



**TC06618**

**Appeal number: TC/2015/02408**

*Corporation tax – capital allowances – sections 11 and 21-23 Capital Allowances Act 2001 – plant and machinery allowances on expenditure incurred in construction and rectification works on underground hydroelectric power scheme – water intakes, network of aqueducts leading to reservoir, underground headrace and tailrace, caverns housing the generating equipment and various other tunnels and conduits considered – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SSE GENERATION LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE KEVIN POOLE**

**Sitting in public at the Royal Courts of Justice, London on 22-25 May 2017**

**Jonathan Peacock QC and Michael Ripley for the Appellant**

**Timothy Brennan QC and Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### **Introduction**

1. This consolidated appeal relates to the treatment, for capital allowance purposes, of various parts of a hydroelectric power generation scheme at Glendoe, near Loch Ness in Scotland (“the Scheme”). It considers the eligibility for plant and machinery allowances, under Part 2 of the Capital Allowances Act 2001 (“CAA”), of various components of the Scheme. At this stage, the parties sought a decision in principle on the various disputed items, on the basis that quantum could be determined at a later stage by the Tribunal if not agreed between the parties. In broad terms, the total cost of building the Scheme (including rectification works) was some £300 million. Capital allowances have been claimed on some £260 million of that expenditure, of which HMRC have accepted some £34 million. Approximately £227 million remains in dispute.

### **The facts**

#### *Introduction*

2. I received a witness statement and heard oral testimony from Jim Smith, Managing Director of Generation of the appellant. Mr Smith is an engineer by background and has been with the appellant and its associated companies since 1988. During the period relevant to this appeal, he was Director of Major Projects for the appellant and the Glendoe project was under his supervision. His evidence was clear, reliable and largely uncontentious.

3. I also received a bundle of documents. Much of the material comprised various accounts, tax computations and similar documents but it also included a great deal of detailed material concerning the construction, repair and operation of the Scheme.

4. I also had the benefit of a site visit to the Scheme, which assisted my understanding greatly.

5. The parties had produced a statement of agreed facts and issues, but unfortunately (apart from uncontentious administrative or procedural matters concerning the various corporation tax returns, associated closure notices and so on) no useful agreements were reached as to the facts.

6. I find the following facts.

#### *Background*

7. The group of companies of which the appellant is part was at all material times a broadly-based energy enterprise, involved in generation, transmission, distribution and supply of electricity, the production, storage, distribution and supply of gas and various associated energy services. As at February 2016, it owned and/or operated total electricity generation capacity of 11,733 MW in the UK and the Republic of Ireland, including gas, coal-fired and renewable generation methods. Of that total, 3,394 MW was renewable energy, comprising hydro-electric, pumped storage, onshore wind and offshore wind capacity.

8. As part of that portfolio, the appellant constructed and operates the Scheme at Glendoe near the southern end of Loch Ness, some 35 miles south-west of Inverness and 2 miles east of Fort Augustus. It is the first large-scale hydroelectric scheme with a conventional hydraulic head feed built in the UK in the last 50 years, and is capable of producing 100MW of power. Because of the volume of water available to it from the relevant catchment areas, it can only operate for some 18% to 20% of the time. The nature of its design means it can be brought online within a matter of minutes when the need arises.

9. Construction of the Scheme began in February 2006 and was completed in December 2008. It was officially opened by Her Majesty the Queen on 29 June 2009. Shortly after that, it was discovered that major remedial works were required to deal with problems caused by a subterranean rockfall (see below). Those rectification works commenced in 2010, the Scheme only becoming fully operational again in August 2012.

10. This appeal is concerned with expenditure incurred in both the original construction of the Scheme and in the subsequent remedial works.

#### *Summary of the Scheme*

11. The Scheme consists of a number of different elements, and there is disagreement about the treatment, for capital allowance purposes, of most of them. Starting from the highest point of the Scheme and working down, the various elements are as follows:

(1) Water intakes. The Scheme uses water, collected over two discrete natural catchment areas totalling some 75 square kilometres. The water from the two catchment areas would otherwise all feed into Loch Killin or the River Tarff. Instead, a network of 17 main water intakes and 8 minor intakes from various different streams feeds part of that water into a network of conduits of various types which form the next part of the Scheme. Approximately 60% of the water used in the Scheme is diverted in this way, only about 40% would naturally end up in the reservoir referred to below. More detail about the different types of water intakes is given at [12] to [14] below.

(2) Conduits. Once diverted from the natural streams, the water is channelled through a network of just under 12 km of conduits into a main reservoir. More detail about the different types of conduits is given at [15] below.

(3) Reservoir and dam. The conduits run into a main reservoir which is formed behind a concrete-faced rock-filled dam sited at the head of a gorge down which the river Tarff runs. The capacity of the reservoir is 12.7 million cubic metres. No claim has been made for plant or machinery allowances in relation to the dam and reservoir.

(4) Main intake. Beside the dam there is an intake through which water is allowed to pass into the headrace, the next element of the Scheme. The intake can be closed in order to cut off the flow of water into the headrace. This was

necessary, for example, when the headrace needed to be drained in order to investigate and rectify the damage to the headrace which had been caused by the rockfall (see below). There is no dispute about plant or machinery allowances in relation to the main intake.

(5) Headrace. This is the technical name for the conduit which carries the water, under increasing pressure as it moves downward, from the main intake at the reservoir to the generating equipment in the caverns referred to below. The headrace is 6.2km long and 5 metres in diameter and is entirely underground, created with a tunnel boring machine. In some similar schemes, the headrace runs along the surface of the ground and is made of concrete or steel pipes. At Glendoe, the choice to use a subterranean shaft was driven partly by engineering considerations and partly to minimise the environmental impact of the Scheme. At the foot of the headrace the last 85 metres contains tapering steel lining which attaches directly to the inlet valve adjacent to the turbine, and the 220 metres above that was constructed with a reinforced concrete lining inside the shaft. The main section of the headrace above that was partly stabilised with rock bolts<sup>1</sup> and lined with shotcrete (concrete sprayed onto the rock surface at high pressure, which strengthens the rock walls), where geological conditions require it. At the foot of the headrace, the water is under a pressure of approximately 900lb/in<sup>2</sup> and the steel-lined and reinforced concrete-lined sections (in addition to providing a properly engineered connection to the turbine inlet valve) prevent the water pressure from bursting through the rock and flooding the power cavern.

(6) Power cavern. This is the name given to the main cavern which houses the turbine and generation equipment. It is a man-made void, excavated from the solid rock, of maximum dimensions 47 metres in length, 20 metres in width and 33 metres in height. It is some 600 metres below the reservoir (also some 6km away from it) and some 250 metres below the local ground level. The rock surface within the power cavern (and the adjacent transformer cavern) is stabilised by the insertion of rock bolts and lining with shotcrete. It is internally separated into four levels or floors. At the top level, there is a large open area called the “machine hall” with a heavy duty overhead mobile crane installed running on reinforced concrete beams, which can access the generating and turbine equipment at the lower levels through removable steel plates in the various floors in order to facilitate maintenance or replacement of them when necessary. The machine hall contains a large central open area (to facilitate such operations) and a control room, storage rooms, messing facilities and toilets (though the whole facility is generally unmanned and operated remotely, so much of that accommodation is very rarely used). Below the machine hall is the generator level, where the electricity generating turbine and closely associated equipment are housed. Below that again is the

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<sup>1</sup> Also known as “rock dowels”, these are metal rods approximately 6 to 8 feet long which are screwed into the rock in particular patterns depending on the local conditions. They knit the mass of rock together, so stabilising it and preventing individual pieces from progressively collapsing into the void.

turbine level, which houses the Pelton turbine equipment which drives the generator above it. Below that is the valve level, which contains auxiliary equipment such as the hydraulic pumping unit which opens and closes the main valve connecting the headrace to the turbine, compressors, cooling pumps, fire-fighting pumps, etc. There is a reinforced concrete beam structure to accommodate, support and hold in place the various elements of the main generating equipment and to transfer the load to the foundations at the base. The generator is effectively suspended from this structure, which also carries floor surfaces. The generator armature and turbine revolve around a vertical axis, with the turbine directly driving the generator. The precise location of the power cavern was chosen so as to optimise the available head of water pressure, suit the local topography, exploit the best available rock conditions and minimise overall cost. As a consequence of the decision to locate the generating equipment in a cavern, its visual impact in an important tourist area was also minimised but this was a consequential benefit and not a motive or reason for the decision. It was excavated by progressively enlarging the void at the end of the access tunnel (see below), using “drill and blast” methods<sup>2</sup>.

(7) Transformer cavern. A much smaller cavern, set off to the side of the power cavern adjacent to the entrance to the main access tunnel, was excavated to accommodate the transformer which “steps up” the voltage of 15.75kV produced by the generator to 132kV for transmission into the National Grid. The transformer represents a significant fire risk and it is sealed off from the power cavern by fire- and blast-resistant panels and doors. The transformer cavern was excavated by enlarging the power cavern at the correct location, again using “drill and blast” methods. It is only large enough to accommodate the transformer itself and provide sufficient space around it for maintenance access.

