Neutral Citation Number: [2020] EWCA Civ 1419

Case No: A3/2019/1656

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Judge Timothy Herrington and Judge Jonathan Cannan
[2019] UKUT 133 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2020

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LADY JUSTICE ANDREWS

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Between:

(1) TOTAL E&P NORTH SEA UK LIMITED (formerly MAERSK OIL NORTH SEA UK LIMITED) (2) TOTAL OIL UK LIMITED (formerly MAERSK OIL UK LIMITED)	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr Laurent Sykes QC (instructed by **Vinson & Elkins LLP**) for the **Appellants**
Mr Michael Jones (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 6 October 2020

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Approved Judgment

Lord Justice Newey:

1. Companies carrying on "oil-related activities" are subject to both corporation tax and a "supplementary charge". "Oil-related activities" include extracting, or causing to be extracted, oil at any place in the United Kingdom or on the UK Continental Shelf, transporting any such oil and effecting the initial treatment of any such oil (see sections 272 and 274 of the Corporation Tax Act 2010). Such activities are treated as a separate trade and the income from them represents "ring fence profits" on which corporation tax is charged (see sections 275, 276, 277 and 279 of the Corporation Tax Act 2010). The "supplementary charge" is levied on "adjusted" ring fence profits, in calculating which financing costs are left out of account (see section 330 of the Corporation Tax Act 2010).

2. Between 2006 and 2011, the supplementary charge amounted to 20% of adjusted ring fence profits. On 23 March 2011, however, it was announced that the supplementary charge would be increased to 32% from midnight. The change in rate was subsequently carried into effect by section 7 of the Finance Act 2011, which received the royal assent on 19 July 2011.

3. The appellants ("the Companies"), which were known in 2011 as Maersk Oil North Sea UK Limited and Maersk Oil UK Limited (respectively "MONS" and "MOUK"), both carried on "oil-related activities" and so were subject to the supplementary charge. The question raised by this appeal is how much of each company's adjusted ring fence profits for 2011 are liable to the charge at 20% and how much at 32%. Both companies had an accounting period which ran from 1 January to 31 December 2011 and so straddled the point at which the supplementary charge was raised.

Section 7 of the Finance Act 2011

4. Section 7 of the Finance Act 2011 ("the 2011 Act") provided, as far as material, as follows:

> "(1) In section 330 of CTA 2010 [i.e. the Corporation Tax Act 2010] (supplementary charge in respect of ring fence trades), in subsection (1), for '20%' substitute '32%'.
>
> (2) The amendment made by subsection (1) has effect in relation to accounting periods beginning on or after 24 March 2011 (but see also subsection (3)).
>
> (3) Subsections (4) to (10) apply where a company has an accounting period beginning before 24 March 2011 and ending on or after that date ('the straddling period').
>
> (4) For the purpose of calculating the amount of the supplementary charge on the company for the straddling period—
>
> (a) so much of that period as falls before 24 March 2011, and so much of that period as falls on or after that date, are treated as separate accounting periods, and

> (b) the company's adjusted ring fence profits for the straddling period are apportioned to the two separate accounting periods in proportion to the number of days in those periods.
>
> (5) But if the basis of apportionment in subsection (4)(b) would work unjustly or unreasonably in the company's case, the company may elect for its profits to be apportioned on another basis that is just and reasonable and specified in the election.
>
> (6) The amount of the supplementary charge on the company for the straddling period is the sum of the amounts of supplementary charge that would, in accordance with subsections (4) and (5), be chargeable on the company for those separate accounting periods.
>
> …
>
> (11) In this section—
>
> *'adjusted ring fence profits'* has the same meaning as in section 330 of CTA 2010;
>
> …
>
> *'supplementary charge'* means any sum chargeable under section 330(1) of CTA 2010 as if it were an amount of corporation tax."

5. The 32% rate of supplementary charge was thus to have effect in relation to accounting periods beginning on or after 24 March 2011 and, as regards accounting periods straddling that date, subsections (4) to (10) were to apply. Subsection (4) provided for a company's adjusted ring fence profits for a straddling period to be apportioned by time, with "so much of that period as falls before 24 March 2011, and so much of that period as falls on or after that date, … treated as separate accounting periods" and the adjusted ring fence profits "apportioned to the two separate accounting periods in proportion to the number of days in those periods". If, on the other hand, that basis of apportionment "would work unjustly or unreasonably in the company's case", it could elect for its profits to be apportioned on "another basis that is just and reasonable and specified in the election": see subsection (5).

