



Neutral Citation: [2024] UKFTT 00870 (TC)

Case Number: TC09300

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/11335
TC/2021/10548

ENTERPRISE INVESTMENT SCHEME – whether qualifying trade begun to be carried on by companies issuing shares intended to qualify for EIS relief within two years after the date of issue of those shares – section 179(2)(b) Income Tax Act 2007- no – appeals dismissed

Heard on: 9-12 July 2024

Judgment date: 26 September 2024

Before

**TRIBUNAL JUDGE MARK BALDWIN
MRS JANE SHILLAKER**

Between

**PUTNEY POWER LIMITED
PISTON HEATING SERVICES LIMITED**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Ewart KC and Scott Brodsky of counsel, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Christopher Stone KC and Thomas Westwell of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellants (Putney Power Limited (“Putney”) and Piston Heating Services Limited (“Piston”)) each issued shares on 4 April 2016 with the intention that the individuals who subscribed for those shares would be entitled to relief under the enterprise investment scheme (“EIS relief”), that is to say they would be entitled to a tax reduction equal to tax at the “EIS rate” (30%) on the amount subscribed by them for those shares. In addition, certain chargeable gains can be deferred by reference to the amount subscribed for such shares and any gain arising on the shares will normally be exempt from CGT.

2. By decisions (“the Decisions”) dated 28 January 2020 the Respondents (“HMRC”) determined under section 234(3)(b) ITA and paragraph 16, Schedule 5B of the Taxation of Chargeable Gains Act 1992 that shares issued by each of the Appellants on 4 April 2016 were not eligible shares for EIS purposes. On 17 September 2021 the Decisions were upheld on review. Each of the Appellants appeals against the Decision which relates to the shares issued by it.

3. A number of requirements need to be met before an individual is entitled to EIS relief. One of these is that the shares are eligible shares for EIS purposes. For that to be the case here, the company issuing the shares (here, each of the Appellants) needed to have commenced its trade by a statutory deadline (the “EIS Deadline” – here 4 April 2018). HMRC say that they had not done so, whereas the Appellants (unsurprisingly) say that they had. The only issue we are concerned with is whether each of the Appellants began to carry on a “qualifying trade” (as defined in section 189 ITA) by the EIS Deadline of 4 April 2018, as required by section 179(2)(b)(ii) ITA.

4. Whilst the underlying projects which the Appellants carried out were similar, the Appellants had reached different stages of readiness by the EIS Deadline, so that the appeals will not necessarily stand or fall as one. It is, however, HMRC’s primary case that both appeals should fail, and it is the Appellants’ primary case that both should succeed.

5. The similarities in the two cases arise from the fact that both investment opportunities were developed by the same investment manager, Triple Point Investment LLP (“Triple Point”). There are three other companies which set up and carried on similar trades in similar circumstances, where the same point arises, and whose appeals are stayed behind the appeals of Putney and Piston.

6. Put broadly, HMRC’s position is that both trades commenced too late, principally because the power stations constructed by the Appellants (for their trade of generating and selling electricity) were not in fact producing and supplying electricity by the EIS Deadline. The Appellants say that position is wrong in law, since it is well-established that a trade can commence at an earlier stage than when the trader begins actual supply.

THE RELEVANT LEGISLATIVE PROVISIONS

7. Section 157 ITA provides (so far as relevant for us) as follows:

“(1) An individual (“the investor”) is eligible for EIS relief in respect of an amount subscribed by the investor on the investor’s own behalf for an issue of shares in a company (“the issuing company”) if – ...

(c) the general requirements (including requirements as to the purpose of the issue of shares and the use of money raised) are met in respect of the relevant shares (see Chapter 3), ...”

8. Chapter 3 of ITA 2007 starts with section 172, which provides relevantly as follows:

“The general requirements are met in respect of the relevant shares if the requirements of this Chapter are met as to ...

(b) the purpose of the issue (see section 174),

(c) the use of the money raised (see section 175) ... “

9. Section 174 is titled “the purpose of the issue requirement” and provides:

“The relevant shares (other than any of them which are bonus shares) must be issued in order to raise money for the purpose of a qualifying business activity.”

10. Section 175 is titled “the use of the money raised requirement” and provides relevantly as follows:

“(1) The requirement of this section is that all of the money raised by the issue of the relevant shares (other than any of them which are bonus shares) is, no later than the time mentioned in subsection (3), employed wholly for the purpose of the qualifying business activity for which it was raised.”

11. The “time mentioned in subsection (3)” is “the end of the period of two years beginning with the issue of the shares”, or (in some cases) two years from the commencement of the qualifying trade.

12. The expression qualifying business activity is defined in section 179 (so far as relevant) as follows:

“(1) In this Part “qualifying business activity”, in relation to the issuing company, means—

(a) activity A, or

(b) activity B [which is not relevant to this case].

(2) Activity A is—

(a) the carrying on of a qualifying trade which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or

(b) the activity of preparing to carry on (or preparing to carry on and then carrying on) a qualifying trade—

i. which, on that date, is intended to be carried on by the company or such a subsidiary, and

ii. which is begun to be carried on by the company or such a subsidiary within two years after that date.”

13. The expression “qualifying trade” is defined in section 189 as follows:

“(1) For the purposes of this Part, a trade is a qualifying trade if—

(a) it is conducted on a commercial basis and with a view to the realisation of profits, and

(b) it does not at any time in period B consist wholly or as to a substantial part in the carrying on of excluded activities.

(2) References in this section and sections 192 to 198 to a trade are to be read without regard to the definition of “trade” in section 989.”

14. Section 989 provides that “trade includes any venture in the nature of a trade”.

15. It is agreed by HMRC that the Appellants' trade was not an "excluded activity" at the relevant time for the purpose of section 189(1)(b).

16. Accordingly, the issue in this case is whether or not the Appellants' trades began to be carried on within 2 years of issue, i.e. by 4 April 2018.

THE FACTS

17. We heard from Mr Max Shenkman, who has worked for Triple Point since 2011. Mr Shenkman was also a director of each of the Appellants from their incorporation until October 2017. We found Mr Shenkman to be an honest and straightforward witness. Our findings of fact are based on Mr Shenkman's evidence (which we accept), along with documents in the hearing bundle or exhibited to Mr Shenkman's witness statement. There was also a statement of agreed facts, which provides a helpful timeline. Each of the parties handed up a document identifying facts they invited the Tribunal to find. In fact, there was little disagreement on the facts; where Mr Ewart and Mr Stone parted company was on the significance of particular facts for our analysis.

The role of Triple Point

18. Putney and Piston carried on their activities under the aegis of the Triple Point group. In particular:

- (1) Individual investors invested money in a fund referred to by Triple Point as the "Triple Point EIS Service":
- (2) Triple Point incorporated individual companies including Putney and Piston and appointed its own employees, including Mr Shenkman, as directors of the companies.
- (3) Triple Point allocated the money received from investors to the purchase of shares in these companies.
- (4) Each investor's funds were allocated equally across the companies.
- (5) Triple Point entities received fees from the portfolio companies including an annual business administration fee (2.25% pa on the company's net asset value); an arrangement fee (2.5% of the EIS funds raised); and an arrangement fee on any debt (2.5% of the debt monies raised).
- (6) The possibility of obtaining EIS relief was, in Mr Shenkman's words, "absolutely a consideration" for investors when deciding whether to invest in the Triple Point EIS Service.

Advance assurance and issue of EIS Shares

19. On 21 December 2015, soon after its incorporation on 15 December 2015, Putney made an application to HMRC for (non-binding) "advance assurance" that EIS relief would be available. Its application stated that it intended to operate combined heat and power ("CHP") energy centres, and that it would construct and operate an energy centre at a site in Moss Lane, Hesketh Bank, Lancashire ("Moss Lane") to supply "electricity, heat and CO2 to the on-site Business, which is British Flowers Limited ...". On 17 March 2016, based on that information, HMRC granted advance assurance to Putney. The British Flowers project was later abandoned by Putney, but it did not inform HMRC of this change of circumstances.

20. On 22 December 2015, soon after its incorporation on 11 December 2015, Piston made a similar application to HMRC for advance assurance.

21. Shares intended to qualify for EIS Relief were issued by each Appellant on 4 April 2016. As Mr Shenkman acknowledged in cross-examination:

- (1) Investors were able to claim EIS relief only once the relevant Appellant issued them with an EIS compliance certificate: section 203(1) ITA.
- (2) Each Appellant could only issue such a certificate after receiving authorisation to do so from HMRC: section 204(3) ITA.
- (3) HMRC could only authorise the issue of the certificates once the Appellant had submitted an EIS1 compliance statement (“EIS1”): sections 204(2) and 205 ITA.

22. On 23 May 2017 Putney submitted an EIS1 to HMRC defining its trade as “provision of heat to businesses”, with an alleged commencement on 9 December 2016. That assertion was made in circumstances where, as far as HMRC knew at that time, Putney was pursuing the activity of building a CHP energy centre to provide heat to British Flowers. In fact, when the EIS1 was submitted, Putney’s activities amounted to leasing two customers two Dyson fans bought from John Lewis and Amazon. It was only in 2019, through a compliance check, that HMRC discovered this.

23. Similarly in Piston’s case, on 22 June 2017 Piston submitted an EIS1 defining its trade as “supply of heating services to businesses”, with an alleged commencement date of 13 December 2016. HMRC’s compliance check revealed that Piston was leasing a Dyson fan to a single customer.

24. Neither Appellant now maintains that it was carrying on a trade of providing heat to businesses on the date stated in its EIS1. Although Mr Stone was anxious for us to record the facts in [19]-[23] above, he acknowledged that, so far as these appeals are concerned, nothing turns on the descriptions of intended or actual trade given by the Appellants in their applications for advance clearance or EIS1. He said that there may be circumstances where the difference between the activity a company sets out to carry on and the one it ends up carrying on might make a difference (and he told us that he is involved in one such case), but HMRC accept that nothing turns on any of that here.

Putney

Period up to financial close (incl. Heads of Terms)

25. Putney’s initial challenge was to identify a suitable project and site for the construction of an energy plant. As we have noted, Putney had identified a project at a site at Moss Lane to construct and operate a CHP plant supplying heat, energy and CO2 to British Flowers. Putney sought to progress this project but became frustrated at the lack of progress caused by developers being engaged on other projects and a lack of traction with the customer. As a result, in 2016 Putney began to meet with other developers to identify a suitable replacement project.

26. AGR Renewables (“AGR”) was one of the developers Putney met. One of the five sites presented by AGR was at Copse Road, Fleetwood (“Copse Road”). This was identified as a replacement for the project at Moss Lane. The project at this site was not for a CHP plant, but for a gas-peaking plant embedded on the local distribution network.

27. Putney identified a number of revenue streams (recorded in an investment committee paper finalised in May 2017):

- (1) Wholesale electricity sales – premised on Putney selling electricity in the day ahead market regardless of the sale price achieved at certain periods (“red band hours”) where particularly high demand was anticipated. These periods could be specified by Putney as “must run” periods;

- (2) “Trading” income – profit from selling electricity outside must-run hours based on the price in the day-ahead and intra-day markets. The decision whether or not to sell could be made as close as 10 minutes ahead of the trading period;
- (3) Generation Distribution Use of System (or GDUoS) payments. These are set according to rates provided by the distribution network operator (or DNO) based on the fact that local (embedded) generation helps DNOs avoid certain costs. These payments are a type of “embedded benefit”;
- (4) Triads – these are another form of “embedded benefit” and are based on running at particular periods of high demand. Putney’s business model took this into account in deciding always to run during “red band” hours;
- (5) Balancing Services Use of System (BSUoS) payments – another embedded benefit based on supply and demand;
- (6) Capacity market income – payments made to generators for having electricity capacity available. These are discussed in more detail below.

28. Mr. Shenkman explained the economics of Putney's business like this. The Copse Road plant generates electricity from gas. It can be turned on and off according to demand. This allows it to act as a kind of balance between renewable energy plants, whose power output is unpredictable as it depends on the varying state of weather conditions, and coal and nuclear generators, which are “always on” as they are inefficient to turn on and off.

29. As a general rule, power generation must match demand at any given moment, as electricity storage technologies are still too nascent. For this reason, there is a market for power generation during periods of high demand. Power generated during periods of high demand can be sold at higher prices than other power. The Copse Road site sells power especially during periods of high demand, and Putney’s business plan reflected the forecasted increasing use of renewable energy over the coming decades. Perhaps counter-intuitively, this increases the demand for gas powered energy, as the more the UK uses renewable energy, as opposed to traditional energy sources such as coal, the more there is demand for gas powered energy in times of high demand when renewable sources cannot match demand.

30. This is relevant for the contract which in due course Putney entered into with Gazprom, under which Putney would supply Gazprom with electricity when base power deliveries were insufficient for the national grid. As this is hard to predict, the contract does not require a fixed amount of electricity to be supplied by Putney; instead, Gazprom could require Putney to sell it electricity when market conditions made it profitable to do so. In practice, Gazprom issues dispatch instruction at times when it is profitable to run the plant commercially. Gazprom and Putney both want the plant to run at those times.

31. Regular meetings were held with AGR to discuss operating strategy, development, budgets and to construct a detailed financial model. Many aspects of the business were debated and agreed at these meetings, including who would be the best engine manufacturer and gas supplier, who should the company sell to and what the contractual terms look like, the optimum trading strategy, the efficacy of the design and technology package, which energy price forecast to use and the correct range of running assumptions for the model.

32. Putney carried out extensive due diligence on the Copse Road site.

33. In October 2016 Putney contacted Gazprom Marketing & Trading Limited (“Gazprom”) to negotiate head of terms for an agreement under which Gazprom would supply gas to, and purchase power from, the Copse Road plant. As is common practice in the sector, Putney would buy gas from Gazprom, before using its power plant to combust the gas

and turn it into power. Gazprom would then buy the manufactured power from Putney before selling it on to its own customers.

34. On 14 October 2016, Putney entered into heads of terms (the “HoT”) in relation to a gas peaking plant project at Copse Road with AGR. The HoT contained both binding and non-binding clauses. It provided Putney with a four-month exclusivity period over the Copse Road site, outlined the various agreements which would need to be negotiated and other steps that would need to be taken before commercial close could be reached and set out the fees that would be payable to AGR and Triple Point.

35. Clause 4 of the HoT, which was stated to be legally binding, deals with the capacity market auction process. This is discussed further at [43] and [50]-[55] below. Clause 4 required Putney to provide applicant credit cover by 14 October 2016. If it did not do so, its rights to develop the project would terminate. The HoT provided that AGR would, among other things, administer the prequalification process for the capacity market auction, the auction process itself and any required post-auction submissions in relation to the Copse Road project.