(8) Tailrace. After the pressurised water has served its purpose in the turbine, it runs away through the tailrace, a conduit a little over 2 km in length which leads into Loch Ness. The tailrace was constructed by “drill and blast” for the first 340 metres of its length from Loch Ness and was bored for the remainder of its length by the same tunnel boring machine as created the headrace. The tailrace and the headrace were constructed in a single operation, essentially in line with each other. Where it emerges into Loch Ness, there is a separate reinforced concrete structure which can be closed off to isolate the tailrace from the loch (so it can be “dewatered” for maintenance).

(9) Access tunnels<sup>3</sup>. There are a number of tunnels which comprise different parts of the underground works. The “main access tunnel” (approximately 1.2

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<sup>2</sup> This involves drilling holes into the rock, inserting and detonating explosives and then removing the shattered rock before repeating the process to extend the void in the required direction, where necessary stabilising the rock around the void so created.

<sup>3</sup> This description is used for convenience only; it comprises various conduits with different characteristics as set out in more detail below and the generic use of the word “tunnel” should not be

km long) provides the main means of personal and vehicular access to the power cavern. It also carries electricity cables (both receiving and transmitting electricity from/to the national grid) and ventilation ducting and it houses water tanks for fire hoses. It was excavated by “drill and blast” and is stabilised with rock bolts and fully lined with shotcrete. It formed the main access for carrying out the rest of the excavations (other than the tailrace and headrace). Other shorter tunnels include the turbine outflow tunnel (which takes the spent water from the turbine out to the tailrace), a tunnel carrying the high voltage cables from the transformer to the main access tunnel, and various other drainage and access tunnels. More detail of these is given as necessary below.

12. There are three different types of water intakes used. All of them are designed to extract water from a flowing stream, not to store a body of water for subsequent use. The main two involve water flowing over a sloping slotted stainless steel screen which is set into the sloping bank (i.e. downstream side) of a concrete structure which creates a low barrier across the stream. Some of the water (but not necessarily all and occasionally none, depending on the level of flow) drops through the screen and is collected, flowing through a sand trap, and is ultimately fed into the reservoir above the dam through a network of conduits. The more steeply sloped version of this arrangement is known as a “Coanda screen”, its defining characteristic being that the angle of the screen is such that debris of any significant size is effectively screened or filtered out of the water and passes on downstream, being washed off the screen by the water flowing over it. If any silt or sand builds up beneath the screen, there are sluice valve arrangements to enable a “flush” of water to be put through in order to clear it. This is done perhaps once a year. The less steeply sloped version can accommodate a higher throughput of water (the screen can be much larger without making the whole structure too high) and also filters out debris, but does not self-clean as the Coanda screens do. Finally, there are some small intakes which are little more than overflow pipes (with the appearance of a walking stick or snorkel projecting from the surface of the water) combined with concrete barriers which draw off water from existing streams.

13. All three types of intake involve the construction of some kind of concrete barrier across the relevant stream, which gives rise to a small pool on the upstream side, known as a “headpond”. The headpond is not specifically excavated, though it is roughly lined with rocks, particularly to create an abutment against the barrier (and some minor excavation may be involved in doing so). Its purpose for the “screen” type intakes is to ensure there is a steady flow of water over the screens which are built into the barrier structure; it does not store water in any meaningful way, it merely regulates its flow; the design of the screens requires the creation of a reasonably steady flow of water to enable them to operate properly. There is no means to empty the headponds (though if the flush valves were left open, much of the content of the headpond would naturally drain). For the smaller “overflow” type intakes, the intake itself is set in the headpond, which facilitates the natural and uninterrupted flow of water into the intake pipe; the small concrete structure across the path of the stream next to the intake has a

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taken to pre-judge the true nature of the various conduits, some of which I consider not to be “tunnels” within the meaning of that word for the purposes of CAA (see below).

“lip” over which the water flows down into the natural stream bed below. Visually, the concrete structure and barrier have every appearance of being constituent parts of a single structure. The level of the lip ensures that in normal conditions there is sufficient depth in the headpond for the water to flow into the intake.

14. When the flow rates of water are high, there are static overflow arrangements to permit excess water to bypass the intakes and flow directly down the natural watercourse. Water can also be diverted using manually operated sluice valves, which are used during times of flooding, again to direct the water away from the collection conduits and into its natural downstream course when it is not required for filling the main reservoir. The whole system of intakes is designed to extract water from existing natural flows, not to create a series of “mini reservoirs”. When (as at the time of our site visit) water levels are low, there may be insufficient water to feed some intakes at all; there are also arrangements to ensure that for environmental purposes a certain minimum flow of any available water is directed down the natural stream in any event.

15. There are a number of different types of conduit taking the water from the water intakes to the reservoir (or to watercourses which feed naturally into it by gravity). There are 4km of single or double buried pipes (mainly single or double glass-reinforced plastic pipes, but some pre-fabricated in concrete); there are 6km of drilled and blasted underground conduit, lined with shotcrete; there is 1km of “cut and cover” concrete conduit (built on-site with reinforced concrete in a large trench which was then backfilled) and there are 800m of uncovered channels lined with rocks and/or concrete set into the ground surface. From the photographs in the bundles, it is apparent that the pipes range in size from approximately 400mm to 2 metres in diameter. The underground conduit and the cut and cover concrete conduit into which it feeds have an internal diameter of between 2 and 3 metres (the concrete conduit having a flat base, vertical walls up to about 1.5 metres and a semi-circular “roof”). They are involved in bringing the water collected from the water intakes in the adjacent catchment area into the catchment area of the main reservoir.

#### *Headrace collapse and remedial works*

16. During August 2009 (very shortly after it was commissioned), the appellant became aware that the Scheme was generating less than its design capacity of 100MW. The headrace was drained and inspected and it was established that there had been a major rockfall in it, just over 2km downstream from the reservoir. There were other, less severe, rockfalls further upstream. As a result, the headrace was quite severely blocked over a length of approximately 800 to 900 metres, with a tail of debris and silt below the blockage. A report into the causes by independent experts concluded that the rock types through which the headrace was bored were misclassified in a number of places, as a result of which insufficient structural support had been provided during construction.

17. After extensive investigation, it was decided that the best way of bringing the Scheme back into full operation as quickly as possible and at lowest overall cost was by constructing a “bypass” to take the headrace around the area in which the collapse had taken place. The remedial works were started in 2010, and the Scheme was brought back into full operation in August 2012. The remedial works included:

(1) Urgent stabilisation work on parts of the headrace which had not collapsed. This involved application of full shotcrete lining in certain areas and structural work using rock bolts and shotcrete to avoid future significant rockfalls. Access for this work was from the top of the headrace. As part of this work, passing places were excavated at the side of the headrace to facilitate the work.

(2) Construction by “drill and blast” of a new 600m long access tunnel from the main access tunnel near the power cavern, around the side of the power cavern and down to the foot of the headrace shortly before it reaches the power cavern. This provided access to enable repairs to be carried out to the headrace, downstream of the collapse. It also provided access for construction of the bypass tunnel. Once the works were complete, it was sealed with a concrete plug where it meets the headrace.

(3) Construction by “drill and blast” of a new 600m section of headrace (the “bypass tunnel”) to bypass the irretrievably damaged section of the headrace. This entire section was extensively lined with shotcrete (including, in the main geological fault zone, a secondary lining of shotcrete reinforced with steel fibres, which achieves the same result and performs the same function as pre-formed pipework).

(4) Removal of silt and rock debris from the headrace.

(5) Provision of further shotcrete reinforcement, after a detailed survey of rock types, to various other sections of the headrace which were regarded as vulnerable. 60% of the headrace now has shotcrete lining.

(6) Concrete plugging at both ends of the bypassed section of headrace.

(7) Further shotcrete reinforcement of the tailrace, which was also surveyed and found to be subject to significant erosion.

18. I was informed that it is agreed between the parties that the expenditure on remedial works to the headrace and the tailrace should be treated in the same way, for capital allowance purposes, as the initial expenditure on the construction of those respective elements of the Scheme.

### **The issues**

19. The areas of dispute are as follows. In each case, the appellant claims capital allowances and HMRC have rejected that claim. The items in question are: the water intakes, the conduits, the headrace (save for the 85 metre steel-lined section), the power cavern (but not the plant or machinery within it, all of which HMRC agree qualify though there is some disagreement about the extent to which other expenditure can properly be said to have been incurred in the “provision” of the plant or machinery), the transformer cavern (but not the plant or machinery within it), the tailrace and the access tunnels. These are items (1), (2) and (5) to (9) listed at [11] above. In addition,



the appellant has claimed capital allowances on the remedial works identified at [17] above and HMRC have rejected that claim.

### **The legislation**

20. Section 11 Capital Allowances Act 2001 (“CAA”) provides as follows:

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

- (1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
- (2) “Qualifying activity” has the meaning given by Chapter 2.
- (3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.
- (4) The general rule is that expenditure is qualifying expenditure if –
  - (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
  - (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
- (5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3.”

21. Chapter 3 of Part 2 CAA is set out in sections 21 et seq. These provide, so far as relevant, as follows:

#### **“21 Buildings**

- (1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the provision of a building.
- (2) The provision of a building includes its construction or acquisition.
- (3) In this section, ‘building’ includes an asset which –
  - (a) is incorporated in the building,
  - (b) although not incorporated in the building (whether because the asset is moveable or for any other reason), is in the building and is of a kind normally incorporated in a building, or
  - (c) is in, or connected with the building and is in list A.