Factual background

6. During 2011, MONS was the operator of six oil fields in the North Sea and had joint interests in three further UK fields. Three of the fields of which MONS was the operator, viz. Gryphon, South Gryphon and Tullich, tied back to the Gryphon Alpha floating production storage and offloading vessel ("the Gryphon FPSO").

7. On 4 February 2011, a severe storm caused extensive damage to the Gryphon FPSO and subsea equipment ("the Gryphon incident"). As a result, the Gryphon, South Gryphon, Maclure and Tullich fields all suffered a "shut in" pending repairs. Production did not resume for more than two years.

8. MONS incurred capital expenditure of $245,885,402 between 24 March 2011 and the end of 2011. This related substantially to the Gryphon incident, but the opportunity was taken to accelerate some upgrades as well. MONS received two insurance payments in respect of the Gryphon incident: $266,298,078 from "Loss of Production Insurance" and $55,039,192 from "Property Damage Insurance". The latter payment resulted in a balancing charge for capital allowance purposes.

9. During 2011, Dumbarton, a field which MONS owned jointly with MOUK, was shut in for maintenance over July and August. It is usual for such work to be undertaken in the summer months because the weather is better.

10. MONS' adjusted ring fence profits from all its oil field operations in the year to 31 December 2011 amounted to £69,082,470.

11. Turning to MOUK, in 2011 it had interests in five oil fields, of which one was Dumbarton. Two of the other fields, Janice and Affleck, were tied back to the Janice floating production unit ("the Janice FPU"). A scheduled shut in at the Janice FPU in September 2011 was delayed and lasted for 12 days rather than the five days planned. A second shut in beginning on 24 October 2011 was expected to last 26 days but actually continued for 180 days, 69 of which fell within 2011.

12. MOUK's adjusted ring fence profits from all its oil field operations in the year to 31 December 2011 were £48,094,717.

13. MONS and MOUK each sought to make an election pursuant to section 7(5) of the 2011 Act. Both adopted an "actual" basis in place of the time apportionment for which section 7(4) of the 2011 Act provided. This "actual" basis involved considering the pre-24 March and post-24 March periods independently, as if they were two separate accounting periods, and allocating income, expenditure and allowances to the periods according to when they arose. The First-tier Tribunal ("the FTT") found that Mrs Linda Ritchie, MONS' tax manager, "used the accruals figures produced by MONS and MOUK's monthly management accounts to provide the 'actual basis' on which she submitted MONS and MOUK's tax returns for the 2011 accounting period, including taking account of capital expenditure at the date when it was incurred" (see paragraph 111(ii) of its decision). The FTT concluded as follows in paragraph 136 of its decision:

> "Mrs Ritchie appeared to me to be a reliable witness who had made a genuine attempt to produce an allocation of taxable profits in line with the requirements of s 7(5) and by reference to a profit allocation method with which she was familiar and was already being used for internal reporting purposes. As she said '*an apportionment based on the Appellants' actual profits per month [was] the most natural alternative*'."

14. The Companies' approach resulted in all their adjusted ring fence profits for the 2011 accounting period being allocated to the period before 24 March ("the Earlier Period") rather than that from 24 March ("the Later Period") and so in their escaping the 32% rate of supplementary charge. As the Upper Tribunal ("the UT") noted in paragraph 19 of its decision, the upshot of the Companies' basis of apportionment was as follows:

	MONS **$**	**MOUK** **$**
Adjusted ring fence profits	110,649,391	77,033,311
Companies' actual basis		
Earlier period	112,762,117	113,028,916
Later period	(2,112,726)	(35,995,605)
Apportionment on actual basis		
Earlier period	110,649,391	77,033,311
Later period	Nil	Nil

15. The Companies were eligible for 100% first year allowances in respect of capital expenditure. Their apportionment of their 2011 adjusted ring fence profits involved allocating capital allowances of respectively $405,066,519 and $140,803,501 to the Later Period on the footing that that was when the expenditure was incurred. That, the Companies maintain, was in accordance with section 5 of the Capital Allowances Act 2001, which provides for capital expenditure "to be treated as incurred as soon as there is an unconditional obligation to pay it".

