

# Using the wind

**Julie Butler** discusses the First-tier Tribunal decision in *Gunfleet Sands Ltd* which considered whether capital allowances claimed on expenditure for studies and project management for the construction of wind farms qualified as the provision of plant.

**A** recent case, *Gunfleet Sands Ltd* (TC8387), involved wind farms, a subject that can be important to farmers. The sums involved were significant, as was the decision.

During the case questions were asked as to whether or not capital allowances claimed on expenditure for studies and project management prior to the construction of the wind farms qualified as the provision of plant. There were four appellant companies, all of whom were members of the same group and each owned and operated an offshore wind farm to generate electricity for sale. This case, together with the relentless scrutiny of capital allowance claims by HMRC, shows the need to plan marginal and significant claims ahead of the expenditure to maximise the claim and to have awareness of where capital allowances will not be allowed. There is a clear need for accountants, tax advisers and the claimant to work together in listing, recording and analysing expenditure and tying it into function.

## Wind farms as single entities of plant

The first tax consideration was whether the wind farms comprised of a single item of plant and machinery for capital allowances purposes. The appellants had claimed the fees for studies and project management in relation to the wind farms on the basis it was 'on the provision of plant'. The significance here was that if the wind farms were considered a single item

### Key points

- Do capital allowances claimed on expenditure for studies for the construction of wind farms qualify as providing plant?
- The need to plan marginal and significant claims ahead of the expenditure to maximise the claim.
- Should a given system qualify as a single system or should each part be viewed as distinct items?
- Wind farms were likened to production lines and the site can, therefore, be considered as comprising as a single item of plant.
- The First-tier Tribunal found that studies and project management costs for the construction of wind farms partly qualified for capital allowances.



© Getty Images/Stockphoto

of plant, it would avoid the need to assess each component – such as turbines and substations – individually.

The appellants put forward that there is no particular test in whether a given system should qualify as a single system or if each part should be viewed as distinct items. It is a question of fact and degree that must be reviewed on a case-by-case basis. Evidence to support the argument was provided from historical cases. For example, *Cole Brothers Ltd v Phillips* [1982] STC 307 and *Urenco Chemplants Ltd v CRC* [2022] UKUT 00022 (TCC) look at whether parts are directed towards a single use. Likewise, it was argued in *CIR v Barclay Curle & Co* 1969 45 TC 221 that capital allowances claimed on individual items of plant did not prevent the dry dock (in which the smaller items of plant were installed) as being considered a single item of plant.

The First-tier Tribunal (FTT) found that each wind farm did qualify as a single item of plant. The purpose of the wind farm is to generate electricity, increase the voltage and then feed it to the National Grid. The generation of electricity occurs from the wind turbines and array cables, whereas the increase in voltage is actioned by the substations. The configuration of all the turbines in a wind farm needs to be designed to ensure the maximum amount of electricity is generated from the overall site. The tribunal found the evidence clearly shows the wind farms are designed at the lowest cost to achieve the optimal electric generation which requires all wind turbines to operate as a single item. The supervisory control and data acquisition system (SCADA) provides a way to control the whole wind farm as a single entity, similar to that of a power station. The FTT stated that it would be 'commercial madness' if all the turbines had to be shut down in order to repair one single turbine and this function therefore, does not make them all individual items of plant.

The wind farms were likened to production lines; there are different components, but all are directed towards a single purpose. While each turbine can generate electricity individually, they can be brought into operation in groups or singularly, their nature and function is to generate electricity

which is the sole purpose of the wind farm. It was decided that the site can, therefore, be considered as comprising as a single item of plant. The FTT stated if they were wrong about this, then every wind turbine and array cable would still qualify for capital allowances, but each as an item of plant.

### Studies and project management costs too remote

The good news is that the FTT found that studies and project management costs relating to the construction of offshore wind farms partly qualified for capital allowances.

*Gunfleet* incurred expenditure of approximately £48m in relation to the construction of offshore wind farms. HMRC accepted that plant and machinery allowances were available on the construction and installation of the wind turbines and the electrical cabling that connected them, but it denied capital allowances on studies and project management costs. It argued that these costs were too remote from, and not incurred on the provision of, the wind farm or the wind turbines themselves.

