Neutral Citation: [2023] UKFTT 995 (TC)

Case Number: TC09006

FIRST-TIER TRIBUNAL
TAX CHAMBER

Centre City, Birmingham

Appeal reference: TC/2022/13625

CAPITAL ALLOWANCES – whether a camping pod is a building – if so whether there was an intention to move in the course of a qualifying activity – whether fixed structure – ultimately whether annual investment allowances available – for basic pods yes for teacher pods no – appeal allowed in part.

Heard on: 9 and 10 November 2023
Judgment date: 22 November 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MR TERRY BAYLISS

Between

ACORN VENTURE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Doodney, of Croner Taxwise

For the Respondents: Ms Harding litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns HM Revenue and Customs' (**HMRC**) rejection of a claim to Annual Investment Allowances (**AIA**) made by Acorn Venture Ltd (**Appellant**) in respect of 26 camping pods in respect of the accounting period ended 30 September 2015 (**Relevant Period**).

2. The Appellant's principal business, and its qualifying activity for capital allowance purposes, was that of a tour operator, providing residential adventure holidays for school children from centres at various locations, predominantly in the UK. In the course of that business, and as detailed below, the Appellant purchased 26 camping pods and sited them at their Royal Oak centre in the Breacon Beacons in South Wales. 20 of the pods were for use by children/young people (**Basic Pods**) and 6 were for use by their accompanying adults (**Teacher Pods**) (together **Pods**).

3. In the Appellants company tax return for the accounting period ended 30 September 2015 the Appellant claimed AIAs of £354,489. HMRC opened an enquiry into the return and following a period of correspondence spanning almost 5 years, on 15 August 2022 HMRC issued a final closure notice reducing the AIA claim by £285,997. That reduction was comprised of two parts: a reduction of £272,140 in respect of the capital expenditure on the camping pods and £13,857 in respect of legal fees.

4. The consequences of the reduction in the AIA were that the Appellant's self-assessment if a £211,628 loss was removed and HMRC determined that the Appellant had generated a taxable profit of £74,419 assessable to corporation tax of £14,883.80. The Appellant's claim for carry forward losses was also disallowed. This carried consequences for group relief claims in other group companies. Those consequences are not relevant in this appeal.

EVIDENCE AND FINDINGS OF FACT

5. We were provided with a bundle of documents and the statement and oral testimony of Mr Andrew Gardiner, director of the Appellant. Mr Gardiner was cross examined by HMRC in some detail. We found Mr Gardiner to be a truthful witness. There were times where he was concerned that HMRC were seeking to put words into his mouth and, on occasions, did not understand what they were seeking to achieve by their questions. In those circumstances his evidence was more circumspect. However, on all material issues we accepted his evidence.

6. From that evidence we find the following facts.

   (1) In 2015 the Appellant operated two adventure centres in Llangorse in the Brecon Beacons: Royal Oak and Tan Troed.

   (2) Both sites were formally owned by the Royal Air Force. Sometime before the Appellant took over the sites they had been converted into adventure holiday centres predominantly booked by schools, and groups for young people. The Appellant took over the sites in 2008. When the Appellant took over Royal Oak, the site comprised a number of buildings, 10 portakabins and a large camping field. The larger and more substantial buildings were used by the previous owner (and subsequently by the Appellant) for the provision of washing and sanitary facilities and for catering etc. The 10 portakabins were on an hardstanding area and were used as sleeping accommodation. Further sleeping accommodation was provided in tent "villages".

   (3) These villages were set up so as to cater for each individual group. The tents were pitched in a horseshoe shape the fronts of the tents facing into the horseshoe.

There would usually be 10 tens for children to sleep in and 2 for accompanying adults. All tents were pitched over platforms which provided a stable and flat base on which to put bed frames (with mattresses). The tents which accommodated children had 4 or 5 beds; those of adults usually 2 or 3. All tents had electrical hookup to provide light.

