or around November 2005 when the board of TAL CPT LLP resolved to cease its attempts to use those Buildings altogether. Nor does HMRC accept that in respect of the remaining buildings, that the balancing event occurred in or around October 2006, when the appellant resolved to cease its attempts to use those buildings.

157. Section 315(1) and (3) set out a list of circumstances where balancing events occur. These events are one-off events which are not able to be reversed. To consider that a change in the subjective intention of the taxpayer could constitute a balancing event is not consistent with the other clearly defined events set out in s315. HMRC submits that the appellant's interpretation allowing balancing events to be determined by reference to subjective intention would create uncertainty and cannot have been what was intended by Parliament. HMRC submits that s315 must be applied to objective factual events and not subjective intention. A taxpayer may change their intention towards a building several times due to a range of factors both internal and external.

158. If the Tribunal disagrees with HMRC and forms the view that the intention of a taxpayer could be relevant for the purpose of constituting a balancing event, then

alternatively HMRC submits that, for s315(1)(d) to apply because a building has ceased altogether to be used (without being demolished or destroyed), the building would need to become actually incapable of a qualifying use. If an intention is formed to cease using a building and the building remains capable of use, HMRC submits that this should fall outside the scope of balancing events.

159. Further, even if the tribunal were to consider that a subjective change in a taxpayer's intention could constitute a balancing event pursuant to s315(1)(d), then HMRC submits that the circumstances of this case do not fit that criterion. If the tribunal considered that a change in intention could constitute a balancing event, HMRC submits that a balancing event must nevertheless be an identifiable date. In this case, the appellant's intention appears to change over a long period of time throughout 2006 and there is no single event or date which TAL can point to to show a single change in intention. HMRC submits this cannot be what Parliament intended considering the wording of s315 which provides in large for identifiable and irreversible events.

160. HMRC submit in respect of the first balancing event that if the four buildings were in a state of 'temporary' disuse, then the balancing event must have taken place in 2006, when the first of the below events occurred:

- (1) When the buildings were demolished, triggering a s315(c) balancing event; or otherwise,
- (2) on 23 March 2006 (site 19) and 24 March 2006 (site 18) when the purchases completed triggering a s315(a) balancing event.

161. HMRC submit in respect of the second balancing event that, if the remaining buildings were in a state of 'temporary' disuse, the balancing event must have taken place in 2007, when the first of the below events occurred:

- (1) The remaining buildings were demolished, triggering s315(c) balancing event; or otherwise
- (2) on 5 April 2007, when TAL sold the remaining buildings, triggering a s315(1)(d) balancing event.

162. Lastly, even if the tribunal considers that the buildings were in a state of 'temporary disuse' for the purpose of s285, HMRC submits that the provision deeming a building an industrial building during 'temporary disuse' only applies "during a period of temporary disuse". Therefore, HMRC submits that the deeming provision only applies during a period of temporary disuse. As the Buildings are no longer in a period of temporary disuse s285(b) no longer operates. This means that in computing the balancing adjustment, the building is not at that point in temporary disuse and so s285(b) doesn't deem it to have been an industrial building. When it comes to making the balancing adjustment this is done on the actual known facts at that time. The Buildings have ceased being deemed to be an industrial building.

163. In February 2006 arrangements were made for the demolition of the site water building, the PED building, the owner house and the salvage building but it is understood that actual demolition took place after the sale.

164. Accordingly, the balancing adjustment must be computed under s319(1)(a) and s323, with reference to the actual period of use. Therefore s319 applies as if the building was not an industrial building for part of the relevant period of ownership by TAL. If the building is not an industrial building throughout the whole relevant period of ownership s319 applies and requires this to be taken into account. HMRC submit that a balancing charge applies to recover allowances given including WDA's. The taxpayer gets total relief only for industrial use. Therefore, the balancing adjustment computations are computed with regard to the periods of actual disuse. This will enable the claw back of the IBAs given.

Discussion

165. Essentially, this appeal turns almost totally on the meaning of “temporarily” in s285. Is it, as HMRC contend, something to be determined solely by reference to what actually happened to the building, or should it be determined, as the appellant contends, by reference to the intentions of the person holding the relevant interest in the building?

166. In interpreting the meaning of “temporarily” we were encouraged to adopt a purposive construction of the words of the CAA, bearing in mind the overall objective of the granting of capital allowances, which was stated to be to encourage investment or to achieve policy objectives. In this regard, both parties referred us to the words of Lord Walker in *Maco Door & Window*, at [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").”

167. Strangely, in referring us to this paragraph, both parties emphasised the first two sentences of the paragraph, but did not give emphasis to the last sentence, which states quite clearly that although we should bear in mind the overall objective of the industrial buildings allowances legislation, ie, to encourage industrial activity, we must do so bearing in mind “the correct construction of the legislation”. We are not sure therefore that this advances our thinking. We are still required to determine the correct construction of the legislation.

168. Both parties are 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.

169. However, neither party could explain satisfactorily to the tribunal the actual purpose of s285.

170. Mr Ghosh, for the appellant argued that its prime purpose was to give the benefit of continued capital allowances to a taxpayer who was “trying to do the right thing” by trying to bring the building back into use as an industrial building.

171. We were however unable to obtain any other definitive explanation of the purpose of s285.

172. In trying to ascertain the intended purpose of s285 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 s285 might have been originally intended to be an anti-avoidance provision.