Expenditure on plant and machinery in CA 2001, s 11 can include more than cost, for example, transport and installations costs. Qualifying expenditure can also extend to expenditure ensuring the operation of the plant, as in *JD Wetherspoon plc v CRC* [2012] STC 1450. The key point in question here, however, was whether the expenditure related directly to the plant. For example, HMRC disputed the costs of geophysical and geotechnical studies, project management and design and procurement of the wind farms, arguing that these were being incurred to obtain statutory consent. However, the appellant argued that legislation does not stipulate that expenditure on plant cannot have some other effect or purpose, merely that it is spent on the provision of plant.

### Not for design but for function

It was deemed up to *Gunfleet* to prove that the environmental studies directly related to the provision of plant, and evidence was required to show that if not for the design, the wind farms and turbines would not be able to carry out their function, ie the generation of electricity. The judge reviewed the expenditure based on this principle of 'necessary and unnecessary' fees. The FTT found many of the fees being claimed by *Gunfleet* did not qualify but seven overall did. These included four marine mammal studies and shellfish studies showing they had a precise physical relationship between the turbines and site enabling the function of them to generate electricity.

Given these studies related directly to the necessary design, construction or installation of the turbines and without such studies the turbines would not have been able to perform their function, they must therefore be function-based and qualify for plant and machinery allowances. The project management expenditure (including preliminaries and overheads) was also allowable to the extent they related to matters which in turn qualified for allowances.

### Capital not revenue

*Gunfleet* raised an alternative argument that if the expenditure was not deemed as capital expenditure and they were denied capital allowances then they could obtain tax relief via a pre trading expense (CTA 2009, s 61). However, the FTT decided the expenditure falls within CTA 2009, s 53, ie

capital expenditure, and therefore the expenditure cannot be claimed as revenue. Those costs that did not qualify for capital allowances could not be deducted from profits as pre-trading revenue expenditure as they were capital in nature. The FTT rejected the department's approach, noting that expenditure can be capital and relate to an asset without qualifying for capital allowances.

### Complex area of capital allowances

This case tackles a complex area of capital allowances legislation – the allocation of indirect costs – and suggests additional fees may qualify dependent upon the effect of the expenditure. To apply the 'necessary design' test seems a heavy burden on claimants given the FTT accepted that 'design' is an ambiguous word. It remains to be seen how the tests introduced here could be applied in practice moving forward, particularly where fees relate to a number of different assets, such as architects' fees for a building.

The analysis in *Gunfleet* focused on the impact of the various studies and whether they actually created a difference in the design or method of construction – something that can be difficult to assess. The various studies which were held to qualify included those such as archaeology studies, traffic, transport and tourism studies and marine mammal studies, although the distinctions were finely drawn. For example, detailed metocean studies were found to qualify, whilst desktop ones did not. Noise assessment studies were also disqualified, partly because they recommended mitigations already covered by marine mammal studies, which qualified. The FTT drew a distinction between necessary and unnecessary design – a new test driven by the *Ben-Odeco* case ([1978] STC 460) and the fact that expenditure must directly relate to the fabrication, installation or construction of plant.

Many might think that this case might be too large to apply to more general applications. The findings do have a wider application for similar expenditure incurred on other asset types, as may be the case for infrastructure projects. However, it does serve to highlight the difficulty in practice in assessing which costs qualify for allowances and what to do with those that do not. Where there are marginal areas of capital allowance claims, it will be important to submit a detailed capital allowance analysis along with any claim to HMRC. ●

#### Author details

**Julie Butler** FCA is founding director of Butler & Co Alresford Limited. She is the author of *Tax Planning for Farm and Land Diversification* (Bloomsbury Professional), *Equine Tax Planning* (ISBN 0406966540), *Butler's Equine Tax Planning* (third edition) (Law Brief Publishing) and *Stanley: Taxation of Farmers and Landowners* (LexisNexis), and editor of *Farm Tax Brief*.



Julie can be contacted by email: [j.butler@butler-co.co.uk](mailto:j.butler@butler-co.co.uk) or by phone: 01962 735544.

#### FIND OUT MORE On Taxation.co.uk

- Green equipment: [tinyurl.com/9h4hstcx](https://tinyurl.com/9h4hstcx)
- The answer is blowing in the wind: [tinyurl.com/3fepsrp4](https://tinyurl.com/3fepsrp4)