(4) In or about 2014 it had become clear that the 10 portakabins had become unusable and the Appellant determined to replace them. Before doing so it was required to obtain planning permission from the Brecon Beacons National Park Authority (**BBNPA**). We were told, and accept, that planning restrictions in a national park are more stringent than generally. The Appellant had a good working relationship with the BBNPA and consulted regularly on all matters relating to both the Royal Oak and Tan Troed sites.

(5) The planning Notice of Decision was granted on 25 June 2014. So far as relevant it provided for:

> "The replacement of 10 accommodation portakabins with 27 timber log pods for overnight accommodation by school children using the facilities at the Outdoor Activity Centre …
>
> subject to the following conditions:
>
> …
>
> 2 The development shall be carried out in all respects strictly in accordance with the approved pans (drawing nos NP1v1, NP4v1, NP5v1, NP6v1, NP7v1, NP8v1, NP9v1, NP10v1 and NP11v1) unless otherwise agreed in writing by the Local Planning Authority.
>
> 3 No development shall take place until details or samples of the materials to be used externally on walls and roofs have been submitted to and approved by in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
>
> …
>
> 7 None of the 27 logpods hereby approved shall be occupied between 1st October in any one year and 31st March the succeeding year.
>
> …
>
> Policies considered relevant to this decision: Local Development Plan (2013) … Policy 46 – Non-permanent Holiday Accommodation."

(6) The plans and documents referred to at paragraph number 2 of the Notice of Decision show drawings of the pods, provide their dimensions, the layout of the site pre and post consent. We note that nothing in the planning documentation draws a distinction between the Basic and Teacher Pods. No information is provided regarding the configuration of the Teacher Pods, and it is not stated that they will be plumbed into foul water drainage.

(7) Condition 7 was subsequently varied to 1 November – 31 March.

(8) Policy 46 provides:

> "1.1 The [BBNPA] is a special purpose Local Planning Authority (LPA) and therefore holds the responsibility of carrying out the statutory planning function for the National Park.
>
> …

1.4 The Authority is committed to supporting appropriate sustainable development to encourage economic and social well-being of its local communities. … the Park will support exemplar sustainable tourism.

…

2.2 Policy 46 of the LDP … set out the policy stance in relation to low impact development or more specifically low impact tourist accommodation.

…

Policy 46

Non-permanent Holiday Accommodation

Development of non-permanent holiday accommodation will only be permitted in exceptional circumstances where:

a. The applicant has demonstrated … that the proposed development is fully integrated into the landscape …

b. On-site facilities, including any accommodation for a site manager, washroom facilities, stores … can be provided by the conversion of existing buildings if available;

c. The development will not be occupied as permanent residential accommodation and will be subject to a seasonal occupancy condition …

d. The proposed site will have an adequate means of access to and into the site that is capable of accepting the width of vehicles required for movement of the accommodation without detriment to highway amenity.

3.0 Low Impact Tourist Accommodation with the Breacon Beacons National Park

3.1 The [BBNPA] Local Development Plan (2013) sees to support Low Impact Development (LID) and adopt a positive approach to emerging trends for low impact accommodation solutions (… see appendix 1). Appropriate proposals will be those which have a minimal landscape and environmental impact and are capable of being removed without leaving a permanent trace.

…

3.4 … Sites should remain available solely for the intended tourism purposes. Below is a list of matters that would require analysis when considering such a development as part of a campsite

- Would the proposal lead to more permanent structures on the land as a result of the new structures (e.g. decking)?
- Would the proposal change the operational function of the campsite beyond that of which is already granted through the land use planning for a particular campsite?
- Would the structures be removed from the campsite out of operating season?

5.0 Planning conditions

5.1 …

Appendix 1

Clarification of typical examples of Low Impact Tourist Accommodation

…

> Log pods (Wooden Tents) – Wooden structures much like sheds that are permanent structures. Although it could be the case that they are portable – usually if bought onto a site compete. They have no foundations and for the majority are not connected to services.