16. HM Revenue and Customs ("HMRC"), however, rejected the Companies' calculations. They did not dispute that each of the Companies was entitled to make an election under section 7(5) of the 2011 Act, but they did not consider the basis on which the Companies had approached apportionment of their adjusted ring fence profits to be "just and reasonable". HMRC took issue, in particular, with the Companies' approach to capital allowances and put forward an alternative basis of apportionment under which capital allowances were time-apportioned. Under HMRC's proposals, 29% of MONS' adjusted ring fence profits and 47% of those of MOUK fell to be attributed to the Later Period and so subject to the 32% rate of supplementary charge.

17. The Companies having declined to accept HMRC's method, HMRC issued a notice of amendment to MONS' self-assessment for the 2011 accounting period which charged additional tax of £2,395,540.00 and a closure notice assessing MOUK to extra tax of £4,474,785.52. The Companies appealed and were successful in the FTT, but the UT allowed an appeal by HMRC.

The FTT decision

18. The FTT (Judge Rachel Short) said this about section 7(5) of the 2011 Act in paragraph 113 of its decision:

> "It is intended to provide relief for companies whose profits are not smoothly spread throughout the year, but whose profits differ greatly from one part of the year to the other, and who could be disadvantaged by … a change of tax rate part way through an accounting period. The legislation recognises that a time apportionment method will work fairly for smooth profits, but it will be potentially unfair for lumpy profits."

19. The FTT observed in paragraph 116 of its decision that the question in the appeal "boils down to how to deal with profits which are not smooth in a way which is just and reasonable, and particularly how to deal with the lumpiness caused by events giving rise to capital expenditure". It went on to say in paragraph 122:

> "It is inevitable in a case like this that comparisons are made between the two methods suggested by the opposing parties, but in fact, all that is required by the legislation is that the alternative method of apportionment utilised by the taxpayer is 'a basis that is just and reasonable'. If the taxpayer's approach is just and reasonable, the fact that HMRC's approach might be said to be better, or more just and reasonable, is not relevant."

20. The FTT concluded that the Companies' approach was "just and reasonable". It explained as follows:

> "Reasonable basis
>
> 138. I have concluded that the actual basis applied by Mrs Ritchie as the basis for MONS and MOUK's corporation tax calculations for the 2011 tax year is a reasonable basis of apportioning the companies' ring fence profits under s 7(5) FA 2011. I have come to this conclusion accepting that it has some shortcomings but also bearing in mind that:
>
> 139. (i) It is a method which is closely aligned to the method used by Mrs Ritchie for management accounting and reporting purposes; it is not a contrived method.
>
> 140. (ii) It relies on a consistent concept which has been applied (with minor errors) by Mrs Ritchie to both income and expenditure, which has not always worked in the Appellants' favour.
>
> 141. (iii) It is in line with the statutory context of s 7 FA 2011 which envisages treating the pre-and post March 24 2011 periods as separate accounting periods.

142. (iv) While not perfect, it provides a reasonable reflection of the financial results of the two companies for the relevant periods, including significant capital expenditure.

143. (v) It reflects the fact that first year capital allowances are not given on time apportioned basis, but on an incurred basis.

144. (vi) I have also taken account of the other examples referred to by Mr Sykes [counsel for the Companies] in which HMRC have accepted that first year allowances do not need to be time apportioned when accounting periods have been truncated.

Just basis

145. It seems to me that HMRC's main concern has been with the justness of the result of the application of Mrs Ritchie's method, because it has led to all of the profits of both companies being allocated to the low tax period prior to 24 March 2011.

146. I have also concluded that Mrs Ritchie's basis for attributing the profits of MONS and MOUK for the two periods before and after 24 March 2011 is just. I have come to this conclusion because:

147. (i) The context of s 7(5) is to solve a perceived unjust result. While the method adopted by the Appellants might not be perfect, it does provide a reasonable alternative to a time apportionment approach which answers the requirement of the legislation.

148. (ii) HMRC suggested that the Appellants had applied a contrived method to intentionally distort their profit profile. I do not accept this either in principle; the actual method was not contrived and was the one regularly used by Mrs Ritchie in her monthly financial reporting, or in practice; Mrs Ritchie allocated both income and expenses by reference to the same method, whether or not this gave rise to an advantage or a disadvantage for MONS or MOUK.