List A

#### Assets treated as buildings

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

(4) This section is subject to section 23.

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

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

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

#### List B

##### Excluded structures and other assets

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

(c) a structure in use for the purposes of a trade which consists in the provision of telecommunication, television or radio services.

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

(3) In this section –

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

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

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

(1) Sections 21 and 22 do not apply to any expenditure to which any of the provisions listed in subsection (2) applies.

(2) The provisions are –

...

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

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

List C

Expenditure unaffected by sections 21 and 22

1. Machinery (including devices for providing motive power) not within any other item in this list.

...

22. The alteration of land for the purpose only of installing plant or machinery.

...

25. The provision of pipelines or underground ducts or tunnels with a primary purpose of carrying utility conduits.”

## **The arguments**

22. Because much of the argument between the parties was focused on specific items rather than general principles, the following summarises only the general principles each side sought to apply. More detail of the argument on specific items is set out as relevant below.

### *For the appellant*

23. Mr Peacock argued that all of the items in dispute were items of plant (as that word is interpreted in the case law). As such, expenditure on all of them was allowable unless specifically disallowed by section 21 or 22 CAA and not saved by section 23 CAA.

24. He had certain specific points to make in relation to the various assets (as set out below) as to why (a) they were “plant” at common law, (b) they did not fall within section 21 or 22 CAA, but to the extent they did, (c) the expenditure on them was “saved” by either item 22 or item 25 of List C in section 23 CAA.

### *For HMRC*

25. Mr Brennan argued that there was no real point in looking at whether the disputed items were “plant” at common law, as the expenditure on all of them was disqualified from allowances by either section 21 (in relation to the caverns) or section 22 CAA, and the savings in List C in section 23 did not apply.

## **Discussion**

### *Preliminary points*

#### The correct approach to the matters in dispute and identification of the items in question

26. The parties diverged on the correct order to approach the issues before me. Mr Brennan urged me to approach the matter by first considering whether the items in dispute were excluded from qualifying by reference to sections 21 to 23 CAA; he described the opposite approach as “eccentric”. Essentially, he was arguing that no enquiry into the question of whether any particular disputed item was “plant” at common law was necessary or relevant if the expenditure on it was disallowed in any event because of the legislative provisions.

27. Mr Peacock thought there was a “chronological appeal” in looking at the case law to establish whether the relevant items were “plant” at all, before becoming entangled in the statutory exclusions and savings. He also argued that in *IRC v Anchor International Ltd* [2005] STC 411 and *J D Wetherspoon plc v HMRC* [2012] STC 1450 the Court of Session and the Upper Tribunal proceeded on the implicit basis that it was necessary to identify the relevant piece of plant at the first stage of the exercise.

28. I consider Mr Peacock’s is the correct approach, for the following reasons. Before one reaches the stage of considering whether expenditure on the provision of any particular structure, asset or works should be disallowed pursuant to section 22, the anterior question is whether the expenditure on its provision would qualify at all under section 11 CAA. In order to answer that question it is necessary to decide whether the

item in question amounts to “plant” at common law. It is only if that question is answered in the affirmative that one logically goes on to consider the question of disqualification of the expenditure pursuant to sections 21 to 23 CAA. Also, embedded in this point is the question of the precise identification of the “item” under consideration; there are numerous cases in which the courts have grappled with the particular question of whether an agglomeration of assets should be considered as one item or as more than one item of plant for capital allowance purposes, and that is a question which must be answered before the “item” under consideration for the purposes of sections 21 to 23 CAA can be identified. This point becomes particularly acute when considering Item 22 in List C, as will appear below.

29. This leads naturally on to the question of the identification of the extent of each item under individual consideration in this appeal.

30. The parties are agreed that the Scheme should not be considered as a single item for the purposes of these proceedings. The appellant stated in its skeleton argument that the parties were agreed the approach should be “on a piecemeal basis by looking at the function of each of the items in dispute” and HMRC have accepted the piecemeal approach but dispute applying it, at least for the purposes of the Lists in sections 21 to 23 CAA, by reference to the function of the items.

31. What was not explored, however, was precisely how to apply this “piecemeal” approach in relation to some of the constituent parts of the Scheme identified above. In *Cole Brothers Limited v Phillips (Inspector of Taxes)* (HL) [1982] STC 307, their Lordships unanimously agreed that it was a question of fact for decision by the Special Commissioners whether the items under examination should be considered as “a single entity”, as individual single items or in categories. In that case, the items under consideration were all elements of the electrical installation in a department store. There were high voltage transformers and associated switchgear and switchboard, light and other fittings (some specially designed) and associated cabling, and wiring to various specific items of specialised electrical equipment. The Commissioners’ finding that “the multiplicity of elements in the... installation, and differing purposes which they serve” fully justified their decision to reject the “single entity” approach. Even though a “single entity” approach might also have been acceptable (indeed, possibly preferable – per Lord Russell of Killowen at p316d), their Lordships upheld the Commissioners’ decision to approach matters by reference to individual items and categories; it was a question of “fact and degree”, or even “pure fact” (per Lord Wilberforce at p 314h) and accordingly the decision of the fact-finding tribunal on it was determinative unless it was one that “no reasonable body of commissioners could have come to”. This approach was endorsed by the Inner House of the Court of Session in *Anchor International* at [26].

32. At one stage, the appellant had argued that all the elements of the Scheme up to (but excluding) the reservoir should be considered as one category, called “the water gathering assets”, indeed its skeleton argument was structured on this basis. Upon closer examination, however, it became apparent that Mr Peacock was really arguing for two separate main categories, the water intakes (and associated works) and the water

conduits; however, within the latter category, he was effectively arguing for six separate sub-categories (being the various different types of conduit identified at [15] above).

33. Mr Brennan did not really engage with the question in any detail, his point being that however the assets were analysed, most of them were disqualified under section 21 or 22 CAA.

34. For convenience, I have considered the various elements of the claim by reference to the headings used by the parties, but as will be seen below there are some headings under which I consider various items should be split out and considered separately.

*The approach to interpreting the statutory provisions*

35. There was much argument between the parties on the approach to interpreting the specific exclusions set out in List B in particular. HMRC had sought to introduce expert evidence on the meanings of various of the relevant words in the civil engineering context and I had refused permission some three months before the hearing on the basis that such evidence would not assist me in deciding the issues before me, specifically the legal meaning of those words in their statutory context and their application to the physical features of the Scheme. They made a further attempt to achieve a similar result by seeking to introduce, late in the day, a bundle of documents with extensive commentary around the same issue. Again I refused permission to admit those documents, essentially on the basis that they were too late (unless an adjournment was being sought to enable the appellant to respond, which might have other implications); in addition to my view as to the lack of relevance of the material, I was also concerned about the apparent attempt to introduce through the back door evidence which had been refused admission through the front some time previously, without that decision having been appealed.

36. Mr Brennan made a wider point, by reference to the appellant's own documents. There were numerous places in those documents where, for example, the headrace had been referred to as a "tunnel"; it had been created by using a tunnel boring machine and he submitted it was legitimate to at least have regard to the appellant's own description of it when trying to decide whether it fell within the meaning of the word "tunnel" when used in List B. Similarly, the word "aqueduct" (and even the phrase "aqueduct tunnel") had been used in much of the appellant's own documentation to refer to some of the underground water conduits.

37. Mr Peacock on the other hand submitted that the various individual structures and assets included in List B in particular had been carefully set out thematically, and it was appropriate to interpret them accordingly. The labels applied for convenience by engineers and others should not be determinative of the statutory meaning of words such as those involved in this appeal.

38. I consider Mr Peacock's argument is essentially correct. Words such as "dam", etc, may be used in particular ways in technical discussions between civil engineers, but they are not specialist terms, they have ordinary English meanings. Those meanings are somewhat elastic, and in seeking to identify which of a range of possible meanings

the draftsman had in mind, I consider it is legitimate to consider the way in which they have been grouped in the legislation, the assumption being that structures and assets which are specifically grouped together are likely to share some basic common theme and should be interpreted in accordance with that theme unless none can in fact be found. Many words are chameleons, and context can often provide colour.

39. One further point of significant argument between the parties was around the approach to interpreting section 22(1)(b) CAA. Mr Brennan argued that anything which involved alteration of land should fall within the provision, and it did not matter whether the relevant item was a structure or asset also falling within List B. Mr Peacock argued that the effect of this approach would be to make List B entirely redundant, as the provision of all of the structures and assets referred to in it would necessarily involve alterations of land in some way. This could not have been the draftsman's intention, and the correct approach to make sense of section 22(1)(b) CAA must be to interpret it as applying to civil engineering works involving the alteration of land with a result which does not fall into List B. Support for this approach was given by the threefold distinction between "structures", "assets" and "works" explicitly stated in the heading of section 22 and implicit in the phraseology of sections 22(1)(a) and (b). Were one to do otherwise, then there would also be an obvious irreconcilable conflict between section 22(1)(b) CAA and the exclusions to the general "catch all" Item 7 of List B – taking for example a gas extraction structure involving alterations to land, which would be disqualified from allowances under Item 7 but for the saving in Item 7(b). It was inherent in Mr Brennan's argument that it would nonetheless be disqualified from allowances by reason of section 22(1)(b) CAA, simply because it involved alterations to land; that could not be right. Mr Brennan did not shy away from the point. He submitted that the boring of a tunnel, for example, would fall within both section 22(1)(b) as "works involving the alteration of land" and List B Item 1. If the tunnel were then lined with bricks, the expenditure incurred in doing so would only fall within List B Item 1 and not section 22(1)(b) CAA.