(9) Having obtained the permission the Appellant purchased the 26 Pods. The Pods are of the same external construction but configured differently inside. The external dimensions of each pod were: 5088cm long, 3157cm wide and 2704cm high. The internal dimensions were: 3726cm long, 3000cm wide 2400cm When viewed from the front they were approximately triangular and similar to an up turned boat hull. There was a small awning or overhang of tongue and groove boarding protruding over a centrally situated pvc lockable door with glazed upper panel and solid lower panel. The buttress panel at the front and around the door was timber. The "roof" ran from the apex to the base i.e. it also formed the "walls" it was made with a Decra Oberon outer skin and tongue and groove timber lining. At the rear there was a small ventilation window set in a wooden panel. There was insulated flooring with ply deck over a dark stained wooden base frame.

(10) The pods were sited on the hardstanding area where the former portakabins had been. The pods were sat on top of breeze blocks which had been cemented into the ground and on which a further wooden frame was attached. The base frames of the pods rested by their own weight on the breeze block/wooden frame which provided for air circulation beneath the Pods. Each Pod was anchored to the ground to preclude movement of the Pod caused by wind/weather events and, presumably, movement from inside the pod.

(11) There were two types of internal configuration. The six pods Teacher Pods were equipped with flushing toilets and washing facilities, a small "kitchen" area (we were not told what this consisted of but as all catering was provided centrally we assume tea/coffee making facilities) and two bed. The remaining twenty Children's Pods were more basic with five beds, two beds of 750cm by 1900cm were down either side of the length of the pod with a fifth elevated bed across the end. All beds were of timber construction and were built into the Pod. All 26 pods had an electric hookup which provided lighting (and we assume electricity for the "kitchen" in the Teacher Pods). The electric hook up was the standard connection for a mobile or static caravan, we understand that to be a 32amp commando socket and such was visible on one of the photographs with which we were provided.

(12) The pods were delivered to site fully constructed on trailers. Once on site they were placed in position using a forklift truck. It was not known how heavy each pod was though Mr Gardiner was of the view that it could probably be moved (rather than carried over a distance) by four men, one at each corner.

(13) We find that the basic pods are broadly what the Lake District National Park Authority describe as "camping pods" i.e.:

> "Small units of holiday accommodation that are prefabricated and delivered to their site complete. They are timber structures with a curved roof that has the appearance of timber shingles and they are placed on the land with simple support and no foundations. Internally they have a single open space and limited headroom with sufficient space to allow two adults or a small family to sleep on the floor. The accommodation that they provide is basic and akin to a tent."

(14) Mr Gardiner explained, and we accept, that when the pods were purchased they were seen as a replacement for the more permanent accommodation offered by the portakabins but also with a view if they were well received and as need arose for replacing some or all of the tented villages. He considered them to be flexible accommodation with a longer life, and more durability than the tents.

(15) The anticipated the drive to replace tents began already begun at the time of the purchase. At that time essentially it came from teachers who were becoming increasingly unwilling to be accommodated in tents. However, particularly at the Royal Oak site, which was situated by a lake, post the purchase parents of primary school age children were becoming concerned that children were expected to walk to a toilet block from the tents at night.

(16) In terms of a comparison to tented accommodation we note that correspondence prepared by the Appellant's representative had variously described the pods as more luxurious, high class and similar. Mr Gardiner explained that in terms of the Basic Pods the accommodation was broadly comparable to a tent in terms of the experience of the children. As indicated above, the tents too had accommodation for 4 or 5 children who slept on beds with mattresses. The tents had an electrical took up so were lit. The pods, however, self-evidently, presented a higher degree of protection from inclement weather facilitating a longer period in which children could be accommodated in a season. Tents were usually used for only approximately 4 months per year whereas the Pods could be used earlier and later in the season (March – November).

(17) As the Pods had a lockable door they provided a greater level of security than a tent. This greater security and the fact that they remained in situ through the off season also facilitated their use as storage for the tents and camping equipment when that equipment was not in use.