36. The HoT permitted Putney to decide not to proceed with the Copse Road project in certain circumstances without having to pay any penalty for doing so. In particular, the agreement provided as follows.

(1) “If following Triple Point investment committee determination (on behalf of the EIS investors) the Company [i.e. Putney] is unable to pursue the Project, for example due to the project internal rate of return being less than 10%”, then

(a) subject to the satisfaction of various conditions (including Putney being repaid all deposits and sums including Applicant Credit Cover and AGR putting forward an alternative company acceptable to National Grid), “the Company will allow AGR to enter into the *Capacity Market auction on behalf of the Project*” and Putney will use reasonable endeavours to transfer the capacity market agreement to the alternative company.

(b) If Putney was awarded a capacity market contract but could not transfer it to the alternative company, AGR agreed to indemnify Putney for losses it suffered if it terminated the capacity market agreement or was unable to fulfil its obligations under it.

(2) “If following Triple Point investment committee determination (on behalf of the EIS investors) the Company [i.e. Putney] is unable to pursue the Project” and the conditions had not been satisfied by 21 November 2016, “*the Company may terminate the prequalification status of the Project*”. Subject to Putney being repaid all deposits and sums excluding Applicant Credit Cover, Putney was required to transfer project rights to AGR (or as AGR directs)

(3) Finally, clause 4(3) provided that:

“If the Company without good reason takes any action that terminates the prequalification status of the Project prior to the Auction date (being 6th December 2016), then unless the previous paragraphs apply, subject to the Company being repaid all deposits and sums excluding Applicant Credit Cover paid by it in respect of the Project, the Company shall (as far as it is lawful and reasonably possible to do so) transfer any project rights to AGR (or an entity nominated by AGR) and pay AGR an amount equal to £20,000.00 per MW(as stated in the prequalification application).”

37. The effect of those parts of clause 4 was that, if Triple Point’s investment committee chose not to pursue the Copse Road project, Putney could abandon it without having to pay the £20,000.00 per MW sum referred to. It was only if Putney took action which terminated the Project’s prequalification status other than because of an investment committee decision and also “*without good reason*” that it would become liable to pay that penalty.

38. Putney undertook due diligence on the financial and technical proposals for the Copse Road project, including by instructing specialist advisers Ove Arup and Partners Limited (“Arup”) on 28 November 2016. Their scope of work included reviewing draft terms of the various contracts and any relevant sub-contracts (including their detailed technical annexes). Arup’s final report dated 23 May 2017 was produced at a cost of £16,387.49 to Putney.

39. Putney undertook due diligence on the physical Copse Road site, including the instruction of lawyers (Cripps LLP) to review a report on title prepared by AGR. The report on title addressed (amongst other things) planning issues, the rights benefitting and burdening the site, and the draft terms of the lease over the site.

40. Putney instructed the law firm Maclay Murray and Spens LLP (“MMS”) to review and finalise the various contractual documentation. The letter of engagement between Putney and MMS was dated 24 March 2017. Putney incurred legal fees of approximately £53,850.00 prior to the closure date of 25 May 2017.

41. Putney engaged with Squire Energy Limited (“SEL”) to secure a gas connection offer to procure the infrastructure required to connect the Copse Road plant to the gas network. A gas connection offer was made to Putney by SEL on 10 April 2017.

42. In addition, two companies, which were engaged by AGR, engaged with Electricity North West Limited (“ENWL”), the local distribution network operator (“DNO”), in order to secure a grid connection offer, which would provide for the DNO to procure the infrastructure required to connect the Copse Road plant to the grid.

Financial close

43. The principal revenue streams identified by Putney in connection with its gas-peaking model, and in particular in relation to the Copse Road project, were set out in a detailed Investment Committee Paper which was finalised in May 2017 and are summarised at [27] above. As well as income (and profit) from generating and selling power, Putney expected to receive capacity market income. Capacity market payments are made to generators in exchange for having electricity capacity available, regardless of whether or not they are in fact called upon to generate (although there may be further payments if they are in fact called upon). The capacity market is part of the state infrastructure designed to ensure that there is, always, sufficient generating capacity to meet demand. A capacity market contract is a bundle of rights and obligations, including the possibility of penalties if a contract-holder is unable to provide the contracted-for capacity. Prior to bidding in a capacity market auction or being transferred a capacity market contract, it is necessary to pre-qualify. Pre-qualification requires the provision of credit-cover in the form a cash deposit or bond.

44. On 25 May 2017, “financial close” occurred in respect of the Copse Road project. On this date Putney entered into a number of agreements, as follows:

- (1) The Engine Supply Agreement. By this agreement, JCB Power Products Limited (“JCB”) agreed to sell, and Putney agreed to buy, four gas-powered generators, along with associated services including delivery, offload and position supervision,

commissioning assistance, and operation and management manuals. The contract price was £2,795,734 plus VAT.

(2) Balance of Plant Agreement. By this agreement Putney agreed to pay AGR £2,294,304 plus VAT for all engineering, procurement and construction works required at the Copse Road site which did not relate to the generators.

(3) The Grid Connection Agreement with ENWL. A grid connection was necessary for the intended plant to provide electricity to the distribution network. The contract price for the required works was £231,314.58 plus VAT. As the DNO, ENWL would set the price for the embedded benefit GDuOS payments.

(4) The Gas Connection Agreement with SEL. A gas connection was needed to acquire the gas that Putney would use to generate electricity. By this agreement, dated 25 May 2017, Putney accepted SEL's gas connection offer, with a fee of £224,684 plus VAT.

(5) The Assignment of Lease Option. Putney took an assignment of AGR's rights under an option agreement over the Copse Road site, thereby giving Putney a right to take a lease of the Copse Road site from the landlord for 21 years at an initial rent of £56,000 per annum.

(6) The Long-Term Maintenance Agreement. JCB agreed to provide services to Putney, principally relating to remote support and maintenance of the gas generators. The contract price included fixed charges (of circa £10,000 per annum), with further variable charges according to the actual hours run by the equipment. Fees were payable from the time the engines passed final performance tests and procedures.

(7) The Technical Maintenance and Management Agreement. AGR agreed to provide operational management services at the Copse Road site to Putney. The fees are made up of an annual fee of £20,000, plus specified hourly rates for unscheduled and/or additional maintenance services. Fees were payable from the first operating year (so not until the plant was commissioned).

(8) The Gazprom Agreements were framework agreements setting out the basis on which Putney could supply electricity to, and purchase gas from, Gazprom following completion of the plant. We discuss the Gazprom Agreements at [56] et seq. below.

(9) A Business Administration Agreement with Triple Point, under which Triple Point agreed to provide business administration services to Putney in exchange for an annual business administration fee, being 2.25% plus VAT of the amount originally invested by the EIS investors, being £4,971,862.

(10) The Escrow Account Instruction Letter and the Collateral Warranty, which related to security for the physical construction of the infrastructure other than the generators.

45. In the Triple Point Investment Committee Front Sheet signed by the Committee on 26 May 2017, the "*Uses of Funds*" section recorded the use of funds immediately following financial close as follows:

(1) It recorded various fees payable to Triple Point (the debt arrangement fee, the EIS arrangement fee and the EIS business administration fee or 'BAF').

(2) It recorded a sum in respect of working capital.

(3) The remainder of Putney's available funds were earmarked for the construction phase of the project, rather than for purchasing gas or otherwise on operating the plant.

46. Soon after financial close, three further documents were executed:
- (1) On 30 May 2017, AGR Peak Power entered into two insurance policies, a Chancel Repair policy and a Defective Title policy.
 - (2) On 1 June 2017, the Barclays Advance Payment Guarantee was executed, under which Barclays gave a guarantee for Putney's obligation to pay an advance to JCB Power Products under the Engine Supply Agreement.
47. Putney exercised its rights under the Option Agreement on 23 August 2017, and accordingly, a 21-year lease was entered into between Putney (as tenant) and its landlord on that date.
48. Construction work on the Copse Road site started in September 2017.
49. The Engine Supply Agreement stated that the latest time for delivery of the generators was 8 December 2017. Similarly, the Balance of Plant Agreement provided that the time for completion of the "Works" as defined in that agreement was 31 December 2017. However, construction work on the Copse Road site was not completed until 31 August 2018. Putney received liquidated damages from JCB and AGR, as compensation for the delay.

Capacity Market Contracts

50. Mr. Schenkman explained that capacity market contracts are entered into by the grid in order to ensure that there are sufficient providers of electricity who were able to provide electricity during periods of high demand and therefore avoid a situation where there is not enough supply to meet demand. To a certain extent the expression capacity market contract, although widely used, is a misnomer because it is really shorthand for the bundle of complex rights and obligations that arise under statute and regulation for those who have been awarded such contracts. By these "contracts" capacity providers agree to be ready and able to provide a certain amount of electricity in a future delivery year. Providers are due a certain sum for committing to provide such capacity, as well as any further sums due upon actual delivery. However, if called upon and unable to perform, there are financial penalties.
51. Putney prequalified into the capacity market in around December 2017, and made a payment of applicant credit cover on 19 December 2017 in the sum of £80,590. Putney was required to provide credit cover as part of the prequalification process. The purpose of the credit cover is that it demonstrates seriousness of the intention to provide capacity and the ability to meet any penalties which might arise from a future failure to provide capacity.
52. On 8 January 2018, Putney entered into the capacity market agreement with Flexitricity ("the Flexitricity Agreement"). Before that date Flexitricity had been awarded capacity market contracts. Flexitricity was effectively an administrator who specialised in participating in the capacity market and winning a capacity contract, before passing the benefit of that contract onto a vendor of electricity such as Putney for a fee. Under the Flexitricity Agreement, Flexitricity agreed to transfer contract capacity to Putney for the delivery years 2018, 2019 and 2020.
53. The Flexitricity Agreement provided for those contracts to be transferred to Putney, subject to (among other things) the Copse Road plant achieving the "Substantial Completion Milestone" (broadly speaking, the Copse Road plant becoming operational), which it did in August 2018. Putney and Flexitricity were both obliged to use all reasonable endeavours to procure the completion of the conditions precedent. Failing to take steps to ensure the substantial completion of the plant, and then to take transfer of the capacity market contracts, would have exposed Putney to the risk of legal action from Flexitricity.

54. Consistent with the contractual position, Flexitricity's contract to provide capacity in 2018 was transferred to Putney with effect from 31 August 2018, which was the day the plant became operational.

55. Mr. Shenkman said that this involved Putney putting money at risk, because it risked financial penalties if it was not able to deliver capacity, but also put itself in a position to deliver profits by way of the capacity payments. Putney had in effect contracted to be ready to provide electricity at that point, even though it was not yet generating it.

The Gazprom Contracts

56. Although described as an energy contract option, the Gazprom arrangements in fact comprise a contract for the sale of gas by Gazprom to Putney and another for the purchase of power by Gazprom from Putney.

57. The agreement comprises a short signed document, which gives the details of the facility (referring to the site at Copse Road) and defines the "start date" as "from commissioning, expected to be 1 January 2018 ". This short document provides that the agreement between the two parties comprises the short, signed document, Gazprom's general terms and conditions for the supply of gas or the purchase of electricity and the product schedule (one for the supply of gas and another for the purchase of electricity).

58. The product schedule for the flexible sale and purchase of electricity requires Putney to provide Gazprom with information, to be updated from time to time, about the generator. Based on that information, Gazprom may enter into power optimisation transactions, effectively where Gazprom purchases electricity from Putney and sells it in the market. It also allows Putney to specify must run periods when Gazprom will purchase a volume of electricity and sell it in the market.

59. Putney is required to provide Gazprom with access to the remote dispatch platform. This effectively enables Gazprom to turn the plant on and off, rather than asking Putney to do that for it. There is provision for the calculation and payment of amounts due under the contract and for the circumstances in which either party can terminate it.

60. The general terms for the purchase of electricity provide that the agreement commences on the date when it has been signed by all the parties and continues until it is terminated. Putney's obligations include the provision of information to Gazprom and obtaining and maintaining throughout the term all the permissions it needs.

61. Clause 3.1.6 provides that throughout the term Putney must not do anything which reduces or is likely to reduce the facility's ability to generate electricity to the delivery point, except for planned maintenance which must be notified to Gazprom in accordance with the terms of the agreement.

62. In clause 5 Putney warrants that on the commercial operations date (defined as the date on which Putney confirms that the facility is commissioned) for the facility, the facility will be operated and maintained in accordance with good industry practice and all relevant laws and shall continue to be so operated throughout the term.

63. In clause 8, Putney gives Gazprom the sole and exclusive right to purchase all of the export supply (defined as all the electricity generated by the facility and delivered to the local distributor's system) and all of the benefits with full title guarantee and free from all charges, liens, other encumbrances and third-party claims. Putney agrees not to sell electricity or benefits to any third-party without Gazprom's prior consent.

64. When it was put to Mr Shenkman that Putney "would not be obliged to supply electricity or take in gas until the plant was commissioned and ready to produce electricity",

he answered, “Yeah, that’s right. It wouldn’t buy gas until the plant was up and running ... It wouldn’t supply electricity until the plant was up and running”.

65. There is a clause (3.1.6 – see [61] above) in the Gazprom agreement obliging Putney not to do anything which reduces or is likely to reduce the facility’s ability to generate electricity. This clause operates throughout the term of the agreement. However, there is no provision in the agreement which in terms obliges Putney to build the facility or to commission it. Similarly, Putney is obliged to sell power generated by the facility to Gazprom when requested and gives warranties about how the facility will be operated once it has been commissioned, but there is no wider obligation on Putney to generate a particular amount of power.

66. Mr Shenkman’s evidence (which we accept) is that the various contracts entered into at financial close were inextricably linked. Putney would not have entered into some without the others. In particular, Putney would not have committed substantial amounts to the development of the plant if it had not entered into the Gazprom contracts at the same time. Similarly, Gazprom would not have entered into its contracts with Putney if it had not been sure that the plant would be completed and able to operate at the required level of capacity.

Piston

67. Initially, Piston considered constructing a CHP plant at a site in Milton Keynes with AG Barr plc (“AGB”) as its potential customer. However, AGB proved insufficiently interested in Piston’s proposal and by July 2016 Piston had begun to consider other potential projects.

68. In July 2016 Piston held meetings with AGR, who shared a portfolio of potential sites including:

(1) A site at Holme Road, Burnley, BB12 0BE (the “Burnley Site”). Over the following months Piston and AGR met on more than one occasion to discuss progressing with the Burnley Site.