40. I prefer Mr Peacock's approach in principle. I consider sections 22(1)(a) and (b) CAA to be alternatives, not largely overlapping, and that the "works" referred to in section 22(1)(b) CAA must be works where the alteration of land is the objective in its own right, not including works whose objective is the creation of some other asset or structure identified in List B.

41. It is important to note that section 22 CAA is very carefully worded so as to disallow (for CAA purposes) expenditure incurred on the listed items referred to in section 22(1)(a) CAA and List B; it does not purport to override the common law test of what amounts to "plant". Section 23 and List C in turn do not purport to provide a list of items which are definitively "plant" at common law, expenditure on which therefore qualifies for allowances; all that they say is that any disallowance which would arise under section 22 and List B does not affect expenditure incurred on those items. The underlying common law question remains to be addressed: does the item in question amount to "plant" at common law. For this, one must refer to the line of cases (which were considered at some length at the hearing) going back to Lindley LJ's formulation in *Yarmouth v France* (1887) 19 QBD 647 at p 658:

“There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, – not his stock-in-trade, which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business...”

42. The main area of dispute between the parties, given the nature of the items we are here considering, was as to the point at which “plant” with which the business is carried on becomes “setting” or “premises” in which it is carried on. Mr Brennan did not strongly contest (though he did not quite concede) that the water intakes, the various conduits to the reservoir and the headrace and tailrace were “plant” at common law. His main dispute was with the power cavern, transformer cavern and tunnels. Some time was spent looking at the authorities concerning the borderline between “plant” and “setting” or “premises” in that context, and this is considered further where relevant below. A compendious review of the common law authorities on “plant” is therefore, thankfully, not required in this decision.

*One point of agreement*

43. The parties agreed that none of the “structures” involved in this case fall into List B by virtue of Item 7 in that list, because it is agreed that all of them fall into the exception in Item 7(a); this is because the expenditure on all of them was incurred on the construction of them for use in the appellant’s qualifying trade (an undertaking for the generation of electricity carried on by way of trade), so they are “within Chapter 2 of Part 3” CAA – because under s 271 and lists A and B in s 274, they count as structures within that chapter. I therefore consider Item 7 in List B no further.

44. In the light of the above preliminary points, I turn to consider each part of the Scheme under dispute as follows.

*Water intakes and associated headponds – screen types.*

45. In relation to each water intake of the “screen” type (and its associated headpond), I consider the following analysis properly applies. In each case, I consider the screen and the concrete structure into which it is set to be a single integrated item which functions as plant by extracting part of the flow from a stream. In order to provide that single item of plant, it is necessary to embed it across the relevant stream, which in turn requires the creation of rock lining and abutments for the headpond which is formed as a result of the installation. All this work (and, therefore, the expenditure on it) is necessary for the installation of the water intakes in a properly functioning manner. As such, under the principles set out in *CIR v Barclay, Curle & Co Ltd* [1969] 1 All ER 732, all the relevant expenditure was in my view incurred in the provision of the integrated items of plant as identified above.

46. The question then is whether any or all of that expenditure should be disallowed by the operation of section 22 CAA. Mr Brennan submitted that the concrete structure is a “dam” or a “barrage” within Item 4 of List B or a “weir” within Item 6; and that the headpond is a “reservoir” within Item 4. Additionally or alternatively, he contended that the works involved in installing the water intakes, structures and headponds are “works involving the alteration of land” within section 22(1)(b) CAA.



47. I consider the reference to “dams” and “reservoirs” in Item 4 to be entirely inapt as a description of the structures and headponds separately, still less so when considering them as elements of single composite “water intake” entities. The very essence of both a dam and a reservoir is to accumulate and store water for later use, not to extract part of the flow from an existing stream on a near-continual basis without material obstruction. As to “barrage”, the context of Item 4 makes it clear that the draftsman had in mind structures similar to dams and reservoirs and therefore comparable in scale; the original barrage on the River Nile springs to mind as the sort of structure involved (and indeed the Oxford English Dictionary records the use of the originally French word “barrage” as first applied in English to that structure). I do not consider it is a word that can properly be applied to any of the concrete structures viewed on their own, still less to integrated items of plant of the type and size described above.

48. The next question to arise is whether the arrangements can properly be described as a “weir” within Item 6 of List B. The meaning given for “weir” in the Oxford English Dictionary is “a barrier or dam to restrain water, esp. one placed across a river or canal in order to raise or divert the water for driving a mill-wheel; also, the body of water retained by this means, a mill-dam; now gen., a dam, of which there are various forms, constructed on the reaches of a canal or navigable river, to retain the water and regulate its flow.” The other structures in Item 6 are “dike”, “sea wall” and “drainage ditch”, all structures which are designed to control or regulate water levels. When one thinks of a weir one generally thinks of the fast-flowing inclined slopes with fixed thresholds adjacent to locks on rivers or canals, and designed to ensure that the water level upstream is maintained at a navigable level. These definitions or common usages of the word “weir” all involve either the regulation of levels within an existing flow of water or a temporary diversion of water from an existing flow before it is returned to that flow after it has served its purpose. I do not consider the word is apt also to describe a composite structure which is designed to abstract water completely from a flowing stream and which incidentally includes a structure which has the effect of raising the water level by a few feet in order to facilitate this function.

49. Thus I do not consider that any of the expenditure incurred on the provision of the “screen type” water intakes (including any incidental excavation work in relation to the abutments and headponds) falls within List B. Nor, for the reasons given at [40] above, do I consider the intake structures to fall within section 22(1)(b) CAA as “works involving the alteration of land” because the creation of the intake structures rather than the alteration of land was the objective of the works. Additionally, to the extent that any of the expenditure was on “alteration of land”, such expenditure would have been incurred “for the purpose only of installing plant or machinery” (the intakes themselves) and therefore Item 22 of List C in section 23 CAA would exclude the application of section 22(1)(b) CAA to such expenditure.

50. It follows that I consider the expenditure incurred on the “screen type” water intake structures and associated abutments and headponds is all allowable in full.

*Water intakes and associated headponds – overflow types*

51. As identified at [12] to [14] above, whilst the function of these arrangements may be similar, their structure is somewhat different. Essentially they consist of an overflow pipe set into a stream at a point where the water level is (subject to overall water flow being sufficient) raised by a matter of a few feet to the level of that overflow by an adjacent concrete structure immediately downstream.

52. Nonetheless, I still consider the intake pipe and the concrete structure to be integrated into a single item of plant; they are designed and constructed together to perform an overall function of extracting water from the stream. They are similar in visual appearance to the “screen” type intake arrangements, albeit somewhat simpler and on a smaller scale; the overflow pipe is set immediately adjacent to the concrete structure, to the point where they have every appearance of being constituent parts of a single structure, even if that is not in fact the case.

53. I do not consider the arrangements (or any part of them) to answer to the description “dam, reservoir or barrage”, for the reasons given at [47] above. Nor do I consider the description “weir” to be appropriate to describe them, for the reasons given at [48] above.

54. Thus I do not consider that any of the expenditure incurred on the provision of the composite “overflow type” water intakes (including any incidental excavation work in relation to the abutments and headponds) falls within List B. Nor, following the analysis at [49] above, do I consider the intake structures to fall within section 22(1)(b) CAA as “works involving the alteration of land”, and any expenditure on the alteration of land incurred in the course of installing them would have been incurred “for the purpose only of installing plant or machinery” (the intakes themselves) and therefore Item 22 of List C in section 23 CAA would exclude the application of section 22(1)(b) CAA.

55. It follows that I consider the expenditure incurred on the “overflow type” water intake structures and associated abutments and headponds are also all allowable in full.

*The conduits*

56. The first issue to be addressed is the extent to which each component item of the conduits should be considered separately. Mr Peacock identified six categories of conduits: buried single plastic pipes; buried double plastic pipes, buried prefabricated concrete pipes, a drilled and blasted conduit lined with shotcrete; a buried conduit built in situ from reinforced concrete; and open channels lined with rocks. Mr Brennan declared himself “agnostic” on whether they should be considered as one or separately by reference to these categories, on the basis that they would all fall foul of the “aqueduct” or “works involving the alteration of land” exclusions in section 22, save perhaps the buried plastic and concrete pipes, which he accepted might be regarded as “pipelines” and therefore have their allowances preserved by Item 25 in List C of section 23 CAA.

57. I consider that although the various types of conduit are interconnected and do together perform a single overall function, nonetheless they have significant physical differences and I consider it most appropriate to consider them as distinct categories of item, by reference to the categories identified by the parties.

58. I consider each of the categories in turn.

Buried pipes – single or double, plastic or prefabricated concrete

59. This heading represents the first three categories identified by Mr Peacock, and I consider the same analysis applies to all three types of prefabricated pipe.