(18) Like the tents the Pods were arranged on site to provide living villages. Each group of children was usually about 50 in number and arrived in a 52-seater coach with their teachers/accompanying adults. The Pods and tents served the same purpose of providing sleeping accommodation for the adults and children in proximity to one another and in a group which was discrete from other groups which were at the site.

(19) The tent living villages were completely flexible and could be readily moved about on the camping field in order to accommodate different groups and the capacity of the site would be flexed by reference to demand.

(20) Mr Gardiner explained that the bases used for the tents which consisted of a frame and a deck of boards which rested on the ground could be used for Pods which could have been comfortably moved and sited on the bases. He believed and understood that the planning team at the BBNPA considered canvas tents and pods to be largely interchangeable such that they could be sited in the camping field but also understood and expected that the BBNPA's permission was required before tents could be so replaced. He understood that permission was not by way of formal planning consent but simply by written agreement (as per the Notice of Decision as it would be a variation to the plans attached). Further, he did not anticipate that there would have been any resistance from the BBNPA had he asked to move the Pods so as to site them in the camping field, but he had never in fact asked to move them.

(21) Thre was paucity of documentary evidence of an intention that the Pods be moved. HMRC had repeatedly requested documentary evidence of such an intention. The evidence provided by the Appellant was limited to:

(a) The accountants note dated 22 December 2015 recording their research as to capital allowance entitlement and a telephone conversation between the Appellant's accountants and Mr R Miller (director of the Appellant). The note confirms that the accountants were told that whilst the Pods were "fixed on a foundation and plumbed and wired in" they are moveable and "would be moved to Hauteville if bookings at Breacon are down". It was also recorded that "Pods were bought to replace [wooden buildings which were basically beyond repair]". The accountant in question concluded, following a conversation with "PFP", that the pods could be moved and that the answer to the question "will you actually move them (is it likely they will be moved)" was "more than likely will be YES."

(b) Correspondence from 2016/17 between Savills, the Appellant and the BBNPA regarding the reclassification and development of Tan Troed. Savills had made a pre application request to BBNPA to convert from a residential adventure holiday site to a site providing substantial lodge accommodation in 41 timber clad static caravans/lodges. The application was following the rejection of a similar application for 52 wooden cabins made on 6 July 2015. The BBNPA had indicated that any such formal application would be refused. However, the Authority also indicated that despite there being no extant consent for the use as a camping site (which could be rectified through an application for a Certificate of Lawful Development) it "may be more appropriate to consider use of the field for non-permanent holiday accommodation solutions such as those enabled under Policy 46". The documents state that, at that time, the BBNPA indicated that they would be prepared to consider proposals to install camping pods. However, it was also recorded that by reference to the business objectives of the Appellant such a proposal would not give the Appellant the returns they were looking for.

(c) A quotation obtained on 25 June 2019 for moving 6 Pods from Royal Oak to Tan Troed. The quote was from Williams Plant and Crane who had quoted to supply a 40-ton mobile crane and 3 lorries at a cost of £1,900 excluding VAT. Later in the season (September 2019).

(d) An undated strategic plan, presumed to have been formulated/recorded about September 2019, pursuant to which it was proposed that 13 pods would be moved from Royal Oak to Tan Troed. The main drivers for the proposal are recorded as upgrading Tan Troed, addressing the unwillingness of teachers to stay in tents and to allow for improvement of facilities at Royal Oak thereby addressing the safeguarding concerns expressed by parents and making the facilities comparable with other similar providers. A two-part plan was set out with costs head identified and steps required to be undertaken before the move could be implemented.

(e) A loan facility with HSBC dated 19 November 2019 for £200,000. The purpose of the loan was to assist with the development of the Brecon Beacons Centre (i.e. Royal Oak and Tan Troed).