(2) A site near Cambridge Road, Stretham, Ely (the “Ely Site”). On 14 October 2016, Piston signed heads of terms (containing binding and non-binding terms) with AGR relating to the Ely Site.

(3) Piston engaged in discussions with AGR in relation to the Ely Site, including about the terms of an agreement with the Statkraft Group (a global energy group ultimately owned by the Norwegian state) and/or Gazprom, and as to the terms on which Piston would engage companies in the JCB Group to provide engines to the intended plant, in addition to carrying out the balance of the engineering, procurement and construction work

(4) A site at Caswell House, Cavendish Road, Stevenage (the “Caswell Site”). This site became the leading contender from around 20 April 2018. The Piston plant was eventually constructed on the Caswell Site.

69. On 4 April 2016, Piston entered into an agreement with Triple Point, by which Triple Point would provide certain business administration services to Piston in exchange for a business administration fee. This agreement was then restated and amended on 17 May 2016. The agreement (including as amended) provided for an annual business administration fee of 2.25% of Piston’s net asset value (plus VAT).

70. By the EIS Deadline, Piston had taken the following steps:

(1) It had entered into a business administration fee agreement with Triple Point. This agreement was merely part of establishing the internal functions of the business.

(2) Piston had registered for the capacity market, with payment of a deposit. It had registered in relation to the Ely Site, rather than in relation to the Caswell Site which it ultimately developed.

(3) Piston had signed heads of terms with AGR in relation to the Ely Site. As explained above in relation to Putney, the heads of terms did not impose an obligation on Piston to complete development of the Ely Site. Piston decided not to pursue this project, but there is no evidence that it was required to make any payment to AGR under clause 4 of the heads of terms as a result.

71. Piston did not identify the Caswell Site as the “leading contender” for its gas plant until after the EIS Deadline.

72. At the time of the EIS Deadline, Piston had not entered any contracts directly related to the Caswell Site (whether related to raw materials, the sale of electricity, construction of the plant or otherwise). Mr Shenkman was not able to say if there had even been any negotiations relating to the Caswell Site by the EIS Deadline.

73. By the EIS Deadline, Piston was still in the process of exploring where its trade would be carried out from. It had not started the construction phase.

74. On 3 October 2018 Piston entered into the following:

(1) Contracts in relation to the construction of the plant at the Caswell Site, including a contract for the supply of the engines for a fee of £3,886,514 plus VAT, and a contract with AGR for various works at the Caswell Site which did not relate to the supply and delivery of the generators/engines themselves, for a contract price of £1,855,206 plus VAT;

(2) Contracts in relation to connecting the plant to the gas network (necessary to secure a gas supply for the engines), and to the electricity grid (necessary so that electricity produced by the plant can make its way to purchasers). The former agreement was with for £88,640 plus VAT. The latter had a price for the works of £395,486 plus VAT.

(3) A lease over the Caswell Site for an initial term of 10 years, with an annual rent of £10,000 (exclusive of VAT); and

(4) A contract with Gazprom relating to the purchase of power and the supply of gas.

75. Construction work began on the Caswell Site in October 2018, and the plant started producing electricity (which was sold to the grid) in August 2019.

CASELAW ON THE COMMENCEMENT OF A TRADE

76. We reviewed a number of cases which addressed questions such as whether an activity amounts to a trade, whether a trade is being carried on and when a trade or business began. We discuss the parties’ submissions on what we can draw from those cases later, but for now we simply summarise what was said in those cases.

Birmingham & District Cattle By-Products Co Ltd v IRC (“Birmingham Cattle”), (1919) 12 TC 92

77. This case was about when a company commenced its trade or business and whether or not it had a pre-War trade year, because these factors were relevant to determining how its profits were to be calculated for the purposes of Excess Profits Duty.

78. The company in question was incorporated on 20 June 1913. There was evidence that in June and July 1913, and on subsequent occasions prior to 6 October 1913, the Directors of the company had:

- (1) viewed other places of business of a similar character in various parts of the country.
- (2) entered into a contract in June 1913, for the erection of the works, which works were duly erected in July 1913.
- (3) purchased machinery and plant for carrying on the business.
- (4) entered into agreements for the purchase of products to be used in the business and the sale of finished products.
- (5) engaged a man as foreman of the works, who prior to October 1913 superintended the manufacture of utensils.

79. The company said that its business began when it was incorporated or alternatively that it had a pre-war trade year. The commissioners' decision was that the company "commenced trading on 6 October 1913". At the beginning of his (short, extempore) judgment Rowlatt J said that "The question is when the company commenced its trade or business."

80. He described all of steps (1)-(3) above as preparatory activities and then said this about steps (4) and (5) and what followed:

"Then they entered into agreements for the purchase of products. Those are the agreements which I have already referred to which formed the substratum of the company, but no materials came in nor were any sausage skins made from the 20th June. They waited, and I suppose in October, the date they refer to in their Minutes, having looked round, and having got their machinery and plant, and having also employed their foreman, and having got their works erected and generally got everything ready, then they began to take the raw materials and to turn out their product."

81. Rowlatt J held that the Commissioners were correct to have concluded that the company "commenced business" when "having got their works erected and generally got everything ready, ... they began to take the raw materials and to turn out their product" on 6 October.

Kirk and Randall, Limited v Dunn (HMIT) ("Kirk and Randall"), (1924) 8 TC 663

82. The company was formed to take over a contractor's business in 1912. The contractor's business was not in a good state. For a couple of years the company carried on to completion the pending contracts of the private firm and was very poorly off. It had no premises after the early years of the War when the Government took them over, and it had no plant; but during those years, it carried on looking for business albeit with no success. The company had directors all the time, and the directors drew their fees, and their secretary drew his fees; and they also had bills for typing and other overheads, and bills for legal services. All these costs related to their efforts to get business, but they did not get any. That went on until 1920 when the company got something. The company said that its trade had never been discontinued and so it could not have been "set up and commenced" in February 1920, as the Crown asserted.

83. Rowlatt J agreed with the company, commenting as follows:

"There have been several cases recently upon the Corporation Profits Tax and the Excess Profits Duty in which the companies liable are defined as companies carrying on any trade or business. I think it is practically the same definition in both Acts. Now several cases came before me, and I took rather a narrow view of those words which define the sort of company. I did not pay much attention to the internal activities of the company - its functional activities as carrying on its own life, and I laid some stress on "carrying on"

and on "business", but the Court of Appeal have taken a freer view of, the words than I did, and they have certainly taken into consideration the circumstances that the company was performing its internal functions, that is to say, holding its meetings and so on, as indicative, if not alone sufficient, to establish the fact that it was carrying on a business. If I might perhaps paraphrase it without any disrespect, they have treated it as a business company carrying on. And, of course, that is putting a more liberal interpretation on the words.

...

So that I confess I approach this case with the feeling that perhaps I have been inclined to take a too narrow view of the word "business", but I cannot help thinking that the question before me in this Income Tax case is rather different from the question under the Corporation Profits Tax cases. The question there always was: Is what this company is doing the carrying on of a trade or business? Here the question seems to be: Is what this Company is doing carrying on a trade or business, or nothing at all? There is no question about it being anything else but a trade or business if it is carrying on anything."

Ransom v Higgs ("Ransom") [1974] 3 All ER 949

84. This is a decision on whether an activity amounted to a trade, not when that activity began. The taxpayer, Mr Higgs, and his wife controlled a number of companies which owned land ripe for development. They also owned a company which was to carry out the proposed development. In order to implement a tax avoidance scheme (which Mr Higgs did not really understand but nevertheless agreed to implement) various steps were taken at Mr Higgs' behest. The Crown claimed that Mr Higgs was liable to tax on the ground that the part which he had played in implementing the scheme constituted 'an adventure in the nature of trade'.

85. On the question whether Mr Higgs was trading, Lord Reid said (at p955d):

"The Income Tax Acts have never defined trade or trading farther than to provide that trade includes every trade, manufacture, adventure or concern in the nature of trade. As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services."

86. Lord Morris commented (at pp960i-961):

"Bearing all this in mind the question still arises, what did Mr Higgs do? To be engaged in trade or in an adventure in the nature of trade surely a person must do something and if trading he must trade with someone. In *Inland Revenue Comrs v Livingstone* the Lord President (Clyde) said:

'I think the test which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade" is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.'

All that Mr Higgs did was to pay heed to an idea which was suggested to him ..., to take advice about it, to understand the purpose of it, though not to comprehend all the details of the scheme which embodied the idea, and then somehow to contrive that his wife and certain limited companies and others

would act 'at his behest' and play their part in effecting the transactions which the scheme necessitated. But can this in any rational or realistic sense be described as trading or as being an adventure in the nature of trade? Quite lacking are the indicia which are common to so many forms of trading activity. Mr Higgs was not himself concerned in any buying or selling activity. He gave no services. He supplied nothing. Nor, in any real sense, was he introducing anyone or acting as a broker. What the companies did were the acts of the companies. What they did cannot be regarded as Mr Higgs's acts.”

87. Lord Wilberforce observed (at 964b and 964j):

“Trade is infinitely varied; so we often find applied to it the cliché that its categories are not closed. Of course they are not; but this does not mean that the concept of trade is without limits so that any activity which yields an advantage, however indirect, can be brought within the net of tax.

Mr Higgs had no trading stock. In the whole course of these transactions he bought nothing, sold nothing, and ventured nothing. Taking each individual transaction, from first to last, not one was performed by Mr Higgs: so far as relevant, two only were carried out by Mrs Higgs; she made the settlement on discretionary trusts; she was concerned in the partnership with two Harlox companies, her interest in which she assigned to the trustees of the settlement. There are nowhere here any of the indicia of trade so far as Mr Higgs, or, if relevant, Mrs Higgs is concerned.”

88. Lord Cross considered (at 974f):

“A man cannot be trading or engaged in an adventure in the nature of trade unless there is someone with whom he is trading—someone to whom he supplies something such as goods or services for some return. Here there was no one with whom Mr Higgs can fairly be said to have 'traded'. Counsel for the Crown said that his 'role' was analogous to that of a broker. A broker procures other people to enter into transactions with one another and that—he submitted—is what Mr Higgs did. But a broker has a customer; one or other or both of the parties to the transaction in question pays or pay him for bringing them together. Mr Higgs, by contrast, simply told the parties concerned to carry out the transaction which the scheme which he had adopted required them to carry out.”

Khan v Miah (“*Khan*”), [2001] 1 All ER 20

89. This is a decision of the House of Lords about whether a partnership existed. Some individuals agreed that they would be partners in a restaurant business. Their relationship broke down in January 1994. By that time, they had acquired premises, bought and taken delivery of furniture, entered into a credit agreement for the purchase of carpets and a contract for the laundry of table linen, and advertised the restaurant in the local press. However, the restaurant did not open for business until 14 February 1994. The Court of Appeal had decided that parties to a joint venture did not become partners until actual trading commenced, that it was therefore necessary to identify the business which it had been agreed would be conducted by the partnership and then decide whether the partners were carrying on the business at the material time. They decided that the business of the partnership was carrying on the restaurant business from the premises and concluded that the parties were not carrying on that business before 25 January 1994.

90. Lord Millett (with whom the other Law Lords agreed) considered that the majority of the Court of Appeal were guilty of “nominalism” in that they had thought that it was necessary, not merely to identify the joint venture into which the parties had agreed to enter,

but to give it a particular description, and then to decide whether the parties had commenced to carry on a business of that description. He was clear that there was distinction between trading and having embarked on a venture, commenting (at p25c):

“The question in the present case is not whether the parties ‘had so far advanced towards the establishment of a restaurant as properly to be described as having entered upon the trade of running a restaurant’, for it does not matter how the enterprise should properly be described. The question is whether they had actually embarked upon the venture on which they had agreed. The mutual rights and obligations of the parties do not depend on whether their relationship broke up the day before or the day after they opened the restaurant, but on whether it broke up before or after they actually transacted any business of the joint venture. The question is not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. Once the judge found that the assets had been acquired, the liabilities incurred and the expenditure laid out in the course of the joint venture and with the authority of all parties, the conclusion inevitably followed.”

91. Earlier (at p24a and p24e) he had drawn an emphatic distinction between the concepts of business/venture and trading, commenting:

“The restaurant was not open for business. There was nothing for the first respondent to manage, and no function for the two chefs to perform. No food had been bought or bookings taken. Everything that had been done was preparatory to the commencement of trading.

...

Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership. Many businesses require a great deal of expenditure to be incurred before trading commences. Films, for example, are commonly (for tax reasons) produced by limited partnerships. The making of a film is a business activity, at least if it is genuinely conducted with a view of profit. But the film rights have to be bought, the script commissioned, locations found, the director, actors and cameramen engaged, and the studio hired, long before the cameras start to roll. The work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customers walk through the door. Such work is undertaken with a view of profit, and may be undertaken as well by partners as by a sole trader.”

92. In the course of his speech Lord Millett described *Birmingham Cattle* as being “of limited assistance” to him, because the statutory context was entirely different, doubted whether Rowlatt J’s decision was correct in any event and noted that Rowlatt J himself had said in *Kirk v Randall* that that he was inclined to think that he might have taken too narrow a view of the word ‘business’ in previous cases.

Mansell v Revenue and Customs Commissioners (“*Mansell*”), [2006] STC (SCD) 605

93. This case dealt with the question whether the taxpayer's trade had been “set up and commenced” before 6 April 1994 within the meaning of transitional provisions relating to the introduction of the change from the preceding year basis to the current year basis in assessing the trading profits of individual traders: see sections 210-218 of the Finance Act 1994. The Special Commissioner, Charles Hellier, decided that the taxpayer commenced trading when he entered into a formal option agreement to buy an interest in land, the land in question being land that the taxpayer considered might well be developed and used as a motorway

service station. The taxpayer contended that he had commenced trading at an earlier date. He argued that he had spent considerable time and money in researching likely service station sites and suggested that he might have commenced trading by amassing knowledge and expertise that he could exploit in a trading sense without even acquiring any actual interest in land. He also argued, in relation to the option agreement, that entering non-binding heads of terms for the grant of the option marked the point when he commenced trading (this also being at a point prior to the critical date under the relevant transitional provisions). The Special Commissioner's decision was that the taxpayer had not commenced trading by virtue of any of these activities and it was only when he acquired the option, being the asset that he might well be able to realise by selling it to one of the operators of service stations, that he commenced his trade. During his decision, the Special Commissioner made these observations:

“88. Section 218 of the 1994 Act speaks of a trade 'set up and commenced' before, or on or after, 6 April 1994. The words 'set up' suggest that a trade can be set up without being commenced. This echoes the distinction drawn in *Slater* (see para 72 above), the distinction between getting ready and commencing in *Birmingham Cattle*, Lord Millett's observation that 'the work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customer walks through the door', and the assembly of a 'sufficient organisational structure' to undertake the essential preliminaries noted in *Gartry v The Queen* 94 DTC 1947 (T.C.C.). I conclude that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up.