60. These pipes in my view clearly perform a plant-like function by assisting in the transfer of water from the various water intakes to the main reservoir. They are not a normal part of the setting in which the appellant carries on its trade. As Denning MR observed in *Bridge House (Reigate Hill) Limited v Hinder* (1971) 47 TC 182 at p 191-192, when deciding whether sewage or drainage pipes were part of the plant of a restaurant business:

“Are sewage or drainage pipes part of the apparatus for carrying on the business? I think not. They are an essential ancillary to the house itself, just as much as the chimney stack...

Vis-à-vis the sewerage authority the pipes may be part of their “plant”, but vis-à-vis the restaurant proprietor they are not.”

61. I consider the appellant in this case to be the equivalent of the sewerage authority referred to by Denning MR in *Bridge House*. I therefore find them to be “plant” within the common law meaning of the word. Whilst not explicitly conceding it, Mr Brennan did not hotly contest this. He argued they were aqueducts, falling within Item 1 of List B in section 22 CAA. However, he accepted it was open to me to find they were “pipelines” (crucially because they were made up of individual lengths of pipe joined together), and accordingly saved by item 25 in List C; he also accepted that if they were properly regarded as plant, then any “works involving the alteration of land” carried out in the course of their installation would be saved by Item 22 in List C.

62. I agree with Mr Brennan that a crucial feature of a pipeline is that it should be made up of individual lengths of pipe joined together. A pipeline is defined in the Oxford English Dictionary as “a continuous line of joined pipes, esp. one used for conveying oil, gas, etc., long distances”. I consider these pipes all to answer to that description. I do not consider them to be (whether individually or as joined together) “aqueducts” because I do not consider that word apt to describe an item which is properly considered to be either an individual pipe or a pipeline made up of such pipes joined together, especially when considering the context in which the word “aqueduct” appears in Item 1 of List B.

63. Accordingly I consider the expenditure incurred on their provision to be wholly allowable – both the cost of the pipes themselves and the costs of installing them. This is on the basis that the latter costs were incurred as part of the cost of “provision” of the

pipelines for the purposes of section 11 CAA (following *Barclay Curle*). As I do not consider the provision of the pipelines to be “works involving the alteration of land” (see [40] above), none of the expenditure would be disallowed by section 22 CAA, but even if it were, such expenditure would be saved by section 23 CAA and item 25 in List C.

Drilled and blasted underground conduit, lined with shotcrete

64. Mr Brennan submitted that, as well as being (primarily) an alteration of land falling within section 22(1)(b) CAA, this was both a tunnel and an aqueduct within List B. Mr Peacock submitted that it was none of those things. I have set out at [39] – [40] above the parties’ arguments and my views on the overlap between section 22(1)(a)/List B and section 22(1)(b).

65. Considering first whether this conduit falls within Item 1 of List B, my views are as follows.

66. Item 1 in List B comprises “a tunnel, bridge, viaduct, aqueduct, embankment or cutting.” The words “bridge” and “viaduct” generally refer to an elevated structure created to carry a road, path or railway across a valley or river (in the case of a bridge) or across a wider piece of low ground (in the case of a viaduct). The word “tunnel” in the Oxford English Dictionary (“OED”) is defined (most relevantly) as “a subterranean passage; a road-way excavated under ground, esp. under a hill or mountain, or beneath the bed of a river: now most commonly on a railway; also in earliest use on a canal, in a mine, etc. (The chief current sense.)”. I would add that in common parlance, the word “tunnel” would normally refer to a passage bored through ground which permits people or forms of transport to pass to and fro. “Embankment” is defined in the OED as “a mound, bank, or other structure for confining a river, etc. within fixed limits” or, more familiarly, as “a long earthen bank or mound, esp. one raised for the purpose of carrying a road or a railway across a valley.”. “Cutting” is relevantly defined as “an open, trench-like excavation through a piece of ground that rises above the level of a canal, railway, or road which has to be taken across it”. On this basis, there does seem to be a clear theme emerging in Item 1 of structures related to transportation infrastructure.

67. Mr Brennan submitted that Item 25 in List C contemplated at least some tunnels as having “a primary purpose of carrying utility conduits”, which would be inconsistent with the proposition that a tunnel ought to have an exclusively “transportation” function. Whilst accepting his point in part (and accordingly acknowledging that a “tunnel” might have other purposes than transportation), I still consider that one essential, though not necessarily primary, purpose of a tunnel is to facilitate access from one end to the other, either of persons or of means of transport. I therefore do not consider this conduit to comprise a tunnel within the ordinary meaning of that word or, therefore, for the purposes of Item 1 in List B; although it is of course large enough to allow a person to enter it (as was clearly done during the work of excavation) and pass from one end to the other, that was not its intended purpose.

68. The word “aqueduct” has two potentially relevant OED definitions. First, it can mean “an artificial channel for the conveyance of water from place to place; a conduit; esp. an elevated structure of masonry used for this purpose”. This was clearly its

original historical meaning, deriving from the Latin, and referring to structures such as the famous Roman Segovia aqueduct (an elevated structure), the Levadas of Madeira (mostly at surface level) or the Gadara aqueduct (a subterranean conduit). A second meaning however is given: “The similar structure by which a canal is carried over a river, etc.” This has a more obvious transportation infrastructure flavour.

69. The question is whether, by reference to the context in which the word appears, it is appropriate to limit the meaning of “aqueduct” in Item 1 to this latter meaning, as Mr Peacock contended. The matter is not without difficulty, but I consider the better view to be that in the context of List B, the word “aqueduct” is apt to describe an asset of the type we are here concerned with – an artificial underground conduit whose function is solely to transport water from one place to another through the ground under the force of gravity; I consider the transportation of water itself is enough to be consistent with the overall “transportation” theme of Item 1, rather than requiring the water to be the means of transportation of other things (as in the case of a canal).

70. Having decided that this conduit is an “aqueduct” within Item 1 of List B, for the reasons set out at [39] – [40] above, I consider that section 22(1)(b) CAA does not apply to it.

71. Mr Brennan argued that there was nothing to stop this conduit from being both an “aqueduct” and a “tunnel”. As I have decided that the conduit is an “aqueduct” but not a “tunnel” and is therefore within Item 1 of List B, I do not need to decide whether it could be both, though I strongly doubt it. For completeness, however, I should mention that if had not considered the conduit to be an “aqueduct”, I would instead have found it to be “works involving the alteration of land” within section 22(1)(b) CAA: see [40] above.

72. Mr Peacock argued that even if this conduit was an “aqueduct”, expenditure on it would be saved by Item 22 of List C, as an “alteration of land for the purpose only of installing plant or machinery” or by Item 25 as a “pipeline” or “underground duct” (he did not argue that it was a “tunnel”, as he accepted it did not have “a primary purpose of carrying utility conduits”). He pointed to the apparently arbitrary distinction that might otherwise arise between this conduit and the other sections of conduit which performed exactly the same plant-like function but which were engineered slightly differently by burying prefabricated pipes in jointed lengths.

73. As has been remarked upon many times and in various ways in the case law, the law of capital allowances is full of fine and sometimes apparently arbitrary distinctions. I do not consider Mr Peacock’s submission (that items with a similar function should be treated in the same way despite substantial differences in their form) can be sustained in the face of the legislation as it stands. Accordingly, expenditure on this aqueduct should not be allowable simply because it arguably performed a similar function to the lengths of pipeline referred to above.

74. Next, I consider Item 25 in List C. Mr Brennan submitted that this conduit did not fall within Item 25 (“the provision of pipelines or underground ducts or tunnels with a primary purpose of carrying utility conduits”) because (a) it was not a pipeline (upon

which I agree with him – see [62] above) and (b) whilst it was both a tunnel and, arguably, an underground duct, its primary purpose was not carrying utility conduits, and that primary purpose had to exist whether it was a duct or tunnel if it were to fall within Item 25 in List C. Here he referred back to the predecessor provision in Schedule AA1 CAA 1990, where the relevant item (Item 4 in Column (2) of Table 2 at paragraph 2(1) of that Schedule, as inserted by Finance Act 1994) included an additional comma after “pipelines”, as follows:

“Expenditure on the provision of pipelines, or underground ducts or tunnels with a primary purpose of carrying utility conduits.”

75. This made it clear that the “primary purpose of carrying utility conduits” test originally applied to both “underground ducts” and “tunnels”. Mr Peacock argued that the removal of the comma meant that the words “with a primary purpose of carrying utility conduits” now referred only to the word “tunnels” and not also to the words “underground ducts”. I do not accept this and I agree with Mr Brennan that even without the comma, the natural reading of the words in Item 25 of List C remains the same. There was no indication in the published explanatory notes at the time that any change of meaning was intended by the omission of the comma between the 1990 Act and CAA 2001, nor can I see any rational basis for a distinction between the two. Mr Peacock did not argue (rightly, in my view) that there are any “utility conduits” involved in any of the various conduits which transfer the water from the water intakes to the reservoir. I therefore consider Item 25 does not apply to this conduit.