In his oral testimony, and by way of further explanation to the reasons given in correspondence, Mr Gardiner explained that as the Appellant company was small and the management team collocated. As a consequence, the Appellant did not generally make an official record of operational decisions. Mr Miller was both the managing director and director of operations. There was a regular dialogue between Mr Miller and Mr Gardiner, but Mr Gardiner would not have expected that matters of operational detail would be discussed in order to obtain his approval and certainly would not be

recorded in board minutes. He considered that it was unnecessary within the business to have recorded an intention to move an item which was inherently moveable particularly on the basis that they were purchased as movable accommodation could and would in line with business need be moved. He stated that tents were regularly moved within a site and between sites (particularly the Llangorse sites) by refence to demand from time to time and this was a purely operational matter left entirely to Mr Miller and his team. Having flexible accommodation and the ability to move it was, in Mr Gardiner's view, an inherent aspect of the business of running residential adventure holidays. We find his evidence on this issue credible and accordingly, we are not prepared to draw an inference that there was no intention to move the pods because there was no documentary record of such an intention. We do so because we consider that it is not unreasonable that a small a close-knit business would not record a decision that a moveable asset might be moved. However, it remains a matter for us, on the evidence, what intention was demonstrated (as discussed below).

(22) In cross examination Mr Gardiner was repeatedly invited to confirm that the costs and requirements for movement were significant and uncertain such that there was a hope that Pods could be moved rather than a fixed for firm intention to move the pods. Mr Gardiner resisted the invitation, he stated that he was confident that there was no material impediment to execution of the various plans to move pods and considered that every business decision carries with it costs, it was reasonable to note the cost of any particular decision. We accept Mr Garinder's evidence that the cost of movement and the requirement to obtain agreement from BBNPA were not impediments to movement. We set out in paragraph (24) below our conclusion as to the evidence on intention.

(23) HMRC invited us to conclude that as there was significant cost and process to effect a move including the hiring of a 40-ton crane and obtaining planning permission movement was a serious undertaking for which there could be no fixed and executable intention until all the pieces were in place. We do not make that finding. We consider that any business decision will incur costs and may require planning and for conditions precedent to be met but those factors, in and of themselves, would not preclude a finding that there was a fixed intention to move the Pods.

(24) When we consider all of the evidence available to us we make the following findings as regards an intention to move the pods:

> (a) In 2015 the Pods were purchased as a suitable alternative to the dilapidated buildings which stood on part of the Royal Oak site and with a view to their being more versatile than the static buildings. We accept Mr Gardiner's evidence that it was intended that they could be moved should the need arise, but we do not consider that there was a fixed or determined intention that they would be moved by the Appellant. The note of the conversation between Mr Miller and the accountants in December 2015 indicates that there was a single and specific envisaged circumstance in which the pods "would be moved" i.e. if bookings at the Breacon Beacon sites (both Tan Troed and Royal Oak) were down. We consider that it at least implicit from that note that at that time there was no intention to move the pods between the two Breacon sites which appear to have been considered together. We accept that there was a contingent possibility of a move to Hauteville. We consider such a contingent intention to be insufficient to be an actual intention to move the Pods.
>
> (b) In 2017 the principal focus of the Appellant was to seek to enhance the value of the Tan Troed site with a view to disposing of it. There was no material

consideration, at that time, of moving the pods on Royal Oak to Tan Troed or to any other venue.

(c) In the summer of 2019 it is apparent that there were a number of business drivers which could be met by relocation of Pods from Royal Oak to Tan Troed. The Pods had been in situ for 4 seasons. The Tan Troed site was becoming increasingly outdated. The Appellant had sought to find alternative uses of the site through its planning application in 2017 and thereby sell the site and had been unable to do so. In the course of so doing it was tolerably clear that the view Mr Gardiner had held that the BBNPA considered tents and pods largely interchangeable was correct and an application for permission (whether that be simple written agreement or formal planning consent) would be granted to move the Pods. A movement of the Pods would have been facilitated by the loan funding which would have thereby upgraded and improved the facilities and customer attractiveness of both Royal Oak and Tan Troed. We find that no later than the summer of 2019 there was a clear and evidenced intention to move the Pods.