...

93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities—and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.

94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed, will constitute operational activity is sufficient. At that stage no operational risk has been undertaken: no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.”

Tower MCashback LLP 1 v Revenue and Customs Commissioners (“*Tower MCashback*”), [2008] EWHC 2387 (Ch)

94. This is a complex case which raised a number of issues, one of which was when Tower MCashback LLP 1 (“the LLP”) had started to trade. In order to sustain a valid claim for capital allowances for the tax year 2003-04, the LLP needed to establish that it had commenced trading prior to the end of that year (5 April 2004). On 31 March 2004 the LLP contracted to acquire some software. Completion was set for 30 April 2004, but it did not take place until January 2005. As at 5 April 2004 the collaboration and operating agreements that would regulate the respective roles of the LLP and others involved in exploiting the system had not been entered into, and none of the required banking arrangements, designed to provide 75% of the capital to be contributed by the investor members, had been entered into either. The LLP argued that in *Mansell* the Special Commissioner had found that that the taxpayer commenced trading when he entered into the formal option agreement to buy an interest in land, the land in question being land that the taxpayer considered might well be developed and used as a motorway service station. So, the LLP argued, entering the contract to acquire the software was sufficient for it to be held to be trading. Henderson J did not accept this, commenting (at [91]):

“[91] Under the relevant SLA, LLP 1 agreed to purchase a licence of the code generation software from MCashback for £7,334,000 payable on completion, which was initially scheduled to take place on 30 April 2004. In return, LLP 1 would become entitled from the date of completion to 0.66% of the gross clearing fees generated from the exploitation of the MRewards technology. It is important to note that there was never any question of the code generation software being exploited by itself, or by LLP 1 alone. It was always envisaged that the system as a whole would be operated by MCashback and the LLPs, pursuant to Collaboration and Operating Agreements. Neither the software licensed to the four LLPs nor the software retained by MCashback could function independently, and the proposed business model was for the joint exploitation and development of the technology under the direction and management of a committee with members appointed both by the LLPs and by MCashback. However, these agreements had not progressed beyond draft stage by 6 April 2004, and the Collaboration Agreement was not in fact signed until more than one year later, on 16 May 2005. Furthermore, completion of the SLA itself was also delayed and did not take place until 12 January 2005.

[92] In the light of these facts alone, it is in my judgment plain that LLP 1 could not have begun to carry on a trade within the meaning of s 11 on or before 5 April 2004. All it had done was to enter into a contract to acquire an asset which it intended to use in due course for the purposes of a trade of exploiting the licensed software, on terms still to be agreed with MCashback and its fellow LLPs. The entry into the SLA was a step preparatory to the carrying on of a trade. It was not a step taken in the course of a trade which had already begun, nor was it a step which itself marked the commencement of trading. Until terms had been agreed, it could not in my view be said that LLP 1 was in a position to start turning the licensed software to account, or that it had in any meaningful sense started to trade.

[93] As I read paras 90-91 of the decision, these were essentially the considerations which led the special commissioner to conclude (at the end of para 91) that the fact of having entered into the SLA ‘did not mean that LLP 1 had thereby commenced its trade’. He also referred to the decision of another special commissioner, Mr Charles Hellier, in *Mansell v Revenue and Customs Comrs* [2006] STC (SCD) 605, where it was held that the taxpayer

began trading when he entered into a formal option agreement to buy an interest in land, with a view to its development and use as a motorway service station. The special commissioner in the present case distinguished *Mansell's* case on two grounds: first, he said that 'options to acquire land are regularly traded'; and secondly, he said that the acquisition of the option 'resulted in the taxpayer actually acquiring his stock-in-trade that he intended to realise.'

[94] *Mansell's* case was not a case concerned with capital allowances, but with the different question whether the taxpayer's trade had been 'set up and commenced' before 6 April 1994 within the meaning of transitional provisions relating to the introduction of the change from the preceding year basis to the current year basis in assessing the trading profits of individual traders: see ss 210-218 of the Finance Act 1994, and in particular s 218(1). In a valuable discussion in paras 88 and following of his decision, Mr Hellier referred to the fitful guidance to be obtained from earlier authorities (none of which deals directly with the question when a trade commences), and concluded that in his view a trade commences 'when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities'. He went on to say that by operational activities he meant dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk.

[95] It is unnecessary for me to say whether I would have reached the same conclusion on the facts as Mr Hellier did in *Mansell's* case, but in broad terms I find his test of the beginning of operational activities a useful one. Every case will turn on its own facts, but in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin. Mr Hellier gave as examples of setting up a trade such matters as the purchase of plant, and organisation of the decision making structures, the management and the financing (see [2006] STC (SCD) 605, para 88). In my judgment a similar approach is helpful in answering the question whether a trade is being carried on for the purposes of s 11 of CAA 2001, and the present case falls clearly on the pre-trading side of the line because the SLA amounted to no more than a contract for the acquisition of plant at a time before any decision-making, financial or management structure for the intended trade had been put in place."

95. Earlier at [89], Henderson J had made the general observation that, "In the context of a trade, it seems to me that a person cannot normally be said to be carrying it on within the meaning of s 11 if he is not yet in a position to start turning the business to account, or operating it, in a way that is designed (at least ultimately) to yield a profit."

Hunt v HMRC ("Hunt"), [2019] UKFTT 515 (TC)

96. Mr Hunt claimed relief under section 253(4) of the Taxation of Chargeable Gains Act 1992 ("TCGA") for capital losses of £4,905,896 incurred as a result of being called upon to make a payment under a personal guarantee given to Barclays Bank in respect of a loan to Altala Group Limited ("Altala"). The sole issue before the Tribunal was whether Altala had commenced trading. If it had, it was agreed that Mr Hunt was entitled to the relief claimed.

97. Altala was set up to operate a lottery. It was financed by a loan from Barclays. Altala spent 16 months developing the lottery, making substantial investment in developing IT software, systems and websites for the business. It commissioned market research studies, and prepared marketing materials and advertising campaigns. It recruited an expert team to

ensure the required operational infrastructures and processes were in place. Specialist assets were purchased and rigorously tested whilst prize insurance was put in place. The business was ready to launch on schedule in the autumn of 2008, with media launches and promotional campaigns lined up. A field solutions team were engaged to train retailers and to ensure there was a strong point-of-sale reference when the lottery launched. Agreements were in place with counter payment terminal providers and transaction network providers. However, Altala was unable to launch the lottery as the Gambling Commission refused it a licence for reasons related to Mr Hunt's background.

98. The FTT decided that Altala had established a framework or structure for its trade. At [78] the FTT commented:

“Having regard to all the circumstances of the present case, particularly by the production of Play Cards, by its dealings with retailers, by engagement with third parties regarding advertising and marketing, by its creation and testing of IT systems and sales infrastructure and purchase of lottery ball machines, Altala had, in my judgment, clearly established a framework or structure for the trade. The question is whether it progressed from this stage to begin operational activities?”

99. On that point, the FTT held:

“79. As is clear from [93] of his decision, by “operational activities” the Special Commissioner in *Mansell* meant “dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk”. This includes “entering a contract to provide goods or services.” It is also clear from the decision of the Special Commissioner (at [91]) that it is not always necessary for a sale to be made or a service supplied before a trade can be said to have commenced.

80. Although, because it did not hold an Operating Licences from the Gambling Commission, the condition precedent in the contracts with the CICs was not met, Altala nevertheless not only entered into agreements with the CICs to provide services but, as described above, created the infrastructure for a lottery and entered into dealings with third parties as required by that agreement, eg by making arrangements for the sale of tickets, procuring the equipment required to make the draw and making agreements with “an appropriate broadcaster and production company”. In doing so Altala incurred substantial expenditure and clearly put its money at risk in the hope that it would give rise to profits.

81. Having regard to all the circumstances case, I consider that Altala did engage in operational activities in which it incurred a financial risk. As is clear from *Mansell*, this is sufficient for it to have commenced trading. It therefore follows that Mr Hunt is entitled to the relief claimed under s 253(4) TCGA.”

100. The reference to the contracts with the CICs is to the 52 CICs under the control of a charitable trust. The CICs were independently run and had the objective of raising money for health projects within their local area. Each week two CICs were to be selected to be the beneficiaries of the lottery draw for that week. The money collected was, after deduction of commission to be paid into the accounts of the CICs which would retain 20% for good causes and 45% as the prize fund with the balance to be paid to Altala from which the costs of running the lottery, retailer commission etc would be met. Altala had contracts with each of the CICs to provide lottery management services. These contracts were conditional on Altala being granted the required licences.

Ingenious Games LLP v HMRC (“Ingenious”), [2021] EWCA Civ 1180

101. Ingenious was a “film scheme” case, one of the issues being whether certain LLPs were trading. Mr Ewart drew our attention to two passages in the Court of Appeal judgment relevant to the question whether a trade was being carried on:

“51. In [*Ransom v Higgs*], Lord Morris of Borth-y-Gest said at 1606D:

"In considering whether a person " carried on " a trade it seems to me to be essential to discover and to examine what exactly it was that the person did."

In the present case, the FTT quoted that statement, although they misattributed it to Lord Reid, before continuing, in terms which we would respectfully endorse, at FTT/358:

"That means what the LLPs did, not their members, and not what was done by Ingenious for itself or other persons. It will involve a weighing of a number of factors, the relevance and importance of which will depend on the circumstances. There is no complete list of those factors and no rule that any one or more of them are decisive..."

...

78. ... On the FTT's general approach to the [trading] issue, we have already cited with approval what they said at FTT/358, and we would likewise endorse what they said at FTT/359:

"Whatever else in determining whether something is a trade, the tribunal must stand back and take an unblinkered view of all the circumstances: the totality of the person's activity and enterprise. That is not a result of any particular facet of the *Ramsay* doctrine but of the nature of the word "trade" – archetypically whether someone is trading is a conclusion based on commercial substance rather than form. Trade is not a narrow legal concept but a broad commercial one: transactions planned and executed as a single transaction must be viewed as a whole."

John Wardle v HMRC (“Wardle 1”), [2021] UKFTT 0124 (TC)

102. We now come to three cases in which Mr Wardle attempted to claim entrepreneurs' relief under section 169H(2)(a) TCGA in relation to disposals of partnership assets or interests in a partnership.

103. In *Wardle 1* Mr Wardle was one of three partners who established a general partnership whose business was to develop, construct and operate renewable power plants at three locations in the UK. The partnership commenced pre-trading activities and, once the projects reached the stage where construction could begin, the partnership sold two plants to a third party. At that time, the partnership had not commenced trading. Mr Wardle argued that a partnership's business, disposed of prior to commencement of actual trading and while still in the setting-up phase, came within the definition of “a business” in s169S(1) TCGA (which it needed to do if entrepreneurs' relief was to be available). This defined “business” as follows:

“169S(1) For the purposes of this Chapter “a business” means anything which–

(a) is a trade, profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits.”

104. The FTT disagreed with Mr Wardle, holding (at [98]):

“I consider that the “natural and ordinary” meaning of the definition of “a business” in s169S(1) is that it requires that an individual or partnership making the disposal is disposing of something (or anything) that is, at that time, a trade and is conducted, at that time, on a commercial basis. The trade must exist at that time – it does not extend to activities which are capable of being conducted as a trade at a point in the future.”

105. One of the reasons for the FTT’s conclusion was that Parliament had made specific provision for pre-trading activities of companies in the definition of a “trading company” in section 165A (entrepreneurs’ relief was only available on a disposal of shares if the company in question was a trading company or the holding company of a trading group), which provides (so far as relevant):

“(3) “Trading company” means a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities.

(4) For the purposes of subsection (3) above “trading activities” means activities carried on by the company–

(a) in the course of, or for the purposes of, a trade being carried on by it,

(b) for the purposes of a trade that it is preparing to carry on,”

John Wardle v HMRC (“Wardle 2”), [2022] UKFTT 00158 (TC)

106. Not put off by his first encounter, Mr Wardle returned to the FTT, this time in connection with a disposal of interests in a LLP which had been established to acquire, construct, and operate a power plant in Hull using wood waste biomass as its fuel or feedstock. On 21 August 2015 “financial close” occurred, when the LLP entered 56 contracts relating to the construction, operation, and financing of the plant, including a contract to purchase feedstock from a supplier (the “Feedstock Agreement”). On 24 August 2015, the LLP issued a “notice to proceed” under the Feedstock Agreement to the relevant supplier. On 14 September 2016, the LLP applied to the Environment Agency for a permit to operate the power plant, which the Environment Agency issued in May 2017. On 8 November 2016, Mr Wardle disposed of 666 of his 1,465 units in the LLP.

107. Mr Wardle accepted that, for entrepreneurs’ relief to be available, the LLP had to be trading, but he argued this was the case. He said that the LLP’s business had been set up (the concept had been decided on, customers had been identified and contracts entered into, the management team had been identified and financing arranged). The LLP’s trade commenced when notices to proceed were issued on 24 August 2015. Entering into the Feedstock Agreement and giving the notice to proceed amounted to dealing with a third-party customer for the disposal of waste wood it had contracted to supply, the processing of which the LLP expected would give rise to revenues and profits. The same was also true of the contract with the energy company for the supply of electricity. Relying on *Hunt*, Mr Wardle submitted that the fact that the contracts were conditional, e.g. the Feedstock Agreement was conditional on the construction of the plant, was not a bar to trading.

108. In terms of the test to be applied to decide whether the LLP was trading, the FTT observed:

“88. Whether or not a trade has commenced will depend on a consideration of all the individual facts and it is in my view inappropriate to apply the short reasoning in *Birmingham & District Cattle* to all circumstances. I do not accept HMRC’s argument that because it is a simpler the test *Birmingham & District Cattle* is necessarily to be preferred. In my view the well-articulated and clear summary of the issues as set out in *Mansell* at [88]

to [95] represents a better summary of the factors to take into account, at least in the current appeal. Henderson J in *Tower MCashback* found the “operational activities” test in Mansell “useful” and in *Hunt* both HMRC and the appellant agreed that the relevant test was as set out in *Mansell*.”