76. I turn next to Item 22 in List C, which leaves “unaffected” by the excluding provisions of section 22 any expenditure on “the alteration of land for the purpose only of installing plant or machinery”. In the present case, the only possible “plant” capable of being relevantly installed is the conduit itself (I consider it to be too remote from any of the water intakes, the headrace or the generating equipment for this purpose). As already identified (see [41] above), the inclusion of an item in List B does not exclude the item from qualifying as plant, it merely excludes allowances for expenditure incurred on its provision. One must fall back on the common law to establish whether this conduit is “plant”. It admittedly serves a plant-like function (of assisting in the transfer of water from the water intakes to the reservoir) and I do not see how it could be regarded as part of the “premises” or “setting” within which the appellant’s trade is carried on. I see no reason why it should not properly be regarded as part of the appellant’s plant at common law, and I find that it is (Mr Brennan did not contest this, whilst not actually conceding it). Having established that, the other two questions to be addressed in considering Item 22 are (a) whether the expenditure on its creation can properly be regarded as being expenditure on “the alteration of land”, and (b) whether any such alteration can fairly be regarded as “for the purpose only of installing plant or machinery” (it being remembered that the relevant plant is the conduit itself).

77. As to question (a), in a situation where the drill and blast process was undertaken in order to create a subterranean conduit, it must follow logically that the expenditure incurred on that process was incurred on the alteration of land; the essence of the process was to alter the land in order to form the conduit. Moreover, I consider the conclusion at [40] above in relation to the interpretation of “works involving the

alteration of land” in section 22(1)(b) CAA to be irrelevant when considering the slightly different phrase “the alteration of land” in the different context of Item 22 in List C.

78. As to question (b) (whether such alteration was “for the purpose only of installing plant or machinery”), the key issue is whether it can fairly be said that the drilling, blasting and lining process which actually created the conduit was done “for the purpose only of installing” the conduit itself. In this context, I consider the completed conduit must be considered as a single item, made up of the drilled and blasted void together with the associated shotcrete lining (and any associated rock bolt stabilisation, though no evidence of such was drawn to my attention). As I see it, the answer to the question revolves around the meaning of the word “installing”, and in particular whether it extends to include installation by the creation in situ of the asset in question, in addition to installation by putting in place something which previously existed, albeit perhaps only in component form (as in the case of installation of a pipeline).

79. The OED relevantly defines “install” as “to place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use”. This does not take matters much further. I consider the matter finely balanced, but standing back and looking at the matter realistically, the end result of the appellant’s operations was to create in the appropriate place an item of plant (the aqueduct) which was an important element of the overall Scheme where previously there had only been solid rock. Looked at in that way, I consider the alteration of land involved in the creation of the aqueduct to have been carried out for the purpose only of installing the aqueduct.

80. It follows that I consider allowances to be available in full for the expenditure incurred in the creation, lining and (if relevant) stabilisation (with rock bolts) of the conduit.

#### “Cut and cover” conduit built on site with reinforced concrete

81. In common with the other components in the system of conduits, I am satisfied this structure has a plant-like function and I consider it to be part of the appellant’s “plant” within the common law sense. It differs from the drilled and blasted section in that it comprises a clearly quite discrete concrete structure which was erected along a large pre-excavated trench which was then backfilled, rather than a drilled and blasted conduit which has simply been lined.

82. However, applying my views set out at [67] and [69] above as to, respectively, the correct interpretation of the words “tunnel” and “aqueduct” in Item 1 of List B, I consider this structure also to be not a tunnel but an aqueduct (and, accordingly, not “works involving the alteration of land” within section 22(1)(b) – see [40] above). Expenditure on its provision is therefore excluded by section 22(1)(a) and Item 1 of List B, except to the extent saved by section 23 and Item 22 or 25 of List C. For the reasons given at [41] above, I consider its inclusion in List B does not preclude it from being “plant”, only (potentially) from expenditure on it being allowable.

83. For the same reasons as are set out at [62] above, I do not consider it falls within Item 25 of List C as a “pipeline”, and for the reasons set out at [75] above, I do not consider it to fall within the other parts of that Item.

84. The question then arises as to whether Item 22 applies to this aqueduct, given its slightly different method of construction from the “drill and blast” section referred to above. The difficulty for the appellant here is that the reinforced concrete structure which was actually built but then covered over must, on any sensible view, be regarded as the “aqueduct”; it had a separate existence as such entirely independent of the prior excavation and subsequent covering over. In that important respect, it is different from the “drill and blast” aqueduct, which only became viable as such once it had been excavated and lined. The erection of the concrete aqueduct structure could not, in my view, fairly be said to be an “alteration of land”, and the costs of that erection are not therefore saved by Item 22. However, it is equally clear that the costs of excavating its base and subsequently covering it over were incurred on the alteration of land for the purpose only of installing the aqueduct structure itself, and are accordingly allowable.

85. It follows that no allowances are available for the expenditure on the fabrication in situ of the concrete conduit itself (excluded as an “aqueduct” by Item 1 in List B), but the expenditure incurred on the preparatory excavations and the subsequent re-covering of the conduit after it had been built is allowable. Whilst it might appear a somewhat counter-intuitive result that the method of construction should make a difference to the CAA treatment in this way, intuition is rarely a reliable guide to statutory interpretation, and the difference in treatment flows logically, in my view, from the terms of the legislation.

#### Uncovered rock- and concrete-lined channels

86. For the same reasons as set out above, I consider these channels are also “aqueducts” for the purposes of Item 1 of List B. They are clearly not “tunnels”. Expenditure on their provision is therefore excluded, except to the extent saved by Item 22 or 25 of List C. I consider Item 25 cannot apply because all of these channels are, by their very nature, set into the surface of the ground and are not therefore “underground ducts or tunnels”; quite clearly they are also not “pipelines”.

87. So far as Item 22 of List C is concerned, I consider the same analysis must logically apply as for the drilled and blasted section of aqueduct. The aqueducts have been created by excavating rough channels, which have then been lined either with rocks or concrete. They have been created by means of that process, which is inherently a process of alteration of land. The only purpose in doing so was to install the resulting aqueducts as part of the overall water gathering system.

88. It follows that I consider all of the expenditure incurred in the provision of the rock- and concrete-lined channels to be allowable.

#### *The headrace*

89. Sections of the headrace are engineered in somewhat different ways and the bottom two sections perform additional functions to those performed by the upper part.



The top (main) section of the headrace was originally designed and built as a simple shaft through the rock, reinforced (where rock conditions required it) and lined with rock bolts and shotcrete. The next 220 metres or so (working down) includes a very much more robust reinforced concrete lining with grouting injected between the bare rock and the reinforced concrete. This section was designed in this way in order to prevent any risk of the water pressure in the headrace bursting through the rock and flooding the power cavern. The final 85 metres below that section includes a tapered and curved steel tube which is securely attached to the main inlet valve below the turbine at the bottom of the power cavern (which, as well as preventing the water pressure from bursting the wall of the power cavern, also provides a completely secure and watertight engineered connection between the headrace and the main inlet valve).

90. The headrace as a whole certainly performs a plant-like function in delivering water at progressively increasing pressure, without significant leakage, from the reservoir to the turbine in the power cavern. I consider it to be an item of plant at common law. I note that in *Margrett v Lowestoft Water & Gas Company* (1935) 19 TC 481 Finlay J in the High Court decided that a structure which supported a water tank at the requisite height above ground level to provide the necessary head of water was not plant; however I consider the headrace to be very different (as well as noting that in *Barclay Curle*, doubts were expressed about the correctness of the decision in *Margrett*). Rather than simply supporting a plant-like structure, the headrace itself performs the function of plant. To echo the words of Lord Guest in *Barclay Curle*, it performs a function of “harnessing the natural element of gravity... to perform a trade function.” As such, it cannot be seen as part of the setting in which the appellant’s trade is carried on, it is part of the plant *with* which it is carried on.

91. I consider the functions of each section of the headrace to be very different from that served by the various aqueducts considered above, and I do not consider the headrace (or any part of it) to be an “aqueduct” in the sense used in Item 1 of List B – its function is far more complex than simply transporting water from one place to another; it is designed to deliver the required 18.6 cubic metres per second of water at a pressure of 60 atmospheres to the turbine without allowing it to escape and dissipate or cause catastrophic damage to the power cavern and the equipment in it.

92. The question then arises as to whether it (or any part of it) is a “tunnel” within Item 1. My observations on the meaning of “tunnel” in that context are set out at [67] above. For the reasons there given, I do not consider the headrace (or any part of it) to be a “tunnel” within Item 1 of List B.

93. Thus I do not consider the headrace, or any part of it, to be any of the assets or structures listed in Item 1 of List B (the only Item which Mr Brennan argued to be relevant).

94. The next question is whether any of the expenditure on the headrace was incurred on “works involving the alteration of land”, within the meaning of section 22(1)(b) CAA. Given the way in which I consider that phrase should be interpreted (see [39] – [40] above), I consider that it was, insofar as it comprised the cost of drilling the headrace and reinforcing and lining it. The works in doing so amounted in my view

to works which had as their objective the creation of a carefully engineered headrace by means of the alteration of land which was carried out through the boring, reinforcing and lining process.

95. Accordingly, unless saved by Item 22 or 25 in List C, the expenditure incurred in creating the headrace would be disallowed to that extent.

96. Given my views on the correct interpretation of Item 25 in List C (see [74] and [75] above), I do not consider it can assist Mr Peacock in relation to any part of the headrace.