MONS and MOUK

149. I have considered whether this conclusion should be the same for both MONS and MOUK, it being undoubtedly the case that MONS suffered a more significant disruption to its ring-fenced trade in 2011.

150. Albeit rather late in the day, HMRC accepted that MOUK could also make an election under s 7(5) FA 2011 and therefore it does not seem to me to be open to HMRC to argue that

> MOUK should nevertheless be taxed on a basis which is only one remove from full time apportionment.
>
> 151. Much of HMRC's arguments in respect of MOUK seemed to me to really be an attempt to argue that MOUK's profits were not in fact very lumpy. But having accepted that MOUK's profits are sufficiently irregular to allow it to make the s 7(5) election, it does not seem to me that degrees of lumpiness are relevant, as long as the alternative basis suggested by MOUK is just and reasonable.
>
> 152. I have therefore concluded that the same approach should be accepted for MOUK as for MONS. If Mrs Ritchie's approach is just and reasonable for MONS, it is also just and reasonable for MOUK."

The UT decision

21. The UT (Judge Timothy Herrington and Judge Jonathan Cannan) took a different view. It considered that the FTT "ought to have considered whether the result went beyond what was necessary to compensate for the factors which made time apportionment unjust or unreasonable" (paragraph 71 of its decision). Since the Companies' basis of apportionment "plainly goes beyond what is necessary to compensate for the effects of the Gryphon incident and the shut ins affecting the Dumbarton field and the Janice FPU", it was "not a just and reasonable apportionment for the purposes of s 7(5) [of the 2011 Act]" (paragraph 72 of the decision) and the Companies' appeals against the amendment of the self-assessment and the closure notice fell to be dismissed.

22. Earlier in its decision, in paragraph 47, the UT had said that time apportionment was intended to be the default position and had gone on to say this:

> "As a general rule time apportionment will apply unless, for reasons specific to the company, time apportionment would work unjustly or unreasonably. Hence the reference in s 7(5) to time apportionment working unjustly or unreasonably 'in the company's case'. In other words, factors which affect companies generally, such as shut ins for maintenance during the summer months, would not be expected to make time apportionment unjust or unreasonable."

23. The UT also considered that, to be "just and reasonable", an alternative basis of apportionment must do no more than take account of factors specific to the company in question. In that connection, it said this:

> "59. … As we have said, it is factors which are specific to the company which must cause s 7(5) to be engaged rather than factors which affect all companies in the same or a similar way. Further, it would not be just or reasonable if the alternative basis of apportionment went further than was necessary to counteract or compensate for the effect of those factors. Such

> an approach is just because it ensures that all taxpayers would be taxed on the same time apportionment basis, subject only to any necessary adjustments arising from the particular circumstances of the taxpayer electing a different basis of apportionment.
>
> …
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> 61. We do not accept [counsel for the Companies'] submissions about the relevant comparator. They are premised on the basis that identifying a tax measure of profits for the Earlier Period and the Later Period and apportioning the profits by reference to those tax measures of profit must be just and reasonable. However, that fails to take into account what we consider to be the intention behind s 7(5). Namely, that in the ordinary course time apportionment is just and reasonable even where profits are not smooth. Where it is not just and reasonable the alternative basis should operate only to the extent necessary to compensate for those factors specific to the company which led to time apportionment not being just and reasonable.
>
> 62. In our view the position is illustrated starkly in relation to MOUK. The profits of MOUK were reduced principally by an unexpected shut in during the last 6 weeks of 2011. The basis of apportionment proposed by MOUK has the effect that all of its profits for 2011 are apportioned to the Earlier Period. The parties agreed that this is because capital allowances are treated as being incurred in the Later Period. In our view that cannot be a just and reasonable apportionment when one considers the position of other taxpayers who must time apportion their profits. The alternative basis of apportionment goes beyond what is necessary to compensate for the effects of the shut in.
>
> 63. We are satisfied that the FTT did not properly take into account the result of the Companies' basis of apportionment. In particular, it did not consider whether the Companies' basis of apportionment was limited to what was necessary and sufficient to ensure that the apportionment was just and reasonable."

24. The UT also said the following, in paragraph 45 of its decision:

> "We are satisfied that Parliament did not intend there to be a recalculation of profits for the Earlier Period and the Later Period. It intended an apportionment of the profits for the whole period."