173. However, we have no underlying evidence that this might have been an anti-avoidance provision and we cannot therefore base any conclusions on that approach. Mr Ghosh suggested that it did not matter if s285 was intended to be a relieving provision or an anti-avoidance provision. We were still faced with the fact that s285 was a clear deeming provision and we were required to interpret it in a way which made sense and produced a coherent structure for the granting and clawback of IBAs. This he said was achieved by considering the intentions of TAL.

174. We can however find nothing in the legislation or case law which makes any reference to the determinative factor in such cases to be the intention of the taxpayer. This is relevant to two of Mr Ghosh’s arguments:

- (1) That the Building continued to be in a state of temporary disuse from the time when TAL bought it, and
- (2) That the Buildings ceased altogether to be used when TAL decided to sell them.

175. HMRC’s argument in contrast is that in order for there to be a period of temporary disuse there must be a period of actual use both at the beginning and the end of the period of temporary disuse. We are not sure that this would be an inviolable rule which would apply to all circumstances, but to us it makes a great deal of sense as a simple matter of construction of English.

176. HMRC point out that one of the problems with adopting the “intentions” approach is that a party’s intentions can change very easily and, if we were to follow such a line, a building could fall in and out of temporary use a number times without anything happening to the building. In this case, the appellant has produced a compelling narrative, which sets out clear timings as to when TAL’s intentions changed, but this would be unlikely to be the case in many circumstances and it would be easy to envisage circumstances where the owner’s intentions changed a number of

times, such that the status of the buildings changed frequently over a period of time. This would provide a tax-avoider's charter and, as such, we do not think it makes sense as a general proposition or as a proposition which Parliament could have or would have intended.

177. In contrast, Mr Ghosh pointed out that HMRC's interpretation involved a "wait and see" approach to the granting of IBAs, such that when buildings were taken out of use temporarily, the taxpayer might continue to file returns claiming IBAs for a number of years but then, when it subsequently became apparent that the building was never going to be brought back into use, perhaps after three or four years, it would be necessary to reopen the computation for the first year in which the building fell out of use. The return for that period might by then be closed such that it would be impossible to grant a balancing allowance or levy a balancing charge in the period during which the building had, with the benefit of hindsight, "ceased altogether to be used" as envisaged by s315(1)(d).

178. HMRC suggested a number of ways in which an appropriate result could be achieved, possibly by giving a balancing allowance or levying a balancing charge in the year in which the permanent disuse became apparent. Overall this might produce the correct amount of IBA for the full 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, especially in the era of self-assessment.

179. The broad structure of IBAs was formulated immediately after World War II, long before the introduction of the self-assessment regime, and one would not necessarily expect the IBA regime to fit neatly within the self-assessment regime, but nevertheless, the solutions put forward by HMRC using their "wait and see" approach do not seem to deliver the correct result on a year by year basis, even if, overall, the correct amount of IBA is given.

180. As an illustration of how a "wait and see" approach had been incorporated into other legislation, Mr Ghosh referred us to s77 Income and Corporation Taxes Act 1988, which related to the granting of relief for the incidental costs of raising loan finance. Inter alia, this legislation addressed the question as to how relief should be given in respect of the incidental costs of raising loan finance by way of the issue of a convertible bond. A convertible bond might at some stage be converted into equity and the incidental costs of raising equity did not qualify for relief under s77. There therefore needed to be provisions which somehow denied relief for the costs of raising loan finance by way of convertible bonds which were subsequently converted into equity, since otherwise again this would have provided a tax-avoider's charter.

181. In the case of s77 this was done by deferring relief for the costs of issuing a convertible bond for a prescribed period of three years at which point the status of the convertible bond would be reconsidered. If it had not been converted into equity by that time then relief for the costs of issuance would be granted **at that time**. This was in complete contrast to the HMRC proposition regarding industrial buildings, where there was no prescribed period for the "wait and see" exercise and, importantly, no provision for the balancing charge to be levied or balancing allowance to be granted in a subsequent period. Mr Ghosh therefore argued that his proposition, built round

the concept of considering the intentions of the taxpayer, avoided this problem, because it involved only the consideration of the facts as known to the parties at the time any subsequent tax return was submitted.

182. If we adopt this approach then we must 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. If this had been the case however then we think that the draftsman would have inserted some specific provisions into the legislation, indicating that the taxpayer's intentions should be a key element in deciding whether a building had fallen into permanent or merely temporary disuse. There is no such provision in this legislation.

183. We think it 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. In our view, this is simply one of many situations in the Taxes Acts in which the legislation fails to anticipate all possible circumstances, especially when those circumstances are some distance into the future, in an economic climate which the draftsman could not possibly have predicted. There is also the possibility, for which we have found no firm evidence, that this was intended as an anti-avoidance measure, and that its main aim was to ensure that an owner could not simply 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 this case the prime purpose of s285 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. Again however we must say that we have found no support for the proposition that s285 was an anti-avoidance provision.

184. In our view, the fact remains that the legislation regarding IBAs does not cope well with an extended period of temporary use, but that is no reason to adopt an entirely different approach, involving ascertaining the intentions of the taxpayer, which is not an approach referenced at any point in the legislation.

185. On balance therefore we prefer the approach put forward by HMRC, that 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.

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.

Decision

188. For the above reasons therefore we decided that the appellant's appeal in respect of IBAs for the years 2004-05 and 2006-07 should be DISMISSED.

189. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 26 APRIL 2019