97. As to Item 22 in List C, I consider similar points arise as in relation to the underground water conduits (the “drill and blast” and “cut and cover” sections referred to at [64] and [81] above respectively).

98. The bottom 85 metre section of the headrace contains a tapered steel pipe which attaches to the main inlet valve and HMRC have accepted that the cost of this pipe and of boring the associated length of the headrace itself qualify for allowances. In my view, they were correct to do so.

99. The remainder of the headrace might be regarded as comprising two sections working upwards: first, the final 220 metres or so before the steel-lined section, which has been lined with reinforced concrete; and second, the remaining length which was either left as a simple drilled shaft through the bare rock or was stabilised and lined to a greater or lesser degree with rock bolts and shotcrete (whether at the time of original creation of the headrace or when the remedial work on it was carried out).

100. Whether these sections are viewed independently or (which I consider to be the better view) as elements of a single item of plant comprising the entire headrace, it is clear to me that any parallel with the “cut and cover” aqueduct section would be misconceived. The headrace was created and reinforced or lined in a single operation which brought into existence an item of plant, rather than being formed by installation of a separate structure within the setting of a prepared shaft. It is akin to the “drill and blast” section of aqueduct, and in my view the same analysis must apply to it. The expenditure that was incurred in boring and lining it was in my view incurred for the purpose only of installing the completed headrace, an item of plant at common law. Accordingly, whilst it would be excluded from allowances by section 22(1)(b) CAA, the expenditure on it is saved by Item 22 in List C and accordingly it is allowable in full.

101. The parties have agreed that the remedial expenditure on the headrace should carry the same treatment for CAA purposes as the original expenditure on its creation. I consider this to be correct and accordingly such expenditure is also allowable in full. For the avoidance of doubt, I consider that the cost of boring the downstream access tunnel (which was created solely in order to provide direct access to the headrace from the main access tunnel for the purpose of the remedial works, and therefore for the purpose only of installing the replacement section of headrace) should be regarded as

having been incurred in the provision of that replacement headrace section, similar to the excavation works in *Barclay Curle*.

*The power cavern and transformer cavern*

102. Mr Peacock urged me to consider these as two separate items, Mr Brennan considered them to be a single entity. They were excavated in a single process and only separated afterwards by blast-resistant and fireproof doors and partitioning, but if it were relevant I would regard them as a single entity.

103. Mr Brennan's primary submission was that these caverns were "works involving the alteration of land" within section 22(1)(b) CAA and accordingly the expenditure on their provision was not allowable. The only arguable saving provision was to be found in Item 22 of List C, but in his submission that saving was clearly inapt because the caverns had been excavated not only for the purpose of installing the various large items of generating plant and machinery, but also (crucially) for the purpose of providing the place in which the appellant carries on its trade of electricity generation, including various elements of staff accommodation (toilets, showers, rest room, control room, etc). The caverns could not themselves be seen as "plant" in the sense that the dry dock in *Barclay Curle* was a "giant vice" in which the ships were held. They performed no function apart from accommodating an underground power station. They were the setting in which the trade was carried on, not part of the plant used in doing so.

104. Mr Brennan's secondary argument (though he placed it first in his skeleton argument) was that if not "works involving the alteration of land", then the caverns constituted a "building" within the meaning of section 21 CAA. They had all the accoutrements of a building – walls, a floor, a roof, rooms etc. They were "the result of a process of construction which has given rise to an enclosed space designed and used for the accommodation and protection of things and persons and for the carrying on of the trading activity". They were an unusual building, to be sure, but a building nonetheless. To illustrate the breadth of possible meanings of the word "building", he referred me to *R (Ghai) v Newcastle City Council* [2010] EWCA Civ 59, 3 All ER 380. That case was concerned with the interpretation of the word "building" as applied to structures within which human cremation was permitted under statute, but the Court of Appeal made some general comments about how the interpretation of the word should be approached.

105. I do not find Mr Brennan's submission that the caverns (or either of them) amount to a "building" in any way convincing, nor do I find the comments in *Ghai* of any assistance. In normal English usage, nobody would refer to a cavern as a "building", nor do I consider there to be anything in the statutory context here which suggests otherwise. Section 21 CAA contemplates the "construction" of a building, and it would be more apt to regard the caverns as having been excavated than constructed. The fact that the power station might just as easily have been installed in a different structure which anyone would recognise as a building (which Mr Brennan seemed to consider relevant) adds nothing to the argument. I do not consider the caverns (either separately or together) to be a building and therefore section 21 does not apply to them.

106. In response to Mr Brennan’s primary argument, Mr Peacock likened the expenditure on excavation of the caverns to the excavation expenditure in *Barclay Curle and Cooke v Beach Station Caravans* [1974] STC 402. He argued that the cost of excavation was part of the cost of provision of the generating equipment, on the basis that it was necessary expenditure to install that which is agreed to be plant or machinery. To the extent it might serve other purposes (e.g. to provide accommodation appropriate for the use of visiting engineers), those other purposes were entirely ancillary. The uncontested evidence of Mr Smith was that the siting of the generating equipment in caverns at the specific location chosen was “to optimise the head and hydraulic system layout, to maximise the power production from the Scheme while minimising the cost of construction based on the topology and geology.” On any realistic appraisal, the only reason for creating the caverns was so as to install the generating equipment in the very best possible place. So far as the transformer cavern was concerned, the argument was in his submission even stronger, as that cavern contained nothing but the transformer and its associated equipment; there was no ancillary accommodation at all. To the extent it was relevant, Item 22 in List C would save the excavation expenditure from disallowance under section 22 CAA, essentially for the same reasons. As to the word “solely” in Item 22, he submitted the same realistic appraisal of the purpose of the excavations led inexorably to the conclusion that the sole purpose had been to install the generating equipment in the best possible location; in doing so, of course ancillary accommodation was required for visiting staff, etc, but that was not, on any realistic view, a purpose of the appellant in excavating the caverns. Another way of addressing the issue, in his submission, was to apply a “but for” test, i.e. to ask the question: “would this particular expenditure have been incurred but for the desire to install plant and machinery?”

107. One argument Mr Peacock did not raise (though he came close to it at one point) was that the caverns might themselves be regarded as “plant” within the common law meaning of the word. He referred to the description by Lord Guest in *Barclay Curle* of the water tower in *Margrett*: “the harnessing of the natural element of gravity... to perform a trade function” as “a pretty good description of what goes on at Glendoe”. He did not go so far as to seek to bring the caverns themselves under that umbrella, and I consider he was right not to do so.

108. In my view, the caverns clearly fell outside any of the Items in List B (neither side argued that they fell within it) but quite clearly amounted to “works involving the alteration of land” within section 22(1)(b) CAA. The sole question to be addressed therefore is whether the expenditure on their excavation was incurred “for the purpose only of installing plant or machinery” for the purposes of Item 22 in List C. The difference between the parties on this issue could be summarised thus: while Mr Peacock submitted that the only purpose for creating the caverns was to install the generating machinery (it having been established that the best place overall for doing so was in caverns excavated at this precise spot), Mr Brennan submitted that the real purpose of excavating the caverns was to create the premises within which the trade of electricity generation could be carried on, into which the generating equipment could subsequently be installed.

109. As set out at [79] above, the Oxford English Dictionary relevantly defines “install” as “to place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use”. In common parlance, the word carries a connotation of setting something in place, possibly with some ancillary alterations to the “place” in which it is being set. In the present case, the excavation of the caverns actually created the place in which the separate apparatus in question (the generating equipment) was to be installed. Mr Peacock effectively argued that there was an exact parallel between the excavations in *Barclay Curle* (expenditure on which was allowed by the House of Lords as expenditure on the “provision” of the dry dock installed in those excavations) and the excavation of the caverns. I do not consider this to be correct. The excavations in *Barclay Curle* were entirely different in nature from those involved in this appeal; it is one thing to prepare an existing ground surface to receive an item of plant but it is altogether a different matter to create, out of solid rock, a cavern or caverns into which various items of plant and machinery can thereafter be installed. The work involved in the former can fairly be said to be carried out “only for the purpose of installing” the relevant plant or machinery; the latter in my view cannot. Instead, I consider it to amount to the creation of the setting or premises in which the trade was to be carried on; to be sure, the intention was always to install the generating equipment in the caverns, and they would not have been excavated but for that intention. But that is not the test. Unlike the headrace and the aqueducts, I do not consider the caverns to have any plant like function in their own right, they amount merely to the setting or premises within which the generating trade could be conducted.

110. It follows that I do not consider the expenditure on the creation of the caverns themselves (including on the rock bolt stabilisation and the shotcrete lining) to be allowable as expenditure on “the alteration of land for the purpose only of installing plant or machinery”.