109. Applying the *Mansell* test, the FTT accepted that the LLP had a specific idea in mind. As far as setting up its business was concerned, the FTT considered (at [92]) that, “The issue here is that even on the appellant’s case none of these things had been done, except perhaps the financing, beyond contractual commitments as at Financial Close.” The FTT commented (at [93]) that the Special Commissioner in *Mansell* “rather assumed that a business had to be set up first before commencing operational activities (“a trade cannot commence until it has been set up (to the extent it needs to be set up)” [88])” and that Henderson J in *Tower MCashback* had made the same assumption (at [95]).

110. Mr Wardle argued that the 56 contracts entered into on financial close and the associated financial commitments meant that the LLP and its contracting parties were committed to these things and that amounted to setting up the business. The FTT considered (at [95]) that “it is conceivable that a taxpayer could be said to have set up its business in these circumstances. However, this is more likely to be the case where there are clear indicators of buying, selling and related activities, in effect the third limb of Special Commissioner Hellier’s principles.”

111. So, the FTT went on to consider whether the LLP had begun “operational activities” and reached the following conclusion:

“98. As I have found, the Feedstock Agreement is a contract for the supply of materials to the LLP not a supply by the LLP. Nevertheless, I accept that the Feedstock Agreement is “immediately and directly related” to the supplies of energy and ROCs to be made by the LLP. Further, the LLP has put money at risk under the Feedstock Agreement but the contract and so future suppliers are conditional on the construction of the plant. I have been unable to make any findings as to the significance of that condition as the appellant did not produce the relevant construction contracts.

99. There are two potential sources of income to the LLP, the energy contract and the sale of ROCs. I have found that there are no contracts or other arrangements for the sale of ROCs in the relevant period and so they are in my view irrelevant in establishing whether the LLP had commenced operational activities. The appellant did not produce the energy contract and accordingly in my view the appellant has not demonstrated that the electricity contract amounted to the kind of commitment inferred in the third limb of Special Commissioner Hellier’s test.

100. I am therefore not satisfied that the appellant has shown that the LLP has commenced operational activities beyond the commitments in the Feedstock Agreement which in any event are contingent on the construction of the plant.”

112. Mr Wardle had failed to produce any evidence of “operational activities” beyond the conditional Feedstock Agreement. As a result, the FTT was not able to make any finding of fact as to the nature of the financial commitments of the LLP or the contracts and arrangements to which it was party. Neither HMRC nor the FTT could evaluate Mr Wardle’s claim that all relevant contracts had been executed so that (taken with the parties’ common interest) the plant would be completed. That led the FTT to conclude:

“101. In the absence of sales to customers, the appellant sought to rely on the principles in *Mansell* provides (sic) an alternative route to establishing the

commencement of a trade. Special Commissioner Hellier's principles do not apply readily to the current circumstances, in particular the assumption that a business must be set up before it can commence operational activities.

102. However, even applying the principles loosely on the basis that each case must be decided on its own facts, I am not satisfied that the appellant has demonstrated that the LLP has commenced trading in the period.”

John Wardle v HMRC (“Wardle 3”), [2024] UKFTT 00543 (TC)

113. Mr Wardle was back in the FTT for a third time earlier this year, having claimed entrepreneurs’ relief in relation to the disposal of his remaining interest in the LLP involved in *Wardle 2*. This disposal took place on 28 February 2020, which was less than two years after the time (June 2019) when electricity was generated commercially for the first time. To qualify for entrepreneurs’ relief at the relevant time, the LLP needed to be carrying on a trade and to have done so for at least two years. Mr Wardle argued (as he had done in *Wardle 2*) that the LLP’s trade started at financial close (on 21 August 2015), but this time he produced lots of evidence of what had happened at financial close. HMRC asserted that the LLP was not trading on 28 February 2018, because construction was incomplete, commissioning was outstanding, ROC Accreditation had not been obtained, electricity had not been produced and, accordingly, the LLP was not in a position to trade with anyone.

114. The FTT decided that the test it should apply to determine when the LLP started trading was the test in *Mansell*. It was common ground that the LLP had a specific concept of the type of activity to be carried on and so the first step in the *Mansell* test was satisfied.

115. The FTT was satisfied that the second step was satisfied. Here the FTT concluded (at [115]) that:

“We have concluded that ‘set-up’ does not require full, 100% completion. In reaching this decision, we refer to and rely on the wording of *Mansell* which qualifies ‘set-up’ with the words “to the extent it needs to be set up”, which suggest to us that there is a threshold level at which ‘set-up’ can be achieved although incomplete. We consider that this view is supported by *Microfusion* where the *Mansell* test was satisfied in the absence of the DCMS certification and *Hunt* where the *Mansell* test was satisfied in the absence of the Gambling Licence. Accordingly, Step 2 requires the setting up of the business, to the extent it needs to be set up which is a fact-sensitive analysis and what is required to set up one business to the requisite level will vary (potentially greatly) from what is required to set up another. Further to Judge Hyde’s comment in *Wardle 2*, §101, we also consider that, perhaps depending on the trade in question, set-up can co-exist with operational activity in that there is not necessarily a bright line moving between the two, but that, in reality, the two could proceed hand-in-hand.”

116. The FTT was satisfied that the second step in the *Mansell* test was satisfied because the partnership agreement regulating the LLP organised the decision-making structure and management. Finance was fully organised, and funds had been drawn down. Finally, the project had reached financial close, where the suite of 56 agreements was signed. Of these, the FTT said:

“Whilst it is true that the suite of agreements could possibly have been terminated, we consider this unlikely as very significant work had been undertaken, the counterparties had a common goal and, from at least Financial Close all parties were committed. Fourth, on 24 August 2015 notices to proceed were issued, as detailed at paragraph 38 above. In summary, the train was on the tracks travelling to its destination. Its journey appears to us rather like a continuum, and having a genuine and very

substantial commercial underpinning and purpose. It was being conducted under the integrated suite of agreements determining many aspects of its activity, including operational activities as described below. These were inter-related and had been drawn up to a high degree of complex legal, financial and technical detail. For the avoidance of doubt, we have given anxious scrutiny to the fact that as at 28 February 2018 the G59 certificate was not obtained and Clause 2.2 of the PPA was not satisfied, as not all of the pre-conditions were met. However, for the reasons given in paragraph 115 above, we are satisfied that this does not preclude Step 2 from being satisfied. We note that the level of ‘set up’ in this case is commensurate with the level of set up in *Hunt*, albeit we have taken into account that these are different businesses and, therefore, that the decision in *Hunt* is not determinative.”

117. The PPA referred to here is a power purchase agreement the LLP entered into with a Grid company relating to the sale of electricity. The PPA was subject to certain conditions precedent all of which needed to be satisfied before the plant could generate electricity commercially. Interestingly, although not extracted by the FTT, clause 3 of the PPA (which dealt with construction and commissioning of the plant) was not subject to the conditions precedent. Clause 4.2 of the PPA stated that the LLP agreed to sell and the Grid company agreed to buy “...all Metered Output produced by the Facility that is delivered to the Delivery Point from the later of (i) the CP Satisfaction Date and (ii) the Commissioning Start Time until the end of the Contract Term.” The Commissioning Start Time was defined as the date on which the G59 certificate was issued.

118. As to the third step in the *Mansell* test, the FTT said that HMRC had conceded that, if the second step was satisfied, then the PPA would satisfy the third step as the PPA amounted to operational activity, being dealings with a third party that were immediately and directly related to the supplies to be made which it is hoped will give rise to expected profit and which involved the LLP putting money at risk. The FTT agreed. As far as conditionality was concerned, the FTT observed (at [117]) that “We have again taken into consideration the fact that, as at 28 February 2018 the LLP had not received the G59, nor had it satisfied the Condition Precedent at Clause 2.2 (a) of the PPA. However, again in reliance on *Microfusion* and *Hunt*, we do not think that this precludes the PPA from satisfying the third step.”

119. *Wardle 3* is a very recent FTT decision, and it is difficult, therefore, to gauge how it has been received, for example it has not (until now) been considered in any subsequent cases that we are aware of, nor has there been time to see whether commentators agree with the FTT’s analysis and decision. It would be fair to say that it has not been at all well received by HMRC, and Mr Stone (who was critical of a number of aspects of the decision) told us that HMRC have appealed the decision.

HMRC v Suterwalla (“*Suterwalla*”), [2024] UKUT 00188 (TCC)

120. This is an Upper Tribunal decision on the rate of SDLT payable on the purchase of a property, in particular whether a paddock acquired by Mr and Mrs Suterwalla as part of their purchase of a property was part of the grounds of the house they were buying. Its relevance to us is the comments the UT made in paragraph [23] of their decision:

“In [57], the FTT gave no reasons for disagreeing with decision of the FTT in *Brandbros*, a case in which Mr Cannon had appeared for the taxpayer and deployed the same argument based on *scintilla temporis*, but where the panel reached the opposite conclusion to the FTT in this case. Of course, the decision of one FTT is strictly not binding on another FTT as a matter of precedent, but the principle of judicial comity, or horizontal *stare decisis*, requires that a FTT should follow the decision of a previous tribunal of co-

ordinate jurisdiction unless ‘convinced’ or ‘satisfied’ (there is no practical difference between the two) that the earlier decision was wrong (see *Gilchrist v HMRC* [2014] UKUT 169 (TCC) at [91] to [94]). There are good reasons for this practice: it promotes consistency in judicial decisions and predictability of outcomes thereby avoiding re-litigation of identical legal issues, and it builds public confidence in the appeals process by ensuring that similar cases are treated similarly over time. If a later FTT considers that a previous decision of the FTT on materially identical facts and/or law was wrong, then it should set out why. It need not do so at great length but simply stating, as the FTT did in this case, that other decisions not on the same point are preferred leaves the reader in the dark. We consider that, where a FTT decides not to follow the decision of another FTT on the same or a materially similar point, it should explain why it has taken a contrary view.”

HMRC’S SUBMISSIONS

121. Mr Stone starts by submitting that, by identifying a key feature of trading (the need to deal with someone), *Ransom v Higgs*, helps in determining when a trade has commenced. Until a person has set up his business and is ready to face his customers, the trade cannot have commenced. Trading involves dealing with people (supplying them with goods or services). Until a person is ready to do that, they cannot be said to have started trading.

122. The authorities, especially *Mansell*, provide guidance as to when a trade commences, but *Mansell* is not to be treated as akin to a statutory test (indeed, it is only a first instance decision) and its guidance needs to be applied in a way that is sensitive to the features of the particular trade in question.

123. In *Birmingham Cattle* the question was when a company commenced its trade or business. The trade was manufacturing products from the by-products of the butcher’s trade. Rowlatt J drew a distinction between necessary steps that were preparatory to commencing business (or “getting ready”) and commencing business itself. The preparatory steps included: finding places of business; contracting for the erection of works; purchasing machinery and plant. The trade only commenced when the company “began to take the raw materials and to turn out their product”.

124. Although only a short judgment, the following principles derived from the judgment have been consistently applied in later authorities:

- (1) expenditure on creating the fixed capital of a business, such as the premises, plant and machinery (broadly, what might be termed “Capex”) does not constitute the commencement of a trade; whereas
- (2) a trade may commence when a company incurs expenditure on the items or materials which will generate the company’s profits (broadly, what might be termed “Opex”) – in that case, the raw materials which the company would use to turn out its product; and
- (3) it is not necessary for a company to have actually made a sale in order to have commenced trading.

125. In *Khan* Lord Millett observed that everything done prior to 25 January 1994 had been “preparatory to the commencement of trading”. The activities done before that date included taking a lease of premises, contracting for the conversion and fitting out of the premises, purchasing equipment. Trading had not commenced because the restaurant was not open for business; no food had been bought; and no bookings had been taken. In other words, the business was not ready to face its customers.

126. Lord Millett expressed doubts as to whether Rowlatt J’s decision in *Birmingham Cattle* was “right on the facts”. As the Special Commissioner in *Mansell* explained, these doubts do not undermine the correctness of *Birmingham Cattle* on the issue of when a trade commences. Business is a wider concept than trade and generally starts earlier. And in any event, Lord Millett’s comments about when the trade (as opposed to the business) commenced are entirely in accordance with *Birmingham Cattle*.

127. In *Mansell* the Special Commissioner held that the taxpayer had not set up and commenced a trade until he executed option contracts granting him interests in the land. On a number of occasions in his review of the case law, the Special Commissioner reiterated that expenditure on plant and machinery is merely preparatory to trading. He drew the distinction between activities involving expenditure on setting up the business (again, broadly, Capex) and those involving expenditure on acquiring the thing which was to be turned to account by being supplied (broadly, Opex).

128. At [88], the Special Commissioner said that the distinction between setting up a trade and actually commencing the trade was similar to the distinctions drawn in *Slater, Khan*, and *Birmingham Cattle*. Properly understood, there is no contradiction between the approach in *Mansell* and that in *Birmingham Cattle*.

129. On the third limb of the *Mansell* test, framework agreements (such as the Gazprom agreement) are not enough. There must be a contract for the acquisition or sale of something specific – like food coming into a restaurant.

130. In *Tower MCashback Henderson J* described the test in *Mansell* as “useful” and stated that “[e]very case will turn on its own facts, but in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin”. At [89] (in the statutory context of capital allowances) he said, “In the context of a trade, it seems to me that a person cannot normally be said to be carrying it on within the meaning of s 11 if he is not yet in a position to start turning the business to account, or operating it, in a way that is designed (at least ultimately) to yield a profit”. Henderson J upheld the decision of the Special Commissioner that LLP1 had not commenced trading merely by contracting to acquire a capital asset that it intended to exploit in due course. Henderson J’s judgment is consistent with the earlier authorities in requiring a business to be ready to face its customers.

131. In *Hunt* the FTT held that Altala had commenced the trade of operating a “Health Lottery” for the benefit of the NHS, despite not having obtained the necessary Gambling Commission licence, because it had (among other things) implemented and fully tested its IT systems and sales infrastructure and entered into agreements with the third parties on whose behalf it was to operate the lottery. Altala had incurred expenditure on the production of the “Play Cards” which were the physical item it was to use to generate its profits. Altala had got everything ready and spent money on things that would actually be used. Despite the lack of licence, the trade had been set up and there had been operational activity. Even if it could be said that Putney’s not being ready was the builder’s fault (it paid damages), it is still the case that Putney was not ready, in contrast to Altala, which was – it just need the licence to “pull the trigger”.

132. In *Wardle 2* the FTT held that a LLP intending to operate a power plant had not commenced a trade in circumstances where (a) the plant had not been constructed and (b) the taxpayer had entered into a contract which was immediately and directly related to the supplies to be made, but which was conditional on construction of the plant. At [97], Judge Hyde noted that the analysis in *Mansell* at [93] “looks at the revenue side of the business, raw materials and sales, including contracts for both”.