The parties' positions in outline

25. The Companies' grounds of appeal assert that the UT erred in its construction of section 7 of the 2011 Act. It is said that, in particular, the UT "erred in considering an election under s7(5) to require the basis adopted as an alternative to time

apportionment to permit a deviation from time apportionment only in relation to exceptional events that do not arise in relation to companies more generally". It is further said that, "[e]ven following the UT's construction of s7(5), there was no basis upon which the UT could determine whether the basis of apportionment adopted was just and reasonable as it lacked the facts relevant to its construction of s7(5)".

26. In his skeleton argument, Mr Laurent Sykes QC, who appeared for the Companies, identified the "key point of difference" as "whether a departure from time apportionment is possible only because of events unique to the company and not affecting all companies generally, and whether the alternative basis must only depart from time apportionment with respect to those exceptional events". He argued that the UT's approach was inconsistent with the inherent probabilities, with the language of section 7(5) and with a statement made in the House of Commons by Ms Justine Greening MP as Economic Secretary to the Treasury to which it is proper to have regard.

27. In contrast, Mr Michael Jones, who appeared for HMRC, supported the UT's decision. The distinction drawn by the UT, he said, was between factors which produce the sorts of variations in profits generally experienced by all companies within the scope of the supplementary charge and those factors which could be said to lie outside that range. The flaws in the Companies' case, he submitted, are revealed by a consideration of four factors in particular. First, the focus of section 7 of the 2011 Act is on the "*apportionment*" of the adjusted ring fence profits of a straddling period. The treatment of the single period as two does not apply for all purposes and, more specifically, it does not apply for the purposes of computing, or re-computing, the profits in question. Secondly, Parliament intended time apportionment to be the default method of apportionment for all companies within the scope of the supplementary charge. Thirdly, the fact that departure from time apportionment is permissible only where it would work unjustly or unreasonably "*in the company's case*" shows that the injustice or unreasonableness must arise by reason of matters concerning the particular taxpayer in question. Fourthly, there is a distinct absence from section 7 of any direction that some "comparator" basis must be used in order to determine whether a given basis of apportionment is just and reasonable. The true position, Mr Jones argued, is that the exercise of determining whether a proposed alternative basis of apportionment is just and reasonable does not require a comparator as such. What it instead requires is an assessment of the outcome of the proposed method in the context of the relevant circumstances of the company in question. Those circumstances might include, but are not necessarily limited to:

i) The pattern of the profits of the company's ring fence trade during the straddling period;

ii) The circumstances surrounding that trade during the straddling period;

iii) The factor or factors which are said to mean that time-apportionment would work unjustly and unreasonably; and

iv) How the proposed alternative addresses those factors.

Assessment of the UT's approach

28. The UT's view, as I understand it, was essentially that section 7(5) of the 2011 Act caters only for the exceptional. The UT considered that "in the ordinary course time apportionment is just and reasonable even where profits are not smooth" (paragraph 61 of the decision). For section 7(5) to be engaged, profits in a Later Period must, in the UT's view, have been depressed by something out of the ordinary, and an alternative basis of apportionment must do no more than compensate for the effect of that unusual event. Further, various passages in the decision suggest a requirement that, for a factor to be capable of engaging section 7(5) or being the subject of an alternative basis of apportionment, it must be unique to the company in question. Thus, the UT said that "factors which affect companies generally … would not be expected to make time apportionment unjust or unreasonable" and that "it is factors which are specific to the company which must cause s 7(5) to be engaged rather than factors which affect all companies in the same or a similar way" (paragraphs 47 and 59).

29. In the course of explaining its analysis, the UT stressed that section 7(5) refers to time apportionment working unjustly or unreasonably "in the company's case". It observed, moreover, that time apportionment "was intended to be the default position" and that Parliament "intended an apportionment of the profits for the whole period" and "did not intend there to be a recalculation of profits for the Earlier Period and the Later Period" (see paragraphs 45 and 47).