111. However, once the caverns had actually been created, there was additional expenditure incurred on installing the plant and machinery within the void so created. I note, for example, that a reinforced concrete structure was erected, from which the generator was effectively suspended, and the cost of doing so seems to me to have been a cost incurred in the “provision” of the generating equipment (within the general principles set out in *Barclay Curle*), notwithstanding that it also provided floor surfaces capable of being walked upon. The heavy duty overhead mobile crane was mounted on reinforced concrete beams specifically constructed for the purpose and I consider the cost of construction of those beams similarly to have been incurred in the provision of the crane. There was also a dispute about steel access hatches set into the concrete structure to enable the crane to be used to raise and lower heavy items (if necessary, the generator or turbine themselves) for maintenance and replacement purposes. Without such access arrangements, the crane would effectively be largely useless, and I consider those hatches to have performed a plant-like function in facilitating the operation of the crane, and not to operate as part of the premises or setting in which the trade was to be carried on. They share the same analysis, in my view, as the removable partitions in *Jarrod v John Good & Sons Ltd* [1963] 1 All ER 141. As such, I consider the expenditure incurred on their provision also to be allowable.

112. The evidence before me was not explored in sufficient detail to identify all the separate categories of expenditure within the caverns potentially in dispute, so I must leave it to the parties to agree on the relevant allocation in the light of the above principles or, if necessary, to apply for a final determination of any areas of dispute. I would observe however, that the control room, toilet and messing facilities would appear to me to be part of the setting or premises within which the trade was to be carried on; accordingly the expenditure incurred in their installation would not be allowable.

#### *Tailrace*

113. I consider the Tailrace to be an aqueduct, for similar reasons as those set out at [64] to [80] above in relation to the drilled and blasted sections of the water gathering conduits. Though it was mostly bored by a tunnel boring machine rather than drilled and blasted, I do not consider the method of construction makes any difference to the analysis. It is still a conduit which transports water (in this case, the spent water from the turbine) from one place to another (the turbine outlet to Loch Ness) under the simple action of gravity and it has no special characteristics of the type displayed by the headrace. For the same reasons as are set out at [64] to [80] above, I consider the expenditure incurred on its provision is saved by Item 22 of List C.

114. Accordingly, I consider the expenditure incurred on the tailrace (and its subsequent partial shotcrete lining) to be allowable, for essentially the same reasons as apply to the drilled and blasted sections of the water gathering conduits.

115. At the foot of the tailrace is a cylindrical reinforced concrete structure at the side of Loch Ness which enables the tailrace to be isolated from the Loch (by insertion of stoplogs) for dewatering and maintenance. This appears to me to have an identity separate from the tailrace itself, and to act as part of the plant of the appellant's business. I do not consider it to fall within any of the Items in List B, nor is it "works involving the alteration of land". Accordingly, I also consider the expenditure on its provision to be allowable.

#### *Main access tunnel*

116. Both parties agreed this fell within Item 1 of List B as a "tunnel" properly so called. I agree. The question is whether it is saved by Item 22 or 25 in List C.

117. I do not consider that it is. It cannot be said to have a "primary purpose of carrying utility conduits", as its primary purpose was originally to reach the point at which the caverns would be excavated and its subsequent purpose is clearly to allow personal access to the caverns (even though for some or all of its length it also carries utilities). Accordingly Item 25 cannot apply. Nor, for reasons similar to those given in relation to the caverns themselves, can it be regarded as having been created "for the purpose only of installing plant or machinery"; a very large part of its purpose was to facilitate the creation of the caverns themselves (and to provide subsequent access to them), even though of course the plant and machinery would also have been installed after being transported in along the tunnel. Thus although the access tunnel was excavated partly with the purpose of using it for installing the plant and machinery, that

was not the “only” purpose of incurring the expenditure on it; it was also to provide subsequent access to create and use the caverns.

118. I consider therefore that the expenditure incurred on the main access tunnel is not allowable.

119. *Turbine outflow tunnel*

120. This is the name given to the short stretch of conduit that joins the outflow of the turbine to the tailrace (the tailrace and the headrace were bored in a single straight line, with the caverns set to one side, so a short length of conduit is required to bridge the gap from the turbine back to the main tailrace tunnel). I consider this to be an additional (first) part of the tailrace, and to merit the same treatment for capital allowance purposes as the main part of the tailrace, for essentially the same reasons.

121. Expenditure incurred on the turbine outflow tunnel, which I consider to be an aqueduct, is therefore allowable.

*Drainage and dewatering tunnels*

122. The tailrace and the headrace were bored in a single line. As the end of the headrace was then diverted towards the caverns by a 45 degree bend and the output from the turbine re-joined the original tailrace further down at a similar angle, a short length of the original bore of the combined headrace/tailrace, known as the “dewatering tunnel”, was left generally unused. It does however serve (along with a short stretch of conduit, known as the “drainage tunnel”, which links it to the steel-lined section of the headrace shortly before the main inlet valve) as a dewatering arrangement, should it be necessary to dewater the headrace without passing all the water in it through the turbine. Most of the time it lies empty. Nonetheless, I consider its purpose when used to be that of an aqueduct, designed to allow the water to be simply evacuated from the headrace when required.

123. I consider the same analysis applies to this pair of conduits as to the tailrace itself. Accordingly, expenditure on them is allowable.

*Connection tunnel and emergency tunnel*

124. The connection tunnel allows personal access from the main access tunnel (some way away from the caverns) around the side of the caverns to an emergency tunnel (which provides a separate means of escape from the caverns if the main entrance from the caverns to the access tunnel is blocked). It then continues down to join the turbine outflow tunnel about half way along its length, providing access to it for inspection and maintenance purposes. About three quarters of the length of the connection tunnel therefore serves both purposes, and the last quarter solely provides access to the turbine outflow tunnel.

125. I consider this pair of tunnels to fall within Item 1 of List B as “tunnels”. There was no evidence before me to suggest that any part of either of them was created “for the purpose only of installing plant and machinery” (beyond Mr Peacock’s general

argument, which I reject, to the effect that all the excavations were carried out only for that purpose).

126. Neither tunnel carried utility conduits, and I do not consider it can fairly be said (for the reasons set out above) that expenditure was incurred on them for the purpose only of installing plant and machinery.

127. It follows that the expenditure incurred on them is not allowable.

#### *Transformer cable tunnel*

128. This is a short length of tunnel which leads directly from the transformer cavern up to the main access tunnel a short distance outside the caverns. Its purpose is to carry the main 132kV output cabling from the transformer to the main access tunnel. It is however large enough comfortably to walk down, with the cabling mounted securely on the wall.

129. I am satisfied that although it is undoubtedly a tunnel (see [66] above for the basis of this view) and therefore falls within Item 1 in List B, it is also a tunnel which has “a primary purpose of carrying utility conduits”, namely the 132kV output cable to the national grid. Mr Brennan argued there was no evidence before me upon which I could make such a finding. However, I consider it to be a clear inference from the way that the various tunnels are arranged and the fact that this tunnel has no apparent use apart from to accommodate the power cable; it leads nowhere other than from the main access tunnel to the transformer cavern. At one point, Mr Brennan had also argued that the fact that the 132kV cable was an outgoing power supply rather than an incoming one meant that it could not properly be regarded as a “utility”; upon instructions, however, he specifically abandoned this argument though declaring himself, somewhat wistfully, to have warmed to it as he had been developing it.

#### **Summary**

130. I consider the expenditure incurred on the respective items to be allowable (or not) as expenditure incurred on the provision of plant or machinery as follows:

- (1) In relation to the water intakes and associated headponds – allowable in full (see [50] and [55] above);
- (2) In relation to the water conduits between the water intakes and the main reservoir:
  - (a) Lengths of prefabricated plastic and concrete pipes buried underground – allowable in full, including costs of burying (see [63] above);
  - (b) Drilled and blasted underground conduit, lined with shotcrete – allowable in full (see [80] above);



(c) “Cut and cover” reinforced concrete built on site – costs of construction of conduit itself not allowable, but costs of excavation and subsequent re-covering allowable in full (see [85] above);

(d) Uncovered rock- and concrete-lined channels –allowable in full (see [88] above);

(3) In relation to the headrace – allowable in full (see [100] above) including the remedial work to it (see [101] above).

(4) In relation to the caverns, the costs of excavation (including the rock bolt stabilisation and shotcrete lining) are not allowable (see [110] above) but the costs of erecting the reinforced concrete structures within the power cavern in order to mount the crane and the generating equipment properly are allowable (see [111] above) along with the steel access hatches allowing the crane to perform its function. There may be certain further items of expenditure incurred within the caves which may be allowable, as to which a final determination can be issued upon receipt of further detailed evidence, if necessary (see [112] above).

(5) In relation to the tailrace –allowable in full (including the remediation expenditure), as well as the concrete structure on the shore of Loch Ness which permits dewatering (including the cost of any alteration to land solely for the purpose of its installation) (see [114] and [115] above);

(6) In relation to the various other lengths of tunnel or conduit –

(a) Main access tunnel – not allowable (see [118] above);

(b) Turbine outflow tunnel – allowable in full (see [121] above);

(c) Drainage and dewatering tunnels – allowable in full (see [123] above);

(d) Connection tunnel and emergency tunnel – not allowable (see [127] above);

(e) Transformer cable tunnel – allowable in full (see [129] above).

131. The appeal is accordingly **ALLOWED IN PART** in principle to the extent set out above. The parties are at liberty to apply for determination of any unresolved disputes of amount or detail if they are unable to reach final agreement on the basis of this decision in principle.

132. 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.

**KEVIN POOLE  
TRIBUNAL JUDGE**

**RELEASE DATE: 31 July 2018**