133. *Wardle 3* misunderstands the “to the extent that” caveat in *Mansell*. Both that decision and *Tower MCashback* are very clear that set-up must have been completed before a trade can start. The FTT was wrong to think that HMRC had conceded on the third limb of the *Mansell* test. It belies common sense to accept that a business is operational whilst challenging whether it has been set up. The FTT was also wrong to think that it was following *Wardle 2*. Continuum/train is a wrong and misleading analogy, but to follow it, a business is only trading once the train has reached its destination. The FTT has ignored the difference between trading and setting up a trade. It is also not consistent with the test developed in *Khan* of being open for business or ready to face customers.

134. By the EIS Deadline, Putney was not carrying on a trade as understood in *Ransom v Higgs*, involving “the exchange of goods, or of services, for reward” nor was it ready to face its customers.

135. Although by the EIS Deadline, Putney had satisfied the first stage towards commencing a trade identified in *Mansell*, namely the identification of its intended profit-making activities, by that date it had not satisfied the second or third stages.

136. By the EIS Deadline, Putney still needed further preparatory work to be done before the trade could properly be classified as having been “set up”. In particular, Putney’s trade was not “set up” until Putney had put in place the physical infrastructure needed to carry out its profit-making activity. Only then was Putney in a position to commence “operational activities”.

137. By the EIS Deadline, Putney had not completed the essential steps of constructing the plant; and completing tests to ensure that the plant was able to generate and provide electricity safely. It was not, by that date, in a position to trade with anyone.

138. Even if Putney had “set up” its trade, by the EIS Deadline, Putney had not undertaken “operational activities”. By that date Putney had not completed either of the steps identified as crucial in the case-law: it had not begun to, nor was it in a position to, trade with customers; and it had not put money at risk which directly and immediately related to the supply of electricity, from which its profits would be generated (i.e. Opex).

139. The “initial steps” carried out by Putney up to financial close on 25 May 2017 were not immediately and directly related to the supplies which Putney intended to make to customers. Any expenses incurred in relation to these matters were in the nature of overheads.

140. Mr Stone says that the correctness of this interpretation of the HoT in Putney’s case is demonstrated by what happened in *Piston*’s case. *Piston* signed HoT on 14 October 2016 in relation to a project in Cambridge. Those HoT contained an identically worded clause 4(3). *Piston* later decided not to pursue the Cambridge project (as a result of “protracted negotiations and developer difficulties”). But despite deciding not to pursue this project, there is no documentary evidence that *Piston* made a payment to AGR under the HoT (albeit that Mr Shenkman was uncertain on this point).

141. Putney was free, after entering into the HoT, to decide not to pursue the Copse Road project, without incurring liability to AGR. It follows that, by entering into the HoT, Putney did not put money at risk. In any event, the HoT were not immediately or directly related to the supply of electricity; they did not impose any obligation on Putney to purchase gas or supply electricity.

142. Putney’s payment of the deposit and registration for the capacity market auction was not immediately and directly related to supply of electricity; in fact, it was at several removes from that activity. It was not a pre-condition of supplying electricity to a customer. Registration allowed Putney to participate in an auction which might result in its winning a

capacity market contract, which in turn would place an obligation on it to provide electricity if called upon to do so by the National Grid (but which could be provided through the electricity already supplied to Gazprom).

143. To summarise the position with respect to the capacity market:

(1) Under the terms of the Flexitricity Agreement, Putney's obligation to purchase capacity market contracts from Flexitricity only came into effect when the Copse Road plant became operational on 31 August 2018;

(2) Putney did not come under any obligation to a National Grid entity, or to any other person, to provide capacity until 31 August 2018, when the plant became operational and Putney received the "Capacity Agreement Notice" from the National Grid;

(3) By the EIS Deadline, Putney had not come under any obligation to provide capacity, or to supply electricity, under the Flexitricity Agreement or any other capacity market contract; and

(4) By the EIS Deadline, Putney did not receive any revenue under a capacity market contract nor was it at risk of paying any penalty for failing to provide capacity. It was only on risk once the plant was operational and was able to produce electricity.

(5) The deposit was returnable to Putney in a number of circumstances, including if Putney chose not to provide confirmation of its intention to bid in an auction, was unsuccessful in its bid, or transferred its capacity agreement to another person. The deposit is, in those circumstances, released back to the applicant. So, by paying the deposit, Putney had not taken on financial risk in the sense that it would necessarily lose the money if the Copse Road project did not proceed to completion.

144. By the EIS Deadline, Putney had not completed construction of the Copse Road plant; this did not occur until 31 August 2018. So,

(1) It was therefore not in a position to take in the raw material (gas) or turn out its product to sell (electricity) and so was not able to generate revenue or profits of its trade.

(2) It had not entered into any agreement which obliged it to purchase any specific amount of gas or sell any specific amount of electricity, at any particular date in the future. It had merely agreed a conditional framework with Gazprom within which it could, in future, purchase gas and sell electricity. Until the plant was completed, Putney was not under any obligation to buy gas or sell electricity.

(3) Putney had invested funds into the construction of the fixed assets that would be used in its trade but had taken on no financial risk in respect of its raw materials or finished product.

145. The establishment of a trade of generating and selling electricity from a gas power plant involves two distinct phases: the construction phase up to completion of the plant, involving capital expenditure, and the operational phase during in which the plant is run and the operator generates profits from sales. By the EIS Deadline, Putney was in the former. Putney was even further from establishing a trade.

146. There is a clear distinction in this legislation between preparing and carrying on a trade. There is a clear two-year time limit – this is a bright line, and some will fail. To an extent this closes the door on using EIS finance for industries with long set-up lead times, but there

is no reason to think Parliament intended EIS reliefs for all industries. This requirement was clear and known at the outset. There is no unfairness in requiring the condition to be met.

The Appellants' Submissions

147. In *Ransom v Higgs* Lord Wilberforce identifies “certain characteristics ...which trade normally has”. The issue there was whether a particular set of arrangements amounted to a trade at all. However, this tells us nothing about when something which is undoubtedly a trade actually commences. Mr Ewart submits that trade is a broad commercial concept. He refers us to *Ingenious* and submits that, if the question of trading is a broad, commercial one, it would be odd if the question of when a person is trading were a narrow juristic one. So, focusing only on issues such as the Gazprom contracts being conditional is a sideshow – commercial imperatives are important too.

148. *Birmingham Cattle* was an *ex tempore* judgment with limited reasoning and was expressly doubted by the House of Lords in *Khan*. Further, Rowlatt J appeared to doubt his own reasoning in *Kirk and Randall*. The FTT in *Wardle 2* and *Wardle 3* expressly preferred *Mansell* and *Hunt* to *Birmingham Cattle*.

149. Mr Ewart says that, if in fact you have started to trade (to deal with your customers), you must have set your trade up. *Khan* confirms that the touchstone for starting to trade is dealing with customers. If it is right (as Mr Ewart says it is) that a trade starts when the trader engages with customers or suppliers and, if a trader has engaged with customers, they must *ex hypothesi* have set their trade up to the extent required for it to have commenced. Mr Ewart agrees that setting up trade infrastructure is not enough for trade to have commenced, but says that a restaurateur taking bookings for a restaurant which they have not started to build and will not open for a period (possibly as long as a year) is trading as soon as they take these bookings. Here, a forward sale of electricity by Putney would have been enough for a trade (although this did not happen).

150. Looking at the second limb of the *Mansell* test and the need to set up a trade “(to the extent it needs to be set up)”, therefore, Mr Ewart submits that all a trader needs to set up is what he needs in place to interface with customers/suppliers – this may not need much beyond internal decision-making processes. At one point, Mr Ewart conceded that he was not saying that someone who has hardly started to set up the infrastructure of a trade could enter conditional contracts and say they had started to trade. At that point, Mr Ewart said that a court or tribunal would need to look at all factors to come to a decision. At the very least, it is not a “showstopper” that operational contracts are conditional, and the putative trader is not currently able to make any supply. Later, Mr Ewart’s position hardened to the position recorded in [149] above and [175] below.

151. *Wardle 3* is not inconsistent with *Wardle 2*. It decides that, if a person has started to carry on operational activity, they have met step 2 in *Mansell* and set-up can continue after the trade has started. The principles Mr Ewart extracts from *Wardle 2* are that a person does not need to set up the entire trade infrastructure to start the trade and it is not a showstopper that contracts are conditional. Mr Ewart stressed the similarity between the statutory requirements and fact patterns in *Wardle 2* and *Wardle 3* and the instant case (in particular, the similarities between financial close in those cases and the fact pattern we are considering). Against that background, he reminded us of the Upper Tribunal’s comments in *Suterwalla*, which (he submitted) created a presumption in favour of our adopting the same approach to the question when a trade commences.

152. HMRC are wrong to contend that Putney had not yet “readied [itself] to face and find customers” by 4 April 2018, given that Putney had not only faced and found customers, but also contracted with them in the form of Gazprom.

153. HMRC say that Putney had not yet constructed the plant or completed necessary safety checks by 5 April 2018. However, Mr Ewart repeats that such an approach is a derogation from the approach set out in *Mansell*. The Special Commissioner refers to operational activities as dealings with third parties directly and immediately related to supplies to be made; in other words, the trader may not yet be in a position to actually make the supply, but will still be trading if they have put money at risk and contracted with third parties in relation to future supplies. That is what Putney had done.

154. As to the Gazprom agreement, Mr Ewart says that HMRC's position is misguided. In particular, he comments:

(1) To extract from the conditional nature of the contract, as HMRC have done, a contention that Putney therefore put no money at risk, amounts to a blinkered and unrealistic view of Putney's activities. Money was put at risk under the various contractual agreements entered into on financial close or soon thereafter. This represented the broader contractual framework under which Putney was operating. Putney's activities should be considered as a whole, rather than focusing on the Gazprom agreement in an isolated and commercially unrealistic way.

(2) Whilst it is correct that in a limited sense the Gazprom PPA was an "option" agreement, that merely reflected the nature of Putney's business as a gas-peaking plant. The amount of electricity which Putney would supply was always intended to be flexible according to demand. The key point is that Putney had entered into this agreement by which it could access gas and sell electricity.

(3) It was "virtually certain" that Gazprom would purchase the electricity produced despite there being no fixed quantity to be produced and sold. It is usual in the electricity market that suppliers agree to supply electricity without a fixed quantity being agreed.

(4) Even considered in isolation, the suggestion that the Gazprom agreement itself represented "no risk" for Putney is wrong. Whilst certain obligations only arose from the point of commissioning the plant, the agreement was in force immediately upon execution. This put various obligations on Putney, including "not to do anything which does or is likely to reduce the facility's ability to generate electricity to the delivery point". Accordingly, if Putney took any step to halt the progress being made on the Copse Road project, it ran the risk of legal action from Gazprom for breach of contract (as well as from its other contracting parties). Clause 3 of the agreement allowed Gazprom to specify "power optimisation" transactions, to be entered into at Gazprom's election, effectively whenever market conditions made it profitable to do so. If the Copse Road plant was unable to run, Putney could become liable for a "balancing charge".

155. In *Mansell*, the Special Commissioner referred to (as trading) "the speculator who contracts to sell what he has not bought" (at [93]). Putney contracted to provide capacity in the capacity market which it was not yet able to provide, and to sell electricity to Gazprom, albeit that it was not yet in a position to generate that electricity. That was the nature of its risk. In *Mansell*, the Special Commissioner specifically stated that it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced and cited the comments made by Lord Millett in *Khan* which "tend to suggest that selling the first meal is not the earliest time when trading starts"

156. In particular, trading can commence with an agreement to sell something in the future: a person might trade in "futures". The key point is not whether the trader is able to perform or deliver upon the contract immediately, but whether money is put at risk pursuant to dealings

with third parties immediately and directly related to supplies to be made, and which it is hoped will give rise to the expected profits.

157. In *Hunt*, the question was whether Altala had commenced trading prior to its liquidation. It was held to be trading although it had not yet run a lottery or sold tickets. Putney's position is stronger since it had contractual arrangements in place with purchasers, along with other contractual counterparties. By its nature, the Copse Road project was a complex, time-consuming and costly venture, which required Putney to enter into contracts (and be on risk) well in advance of electricity actually being supplied.

158. As far as Piston is concerned, it had progressed beyond a mere review of the possibilities and had a specific idea in mind of its intended profit-making activities. This can be seen from the detailed Investment Committee Paper produced in January 2018. Despite the uncertainty relating to the particular site, the intended profit-making activity (the sale of electricity generated from the construction and operation of a power plant, and in line with the financial projections set out in the Investment Paper) was nevertheless clear. The reason for not yet having finalised a site is important. The delay was not caused by any lack of intent from Piston, nor from any doubts or lack of specificity as to the viability of its business plan. Rather, issues arose with particular sites, including for example in relation to the gas connection load following due diligence.

159. Further, Piston entered into dealings with third parties which were immediately and directly related to the supplies to be made and which it was hoped would give rise to the expected profits. In particular,

- (1) On 11 October 2016, Piston registered for the capacity market.
- (2) On 14 October 2016, Piston signed heads of terms with AGR in relation to the Cambridge Site. This contract contained both binding and non-binding clauses. The binding clauses included an exclusivity period in respect of the site and for a fee payable by Piston to AGR of £20,000 in the event that Piston, without good reason, took any step which terminated the prequalification status of the Cambridge Site.
- (3) On 4 April 2016, Piston entered into an agreement with Triple Point, by which Triple Point would provide business administration services to Piston in return for a fee amounting to 2.25% of Piston's net asset value (+VAT).
- (4) Piston had been engaging with third parties in relation to the Caswell Site since April 2016, including negotiations as to the terms of the contracts that would in due course be entered into.

160. Whilst Piston had further steps to take, it nevertheless had reached a point by which, at 4 April 2018, it was engaging with customers and had the real possibility of profit. Once a suitable site was identified, Piston could accelerate the execution of the relevant contractual documentation so as to progress to the next phase of its operations. Piston's financial close took place on 3 October 2018, and construction work commenced during the same month, demonstrating the significant progress that had been made prior to that point in terms of negotiation and due diligence.

DISCUSSION

161. As we can see from *Wardle 1*, a careful scrutiny of the relevant statutory provisions is necessary in order to understand the test which needs to be satisfied. So, we should start by reminding ourselves of the question we need to answer in its statutory context, which is whether by the EIS Deadline each Appellant had begun to carry on the qualifying trade which, on the date when the EIS Shares were issued, it had intended to carry on (section

179(2) ITA 2007). A “qualifying trade” is one which is “conducted on a commercial basis with a view to the realisation of profits” (section 189 ITA 2007).