30. Section 7(5)'s use of "in the company's case" is doubtless consistent with the proposition that "it is factors specific to the company which must cause s 7(5) to be engaged rather than factors which affect all companies in the same or a similar way". The words can also, however, be read as indicating no more than that the focus is on the circumstances of the company in question, be they unique to that company or such as to affect other companies as well. If, moreover, Parliament had intended matters shared with other companies to be disregarded, it could be expected to have spelt that out, and it has not. On top of that, it is very difficult to see why Parliament should have wished section 7(5) to apply only in relation to matters which did not pertain to other companies. Suppose, for example, that a dramatic fall in the oil price in late March 2011 had had the consequence that oil companies generally had incurred losses in the ensuing period. If one such company had sought to make an election under section 7(5), on the basis that all its profits for the straddling period had been generated before 24 March 2011, there is, on the face of it, no reason why Parliament should have intended such an election to be impermissible because other companies had been affected similarly.

31. Nor do I consider that section 7's references to "apportionment" lend support to the UT's approach. The overall objective is, of course, to apportion the profits of a complete accounting period. The sum of the profits/losses attributed to the Earlier Period and those attributed to the Later Period must equate to the profits for the full accounting period. There may very well, depending on the facts, be more than one way of undertaking the exercise. There is no obvious reason, however, for there to be a bar on allocating the profits earned in the whole accounting period by reference to "actual" performance in the Earlier Period and Later Periods. Such an exercise should both produce figures which, when aggregated, match the profit for the entire

accounting period and provide an intelligible basis for determining how that profit should be apportioned between the Earlier and Later Periods.

32. In the present case, the "actual" basis adopted by the Companies depicted them as having made losses in the Later Period and, correspondingly, profits in the Earlier Period in excess of their total profits for the year. MONS' profits for the Earlier Period were put at 102% of its adjusted ring fence profits and MOUK's profits for the Earlier Period were said to amount to as much as 147% of its adjusted ring fence profits. As, however, Mr Jones accepted, the mere fact that profits for the Earlier Period are given as greater than those for the entire accounting period does not of itself imply any error. Take again the hypothetical drop in the oil price in late March 2011. That might have meant that, by any measure, a company was profitable in the Earlier Period and loss-making in the Later Period. In such circumstances, the profit for the Earlier Period would have been more than 100% of the profits for the year and the appropriate course would necessarily have been to allocate all the adjusted ring fence profits to the Earlier Period.

33. Turning to the proposition that time apportionment "was intended to be the default position", that is plainly correct: absent an election pursuant to section 7(5), there was to be time apportionment in accordance with section 7(4). I do not see, however, that the fact that time apportionment represented the default position says anything important about when a company could elect for a different basis of apportionment. At most, it might be inferred that something of more than minimal significance was needed to justify departure from time apportionment. The existence of the default position is, as it seems to me, of no real assistance in determining whether, as the UT thought, section 7(5) demands something out of the ordinary and/or not shared by other companies. It does not carry any implication that a company which has been less profitable in the Later Period as a result of an exceptional event should be able to opt for a basis other than time apportionment but that one that has been less profitable because of, say, routine shut ins should not. The legislation gives companies subject to the supplementary charge the right to choose an alternative basis where time apportionment would work "unjustly or unreasonably", and the fact that there is a default position does not assist with when that requirement will be satisfied.

34. There was reference in submissions to section 93 of the Finance Act 2002 ("the 2002 Act"), the legislation by which the supplementary charge was introduced. Section 93, headed "Supplementary charge: transitional provisions", provides as follows in subsection (1):

> "In the case of a straddling period, that is to say, an accounting period which begins before 17th April 2002 and ends on or after that date—
>
> (a) sections 501A and 501B of the Taxes Act 1988 (which are inserted by sections 91 and 92) shall apply as if so much of the straddling period as falls before 17th April 2002, and so much of that period as falls on or after that date, were separate accounting periods; and

> (b) all necessary apportionments between the two separate accounting periods shall be made in proportion to the number of days in those periods."

Sections 501A and 501B of the Taxes Act 1988, as inserted by sections 91 and 92 of the 2002 Act, provided for the levying and collection of the supplementary charge on adjusted ring fence profits.

35. Mr Jones pointed out that, under section 93 of the 2002 Act, sections 501A and 501B of the Taxes Act 1988 were to apply as regards a straddling period "as if so much of the straddling period as falls before 17th April 2002, and so much of that period as falls on or after that date, were separate accounting periods". Adjusted ring fence profits were thus to be calculated separately for the period from 17 April 2002. In contrast, section 7 of the 2011 Act provides for time apportionment to apply as the default position notwithstanding section 7(4)'s reference to the periods before and from 24 March 2011 being "treated as separate accounting periods". The difference, Mr Jones suggested, is significant. I do not myself, however, regard it as informative. The distinctions between the provisions simply reflect the fact that, in 2011, Parliament decided that time apportionment should apply unless a company chose otherwise pursuant to section 7(5).