162. Here, as Mr Stone rightly notes, the statute confers valuable tax reliefs provided certain requirements are met. One of these requirements is that, if the issuing company issued shares to raise money for the costs of preparing to set up (or preparing to set up and then carrying on) a qualifying trade, the company must have begun to carry on the trade within two years of the share issue. That is a “bright line” test: the company must carry on the trade, and it must do so within the time set down by Parliament. In *Tower MCashback* (at [89]), Henderson J considered that the statutory context (that capital allowances would be available in a later year if the trade had not been carried on in the year in question) had an impact on his approach to the issue before him. It might be thought that the absolute nature of this test might have an impact on how we should go about answering the question that confronts us, perhaps suggesting that we should be more lenient in our approach to answering that question. We do not consider that would be an appropriate approach. As Mr Stone stressed, Parliament has (for whatever reason) imposed a very clear timing requirement, and it is not for us to stretch the concept of when a trade starts and thus effectively to extend the period Parliament has prescribed.

163. We should, however, also bear in mind the point made by Mr Ewart, that the time within which the funds raised by the EIS share issue have to be expended runs until the end of two years after the time when issuer begins to carry on the qualifying trade (section 175 ITA 2007). So, whatever else starting to carry on a trade might mean, it cannot bear a meaning which requires all the funds raised by the share issue to have been spent.

164. It is not suggested that the activity which either Appellant ended up carrying on was not a qualifying trade. Nevertheless, Mr Stone directed us to *Ransom v Higgs*, and the discussion of what amounts to a trade in that case. This is because, in his submission, unless we can look at what an Appellant was doing on the EIS Deadline and conclude that it was a trade, the company cannot have started to carry on a trade by then. The tenor of the speeches in that case was to the effect that, to trade, a person must do something with someone else (so, for example, provide services or sell goods to another person). Here, Mr Stone says, all the Appellants had done was contract on a conditional basis to do buy gas and sell electricity in the future. There is an attractive symmetry to Mr Stone’s submission, but it seems to us that it is possible to be “open for business” (in the words of Lord Millet in *Khan v Miah*) and thus trading without currently having a customer relationship with anyone (for example, a restaurant that has opened its doors but where no diners have yet booked or walked in off the street). On that basis, we cannot accept that the Appellants were not trading on the EIS Deadline just because they were not supplying electricity, or subject to a “live” contractual obligation to supply electricity as and when required.

165. Mr Ewart directed us to *Ingenious* and the points made in the passages extracted above to the effect that the question whether a person is trading is one of commercial substance to be decided by weighing up all relevant facts, carrying out a “multi-factorial evaluation” of the whole picture, as Henderson LJ described the process in *Samarkand Film Partnership No 3 and Ors v HMRC*, [2017] EWCA Civ 77 at [59]. We agree with Mr Ewart’s submission that this is the correct approach to take in deciding whether a person is trading. We also agree with him that it must follow that a similar approach should be taken to identifying when that trade started. It would be bizarre if the question whether an activity a person carries on is trading at all were one of commercial substance to be answered by reviewing the whole picture, whereas the question whether a person is trading at a particular point in time (which we regard as synonymous with whether they have started to trade) fell to be answered in a narrow, formalistic way.

166. Lots of very different kinds of activities can amount to a trade, and what needs to be done to start one trade may be radically different from what is needed to start another. We can see here that an awful lot needs to be done (both in terms of activity and financial outlay) to set up a power plant. In contrast (to take Mr Ewart's example) next to nothing is required to set up in business as a personal trainer. This was recognised in *Mansell*, when the Special Commissioner observed (at [88]) that "Depending on the trade more or less than this may be required before it is set up." We consider that the question whether a trade has begun needs to be answered as a question of commercial substance, looking at the whole picture of what is going on and, most importantly, considering what is required to start a trade of the kind in question. Looking at the commercial substance may mean (as the FTT did in *Wardle 3*) placing more weight on the commercial reality of a set of arrangements than on the precise legal analysis of contractual rights and obligations.

167. Against that background, we turn to consider the cases outlined above to see what guidance they give on how we might go about answering the question whether/when a trade began. We start with the authorities which are, or at least have the potential of being, binding on us.

The Binding Authorities

168. The first of these is *Birmingham Cattle*. The General Commissioners held that the company had not started to trade until October 1913. Having identified the question as being when the company commenced its trade or business, Rowlatt J concluded that the company commenced business in October 2013 and said that the General Commissioners were correct to have reached this conclusion. That, of course, is not the conclusion which the General Commissioners had reached. They concluded that the company had not started to trade before October 2013. We can see in *Kirk and Randall* that Rowlatt J had begun to doubt his own conclusion that the company was not carrying on business before October 2013. His reason for losing confidence in that conclusion was a realisation that he had not taken into account the company's own internal functions, and *Khan* confirms that Rowlatt J was right to harbour those doubts. Although Rowlatt J lost confidence in his conclusion on the business point, the statutory question he was answering was whether the company had begun a trade or business. He seems to have regarded the concepts of trade and business as being broadly the same, as we can see from the fact that he endorsed the General Commissioners' decision that the company was not trading before October 2013 by saying that it had not started business before then. He was clearly of the opinion that, at least where a manufacturing activity was concerned, the trade/business did not start until the putative trader had acquired the raw materials needed and begun to turn out their product.

169. The point we take from this case is that Rowlatt J regarded the starting of a trade as being a very physical, operational test ("Have I started to make things?"). The very brief summary of the facts refers to contracts entered into by the company for the purchase of materials and the sale of products. The nature of those contracts (whether they were framework agreements or more definitive agreements) has been the subject of some speculation, including in *Mansell*, but nothing can be deduced from the report about them. What we do see is that, whatever the nature of those contracts, Rowlatt J dismissed them and focused on the fact that no raw materials came in and no sausage skins were made in the period between the signing of the contracts and October 2013.

170. Moving onto *Khan*, the House of Lords decided that a business had commenced when the parties started to get ready to open their restaurant. As Lord Millet put it, the question was not whether the restaurant had started to trade, but whether the parties had started on their joint enterprise. Although the House of Lords did not need to decide in terms whether the partnership had started to trade, we can see Lord Millet drawing a clear distinction between

carrying on a business and starting to trade. He described everything that the partnership had done as being preparatory to the commencement of trading, which (at least in the context of a restaurant) he equated with being “open for business”.

171. Next, we come to *Tower MCashback*. Henderson J decided that an LLP, which had done no more than agree to purchase software, which it had yet to take delivery of, and which had not entered into any arrangements for the exploitation of that software, had not started to carry on a trade. Because so little had been done, Henderson J did not need to explore in any great detail what would have been required for the LLP to be carrying on a trade. The wider importance of *Tower MCashback* for us is what Henderson J had to say about the test in *Mansell*. The first point to make is that he considered that every case would turn on its own facts. This reflects the points we have already made, that the statutory context may impact on the precise question to be answered and what is needed to start one trade may be very different from what is needed to start another. Nevertheless, he considered that the Special Commissioner’s “test of the beginning of operational activities” (dealings with third parties immediately and directly related to the supplies to be made, which it is hoped will give rise to the expected profits and which involve the trader putting money at risk) to be a useful one, even though the statutory question he was answering was different. He then went on to say that “in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin” and he referred to the Special Commissioner’s examples of setting up a trade as including matters such as buying plant, organising the decision-making structure and sorting out finance.

172. The conclusion we draw from these cases is that a trade starts when operational activities start (for example, when my restaurant is open for business or when my factory starts to make things). To get to that point a trader will need to have set up their business infrastructure (for example, bought or leased a restaurant and fitted it out or bought or leased a factory and the necessary manufacturing equipment) and taken operational steps (for example, buying food for the restaurant or raw materials for the manufacturing process). The cases do not suggest that it is necessary to have achieved a sale, but it is necessary to be “open for business”, to be ready, willing and able to supply the relevant goods or services.

FTT/Special Commissioner Decisions

173. We turn now to *Mansell* and the more recent FTT decisions, which, whilst not strictly binding on us, clearly need to be considered in our decision-making.

174. The test adopted by the Special Commissioner in *Mansell* for deciding whether a trade had been “set up and commenced” has been adopted for more general use in deciding whether a trade had commenced or was being carried on at a particular time and, as we have seen, was endorsed for use outside its strict statutory context by Henderson J in *Tower MCashback*. Two passages in the Special Commissioner’s decision are relevant for us.

175. First, at [88] he says that “a trade cannot commence until it has been set up (to the extent it needs to be set up) and that acts of setting up are not commencing or carrying on the trade”. As we have seen, Mr. Ewart set great store by the words “to the extent it needs to be set up”. In his submission, an operational activity takes place when a putative trader enters a contract (even a conditional one) with a counterparty to incur what one might describe as revenue expenditure or to make a sale which it is hoped will produce trading income. Because *Khan* dealt with a restaurant business, we discussed a number of scenarios around the opening of a restaurant and when the restaurant trade would have started. In answer to a question we put to him during his closing submissions, Mr. Ewart took the example of a famous restaurateur, who planned to open a restaurant in a new city. Mr Ewart was quite clear that, if the restaurateur took bookings maybe as much as a year in advance at a time

when they still had to acquire and fit out the restaurant, they would have started to trade. The restaurateur does not need to have set up the restaurant in order to take that operational step. They can enter that contract, albeit at some personal risk, without having to set anything up at all. But, Mr Ewart says, they would be trading because they were carrying out operational activity, a dealing with a third party which it is hoped will produce revenue and which carries risk and *ex hypothesi* the trade infrastructure must have been set up (to the extent it needs to be, which on this example is not very much at all) to enable the putative trader to do this.

176. We are not with Mr. Ewart on this point. The effect of his submission, if it is correct, is almost (if not entirely) to do away with any requirement for necessary trading infrastructure to be established before a business can be said to be trading. Going back to Mr Ewart's initial submission, that the question whether a trade has started needs to be answered by taking a commercial, holistic view of all the facts, we simply cannot accept that a business which is not able to carry out its intended operational activities, because those intending to carry on the business have not assembled the necessary infrastructure, can be said in any commercial sense to have started to trade. It is particularly difficult to accept that proposition in the context of a statutory scheme which draws such a clear distinction between preparing to carry on a trade and carrying on a trade as the scheme we are concerned with does. Mr Ewart's submission is also, in our view, wholly out of line with the position adopted in the cases which are binding on us. Henderson J in *Tower MCashback* clearly thought that setting up the business infrastructure was a prerequisite to trading, that is certainly the view that Rowlatt J took in *Birmingham Cattle* and Lord Millet in *Khan* also very clearly thought that the partnership had not started to trade before the restaurant opened its doors for business and he drew a clear distinction between that activity and the preparatory activities which went before it.

177. Mr Ewart submitted that, if the Special Commissioner in *Mansell* had meant to say that, for a trade to commence, the putative trader must be "ready, willing and able" to make the supplies of goods or services in question, he would have said so. He equated dealing with customers as the start of a trade and that can be before a trader is ready to supply goods or services.

178. We agree that the Special Commissioner was clear (at [91]) that it was not necessary for a sale to have been made or a service supplied before a trade commences, but it is also clear that he referred (at [93]) to a person who "having set up his business, begins operational activities" (our emphasis). In the context of Mr Mansell's trade (acquiring land interests to turn to personal account), it is perhaps not surprising that he did not refer to him as being "ready, willing and able" to supply goods or services, because Mr Mansell's business did not involve holding himself out in that way, but he did hold that Mr Mansell's trade did not start until he first acquired a land option ("the particular thing that was to be turned to account"). That trade did not start until Mr Mansell had the wherewithal to trade. He did not need any complicated infrastructure (like a power station), but he did need something to turn to account and his trade did not start until he had that. Albeit in the context of the third limb of his test, that is the Special Commissioner saying that a trade does not commence until the putative trader is able to carry out the trading activity.

179. The Special Commissioner in *Mansell* was, of course, dealing with a statute which required a trade to have been "set up and commenced" by a particular time and that statutory requirement colours some of the language of his decision. So, at [107] we see the Special Commissioner observing that Mr Mansell being ready to negotiate with third parties might indicate that his business had been set up, but not that it had commenced. However, although starting with the particular statutory language, the points made at [88] and [93] are more general observations about when a trade starts and the difference between that and

preparatory matters (purchasing plant, getting ready to face customers). In our judgment, the words “(to the extent it needs to be set up)” do no more than anticipate the point made four lines later in the Special Commissioner’s decision, that “Depending on the trade more or less than [the examples of preparatory activities he had just given] may be required before it is set up”. Neither those words, still less the Special Commissioner’s decision on when Mr Mansell himself started to trade, suggest that a trade can start before the putative trader is able to supply the goods or services or carry out other dealings inherent in their trade.

180. We should stress that we are not saying that the trade infrastructure must be completely assembled before a trade can commence. To go back to our example of a restaurant, suppose a restaurateur planned to open a restaurant with an upstairs and downstairs dining rooms with 20 covers each. To bring in some income, they open the restaurant when only the downstairs dining room is presentable (albeit not fully fitted out), and the kitchen only has capacity to cope with 20 covers a session. We consider that the trade starts at this point, when the restaurant is open for business, even though (at least for a period) the process of finishing off the downstairs dining room, opening the upstairs dining room and fully fitting out the kitchen (to cope with 40 covers a session) continues in parallel. This approach accommodates Mr Ewart’s point on section 175 ITA (that EIS funds are required to be invested no later than two years after the commencement of the trade).

181. The second passage is at [93], where the Special Commissioner sets out the three-limb test which we have seen discussed in later cases.

182. The first limb of this test has not attracted significant comment in later cases. This is not particularly surprising, as we consider that it would be most unlikely that someone would satisfy the second or third limbs of the *Mansell* test and yet fail the first. We have already discussed the second limb of the test in some detail, and all that the Special Commissioner did at [93] was simply refer back to the need to have set up business activities.

183. The third limb requires the trader to have begun operational activities. The Special Commissioner refers to dealings with third parties which are “immediately and directly related to the supplies to be made”. We agree with Mr Ewart that this is not a temporal test; what the Special Commissioner is doing here is drawing a distinction between activities involved in setting up the business and activities related to making supplies (either because they constitute part of the direct cost of the supply or because they involve making the supply itself). Although all the examples of operational activity given by the Special Commissioner at [93] involve doing something, rather than simply entering into a contract to do something in the future, his comments at [94] indicate that entering into contracts containing rights or obligations which give rise to a real possibility of loss or gain can amount to an operational activity. Although broader than the position adopted in *Birmingham Cattle* (which took the narrower view that the trade started when raw materials had been purchased and sausage skins had begun to be made, setting no store by the earlier contracts), this position seems to us to be consistent with the “open for business” approach adopted by the House of Lords in *Khan*. If a person is prepared to expose themselves to the real possibility of risk or reward in making supplies or incurring the direct costs of doing so, then it seems to us that they are “open for business” and have begun operational activities.

184. In *Hunt* the FTT found (at [78]) that Altala had clearly established a framework or structure for the trade. It also found (at [80]) that the contracts with the CICs were agreements to provide services. Although the contracts were conditional (Altala was not required to provide the core lottery-related supplies without a licence), Altala dealt with third parties as required by those agreements and, in doing so, incurred substantial expenditure and clearly put its money at risk in the hope that it would give rise to profits. In other words, the

FTT found that the second and third limbs of the *Mansell* test had been met by Altala. The FTT did not analyse the failure to obtain a licence as a failure to build the required infrastructure (on the contrary, it found that the required infrastructure had been created); instead (at [80]) it merely observed that, despite not having the required licence, Altala had created the required infrastructure and engaged in operational activities.

The effect of financial close for Putney

185. This would be a convenient point at which to consider the agreements entered into by Putney at financial close so far as they relate to operational matters. Looking at the contracts summarised at [44], contracts (1)-(5) clearly go to the establishment of the trade infrastructure. Contracts (6)-(9) deal with more operational matters. It was not suggested to us that the contract under which Triple Point agreed to provide business administration services was directly linked to Putney making supplies to anyone, and we discount that contract as well as the escrow and warranty contracts discussed at (10).

186. The contracts at (6) and (7) are contracts under which third parties will provide maintenance services. These contracts only become operative once the various pieces of equipment have been delivered and commissioned. Putney did not incur any immediate operating expenditure under those contracts before the EIS Deadline, but it did commit itself to such expenditure assuming the various pieces of equipment were commissioned.

187. The most significant contract is the agreement with Gazprom, under which Putney is to purchase gas from Gazprom and sell electricity back to it. That agreement exposes Putney to financial risk and reward in the future. The contract provides for the sale of gas and electricity in relation to the plant at the Copse Road site, and therefore no gas or electricity will be sold until the plant has been constructed.

188. Mr. Stone suggested that the Gazprom contract was conditional, in that there was no obligation on Putney until the plant had been constructed and no obvious obligation in the contract for Putney to secure the construction of the plant. We found the Gazprom contract a difficult one to analyse in this regard. Clause 3.1.6 contains a provision to the effect that Putney will not allow the plant to be degraded, but there is no express covenant under which Putney agrees in terms to procure the construction of the plant. We are not with Mr. Ewart when he says that clause 3.1.6 is effectively a covenant on the part of Putney to procure the construction of the plant. We would expect a provision of such importance, were it be agreed to by Putney, to be much more explicitly spelled out. In our view, clause 3.1.6 is an obligation on Putney's part not to do anything that might stop the plant being constructed or operating as planned. So, for example, Putney could not terminate the various construction contracts. However, we do not consider that anything turns on the precise interpretation of this contract. As we explained earlier, we consider the question whether Putney is trading at any point to be one which should be looked at in the light of the commercial reality of the overall arrangements. We agree with Mr Shenkman when he said that the contracts need to be looked at as a matrix. It would be wholly artificial to say that there is no real risk or reward on Putney in relation to the Gazprom contract, when it has already entered into an agreement with a third-party under which the plant will be constructed. In that context, we regard the Gazprom agreement as effectively committing Putney and Gazprom to a particular set of arrangements for the sale and purchase of gas and electricity and as exposing Putney to a real possibility of future operational risk or reward in relation to the generation of electricity at the Copse Road site.

189. The same is true of the contract with Flexitricity in relation to the capacity market contracts. Completion of the transfer of the capacity market contracts cannot take place until the Copse Road plant becomes operational. Again, given the matrix of contracts of which this

forms part and the commercial imperative of the Copse Road plant becoming operational, we do not set any great store by the conditionality of this contract either. The question it seems to us is whether the Flexitricity Agreement exposes Putney here to a real possibility of future operational risk or reward in relation to the capacity market contracts and it seems to us that, looked at commercially and in context, the Flexitricity Agreement does exactly that.

190. There is a difference between our case and *Hunt*. In that case Altala incurred immediate operating expenditure, in addition to the capital expenditure it incurred on establishing the trading infrastructure. Some of the expenditure incurred by Altala under the CIC contracts appears to have been expenditure already taken into account as expenditure on the trading infrastructure, but mention is made of expenditure on arranging the sale of tickets which is more operational. This is not the case here. Putney is exposed to future risk and reward under the Gazprom and Flexitricity contracts but is not required under either of these arrangements to incur immediate expenditure in addition to the, very substantial, capital expenditure being incurred in establishing the trading infrastructure. However, we do not consider that this is an important point. The question being asked by the Special Commissioner in *Mansell* at [94] was whether negotiations had culminated in obligations or assets and given rise to a real possibility of loss or gain. We consider that the Gazprom and Flexitricity contracts, viewed through the lens of the contractual matrix and overall commercial arrangements they form part of, do give rise to a real possibility of future loss or gain at an operational level. Looking at the third step or requirement in *Mansell* in isolation, we would hold that an operational activity has taken place, albeit that the conditionality of the contracts means that the effect of that activity (the negotiations culminating in the operating-level contracts) is suspended until the plant is commissioned.

191. For completeness, we should comment on Piston's position. It had signed heads of terms in relation to the Ely project. The heads of terms (as we explored in greater detail in relation to Putney) did not lock Piston into the Ely project they relate to. They provide a framework for the parties to work towards financial close. Piston was able to (and in due course did) "walk away" from the project without incurring a penalty and the money it paid to pre-qualify in the capacity contract process was not at risk if it withdrew from the process. The nature and quality of the arrangements Piston was party to at the time of the EIS Deadline were very different from those to which Putney was party; in particular, we do not consider that any of the arrangements Piston was party to at the time of the EIS Deadline exposed it to a real possibility of future operational risk or reward.

Is it enough that "the train was on the tracks travelling to its destination"?

192. The final two cases we need to consider are *Wardle 2* and *Wardle 3*. The issue that those cases (and *Wardle 3* in particular) raise is whether the "set up" of a trade (step 2 in the *Mansell* test) needs to have been completed before a trade can be said to have commenced. The FTT in *Wardle 3* held that at financial close (which was very similar to financial close in this case) there was a suite of documents which could have been terminated, but termination was highly unlikely "as very significant work had been undertaken, the counterparties had a common goal and, from at least Financial Close all parties were committed". That led the FTT to conclude at [116]:

"[T]he train was on the tracks travelling to its destination. Its journey appears to us rather like a continuum, and having a genuine and very substantial commercial underpinning and purpose. It was being conducted under the integrated suite of agreements determining many aspects of its activity, including operational activities as described below. These were inter-related and had been drawn up to a high degree of complex legal, financial and technical detail. For the avoidance of doubt, we have given

anxious scrutiny to the fact that as at 28 February 2018 the G59 certificate was not obtained and Clause 2.2 of the PPA was not satisfied, as not all of the pre-conditions were met. However, for the reasons given in paragraph 115 above, we are satisfied that this does not preclude Step 2 from being satisfied. We note that the level of ‘set up’ in this case is commensurate with the level of set up in *Hunt*, albeit we have taken into account that these are different businesses and, therefore, that the decision in *Hunt* is not determinative.”

193. The FTT discussed at some length (at [112]) whether to follow the test in *Mansell* or the test in *Birmingham Cattle*, which they regarded as inconsistent because “*Birmingham District Cattle* pinpoints the commencement of trade on the taking in of raw materials and the turning out of product whereas *Khan v Miah* and *Mansell* expressly acknowledge that trade can commence at an earlier time, being before the first sale”. *Birmingham Cattle* says that a manufacturing trade starts when the trader starts to make things; it says nothing at all about selling the manufactured goods. *Khan* talks about a restaurant being “open for business” and *Mansell* talks about starting operational activities, which it expressly acknowledges could be before a sale takes place. We do not perceive any inconsistency or tension between these three cases at all on the perceived need (or lack of need) for a sale.

194. On the wider point, the FTT thought that it should not follow *Birmingham Cattle* because of the doubts expressed about it by Rowlatt J in *Kirk and Randall* and the House of Lords in *Khan*. We have discussed these doubts at some length earlier, and we have seen that the doubts are around Rowlatt J’s approach to the concept of business not trade. In any event, we do not perceive any real difference between the approach in the two cases. *Birmingham Cattle* looked at a manufacturing business where the trade infrastructure had been set up and said that the business/trade started when the manufacturing process started. *Mansell* said that a trade would start when the infrastructure was set up (to the extent it needed to be) and operational activities started. The slight difference between the two approaches is that *Mansell* accepts that operational contracts which create a real possibility of future loss or gain can be sufficient.

195. None of this discussion is at all relevant to the question being posed at this point in *Wardle 3*, which is whether the trade infrastructure needs to have been assembled or whether it is sufficient that “the train was on the tracks travelling to its destination”. We have set out our conclusions and analysis on the questions whether and the extent to which the infrastructure of a trade needs to be established before a trade can be held to have commenced at [176]-[180] above. For the reasons we give there, a trade is not set up before the time when the putative trader is able to supply whatever goods or services or carry out whatever other dealings form the subject matter of the trade. Our attention has not been drawn to any authority that supports the proposition that a matrix of contracts, which, if performed, will result in the infrastructure of a trade being established, can be equated with an established trade infrastructure.

196. *Hunt* is not such a case. As we have explained, the FTT found that Altala had clearly established a framework or structure for the trade. It did not analyse the failure to obtain a licence as contributing to a failure to build the required infrastructure and merely observed that, despite not having the required licence, Altala had created the required infrastructure and engaged in operational activities.

197. Nor is *Wardle 2*. There the FTT noted that both the Special Commissioner in *Mansell* and Henderson J in *Tower MCashback* assumed that a business had to be set up before operational activity could commence. On the appellant’s submission that the contractual matrix entered at financial close was sufficient, the FTT thought that this was a “difficult

point”, but it was “conceivable” that this might be the case, especially so if “there are clear indicators of buying, selling and related activities, in effect the third limb of Special Commissioner Hellier’s principles”. However, on the facts the FTT did not need to reach a conclusion on the point as “the appellant has not shown that the LLP has commenced operational activities beyond the commitments in the Feedstock Agreement which in any event are contingent on the construction of the plant.” It is not at all clear to us that the FTT would have regarded operational commitments which were contingent on the completion of the second step in *Mansell* as satisfying the third step in *Mansell*, even if (which the FTT was unsure about) the third step could in principle be satisfied in circumstances where the second remained unsatisfied.

198. In the language of the metaphor in *Wardle 3*, it is not sufficient that the train is on the tracks travelling to its destination. Just as, for all its extraterritorial features, Lenin’s sealed train was still in Switzerland when it pulled out of Zurich station and only reached Russia when it crossed the border eight days later, so a person setting out on a journey to set up a trade only starts to carry out the trade when they have got to the end of their journey, however inevitable it might seem that they will reach their destination.

199. We are very conscious that our journey through the authorities has led us to a different destination from that reached by the FTT in *Wardle 3*. Mindful of the Upper Tribunal’s comments in *Suterwalla*, this made us pause and anxiously revisit our conclusion. However, although we have gone down a different track to our colleagues with no little diffidence and considerable regret, we remain convinced that our analysis at [176]-[180] above is correct and that the trading infrastructure must be actually (not just contractually) assembled, so that it can be used to deliver the trading activity, before a trade can be said to have commenced.

Damages paid by JCB/AGR

200. At [49] we noted that JCB should have delivered the generators by 8 December 2017 and AGR should completed the Works under the Balance of Plant Agreement by 31 December 2017, but they failed to do so. As a result, JCB and AGR paid liquidated damages to Putney. It is common ground that this compensation (which was compensation for lost profits) is taxable. Mr Ewart submits that the fact that compensation is paid for the delay shows the link between the two agreements and the profit-making activities of Putney. That much is clear (Putney could not trade and make a profit because the required plant had not been constructed), but it was not suggested, and we certainly would not accept, that the receipt of this compensation has any bearing on when the trade commenced. If anything, the receipt of compensation rather points in the other direction: compensation was paid because Putney could not trade (and thus make a profit).

201. In *Hunt* the FTT dealt with a situation where a third party’s act (certainly not default) had stopped a company carrying out its planned activities. As we have seen, the FTT held that Altala’s inability to operate a lottery because a third party had not granted a licence did not mean that its trade had not commenced. However, it was clear in that case that Altala had created the required infrastructure and engaged in operational activities, and we do not see anything in *Hunt* to support a proposition that, if a person would have been ready to trade but for something someone else did (or failed to do), they should be treated as having started to trade.

OUR OVERALL CONCLUSION

202. For the reasons set out above, we consider that:

- (1) A trade commences when the putative trader is “open for business”.

(2) A putative trader cannot be “open for business” until they are ready to provide the goods or services or carry out the other dealings which form the subject matter of their intended trade. This requires the putative trader to have assembled whatever infrastructure (if any) is necessary for them to provide those goods or services or carry out those dealings.

(3) Assembly of the trade infrastructure does not need to have been completed before trading starts as long as the infrastructure is operational (i.e. the trader needs to be able to operate/use it to provide whatever goods or services or carry out the dealings they are concerned with, even if not on the scale or in the manner ultimately planned).

(4) Once the trader has assembled their operational infrastructure (if required), they “open for business” by taking a step which exposes them to real operational risk and reward (for example, producing goods “on spec”, buying food for a restaurant or other raw materials, incurring the staff or other costs of opening a restaurant or being ready to provide some other service, with or without a booking or client signed up, contracting to supply goods or services now or in the future).

(5) If (as we find was the case here with Putney, but not Piston) a putative trader takes an operational step (of the type discussed in (4)) in anticipation of finishing assembling their trade infrastructure, that will not accelerate the commencement of their trade.

203. As neither Putney nor Piston had completed the assembly of their trade infrastructure by the EIS Deadline, neither Appellant had begun to carry on a “qualifying trade” (as defined in section 189 ITA) by that time, as required by section 179(2)(b)(ii) ITA.

DISPOSITION

204. For the reasons set out in this decision notice, the shares issued by each of the Appellants on 4 April 2016 were not eligible shares for EIS purposes, and the Decisions were correct.

205. Both appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

206. 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.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 26 September 2024