36. The UT considered that the election for which section 7(5) of the 2011 Act provides "was plainly intended to mitigate the effect of what might be described as retrospective taxation" (paragraph 37 of its decision). That must be right, but, contrary to the UT's conclusion, it seems to me to suggest that the availability of the election should not depend on there having been something out of the ordinary and/or not shared by other companies. If a company made a disproportionate share of its profits for the straddling period in the Earlier Period as a result of something routine (shut ins, say) rather than an exceptional event, it could still justifiably complain of retrospective taxation if profits were apportioned in accordance with section 7(4). Time apportionment would have the consequence that some of its pre-24 March 2011 profits were subject to tax at 32% rather than the 20% which prevailed when they were generated. The simple fact is that any company with a straddling period which earned profits at a higher rate before 24 March 2011 than afterwards would find some of its profits from the Earlier Period taxed at 32% if section 7(4) were applied. It makes no difference whether profits in the Later Period are depressed by an unusual event or a routine one.

37. A further reason for considering that Parliament is unlikely to have intended to restrict section 7(5) to cases where there has been something out of the ordinary and/or not shared by other companies is to be found in the problems of application to which such a requirement would give rise. Suppose that a company's production in the summer months were usually reduced by a four-week shut in for maintenance work, but the shut in lasted five weeks in 2011. Would that be sufficiently exceptional to allow the company to invoke section 7(5) and, if so, could an alternative basis of apportionment take account of the full loss of production or only a week of it? Suppose that a company suffered storm damage in six years out of ten. Would that fall to be disregarded as routine? Would the position be the same if there were storm damage in (a) four years out of ten or (b) eight years out of ten? Would it make a difference if such damage were particularly severe or, conversely, less serious than in many other years? Had Parliament intended the section 7(5) election to be subject to a limitation

of the kind that the UT considered to exist, it could be expected to have explained its wishes more clearly and to have catered for the sorts of issue I have mentioned.

38. In all the circumstances, Mr Jones' able submissions notwithstanding, I take a different view from the UT of section 7(5). I do not think the application of section 7(4) could be said to work "unjustly or unreasonably" unless time apportionment would prejudice the company in question to a more than minimal extent. It seems to me, however, that any company which earned profits at a significantly faster rate in the Earlier Period than the Later Period, and so stands to be materially prejudiced by time apportionment, can avail itself of section 7(5). It matters not, in my view, whether the differential profitability arose from the exceptional or the routine. The FTT thought that section 7(5) applies to all companies "whose profits are not smoothly spread throughout the year, but whose profits differ greatly from one part of the year to the other, and who could be disadvantaged by … a change of tax rate part way through an accounting period". I agree.

39. A particular bone of contention in the present case is the Companies' treatment of capital allowances. HMRC maintain that the capital expenditure which the Companies incurred in the Later Period should be spread between the Earlier and Later Periods, the Companies that it was appropriate to allocate it all to the Later Period because such expenditure falls to be taken into account when incurred. In my view, the FTT was amply entitled to consider that the Companies' approach to capital allowances did not prevent the basis of apportionment which they propounded from being "just and reasonable". Had the Companies happened to have accounting periods ending on 23 March 2011, their capital expenditure in the remainder of 2011 would undoubtedly have served to reduce the adjusted ring fence profits subject to the 32% rate of supplementary charge: there would have been no question of any of the capital expenditure being relevant to determining the Companies' profits for the period up to 23 March 2011 or, therefore, of the capital allowances increasing the extent to which their adjusted ring fence profits bore the supplementary charge at 32% rather than 20%. I do not see why a basis of apportionment which produces the same results and reflects the Companies' entitlement to 100% allowances when capital expenditure is incurred should on that account be other than "just and reasonable". In fact, the Companies could legitimately complain of retrospective taxation if expenditure which they incurred after 24 March 2011 could, in effect, be used to impose additional tax on the profits which they had already earned by the time the higher rate of supplementary charge was announced on 23 March 2011.

Conclusion

40. I would allow the appeal.

Lady Justice Andrews:

41. I agree.

Lady Justice King:

42. I also agree.