(25) It was not contested, and we find that in the period from purchase to when the Pods were sold in 2021/2 they were not in fact moved from the position in which they were first sited on Royal Oak.

(26) In the financial year of purchase the Pods were accounted for on the basis that they were "land and buildings". Mr Gardiner did not know precisely why that category had been chosen. He accepted that he had signed the directors' statement that the accounts represented a true and fair view of the company. He also confirmed what HMRC had been told in correspondence that the inclusion of the Pods in land and buildings benefitted the valuation of the site which was a matter important to the company. The company's policy on depreciation was to depreciate buildings over 25 years but for tents and other camping equipment to be depreciated over 5 years. When questioned by us, Mr Gardinier considered, but was not certain, that the categorisation as buildings was likely to have been driven by the depreciation period and as a means of securing a better valuation of the site, rather than as an indication that the Pods were considered to be buildings. He indicated that the "label" applied to that class of asset was not as clear as it could have been. We find that the accounts were prepared and audited so as to be true and fair, it was more appropriate given the life of a pod to depreciate them over 25 years than 5 years. We consider it more likely that the Pods were including in land and buildings because of the relevant depreciation period. Whilst the label attached to the relevant class of asset is not irrelevant we do not consider it appropriate to give it the weight that HMRC appeared to invite us to. We therefore decline to determine the classification of the Pods for capital allowance purposes by reference to their accounting treatment alone.

LEGISLATION

7. The appeal concerns HMRC's rejection of the Appellant's claim, made under section 51A Capital Allowances Act 2001 (**CAA**), to AIA. Under that provision the Appellant was entitled to claim up to £500,000 by way of capital allowances in respect of expenditure incurred in the Relevant period by on plant and machinery.

8. In so far as is relevant in this appeal Capital Allowances Act 2001 provides:

(1) Section 11:

"(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.

…

(4) The general rule is that expenditure is qualifying expenditure if (a) it is capital expenditure on the provision of plant and machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure."

(2) Section 21:

"(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.

…

(4) This section is subject to section 23 …"

(3) Section 22:

"(1) For the purposes of this Act, expenditure on the provisions of plant or machinery does not include expenditure of a structure …

…

(3) In this section (a) "structure" means a fixed structure of any kind …

(4) This section is subject to section 23 …"

(4) Section 23:

"(3) Sections 21 and 22 … 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 and machinery."

ISSUES IN DISPUTE

9. The Appellant does not dispute the procedural validity of the closure notice issued and accepts the conclusion and associated adjustment in respect of the legal fees.

10. HMRC accept that the expenditure on the Pods is capital in nature, incurred for the purposes of the Appellant's qualifying activity and that the Pods are not the setting/premises from which it operates its business. But for sections 21 – 23, HMRC accept the Appellant would be entitled to claim the allowances.

11. The parties are therefore agreed that the issues we have to determine are limited to answering the following questions:

(1) Whether the camping pods purchased by the Appellant are buildings such that the exclusion under section 21 CAA 2001 applies to exclude a claim for capital allowances (**Issue 1**).

(2) If so, whether the camping pods are moveable buildings intended to be moved in the course of the qualifying activity such that item 21, List C, section 23 CAA 2001 disapplies the exclusion for buildings at section 21 CAA 2001 (**Issue 2**).

(3) In the alternative, whether the camping pods are fixed structures such that the exclusion in respect of structures at section 22 CAA 2001 applies to exclude a claim for capital allowances (**Issue 3**).

12. The parties accept that in addressing these issues we may reach different conclusions with regard to the Basic Pods and the Teacher Pods.

PARTIES SUBMISSIONS

Appellant's submissions

13. The Appellant's starting position was that, in substance, the issues in this appeal could not and should not be distinguished from those before the Tribunal in *Andrew v HMRC* [2010] UKFTT 546 (TC) (***Andrew***).

14. That case concerned a wooden gazebo which had been placed in a pub garden for the purposes of providing a sheltered area for smokers no longer able to smoke inside the pub. HMRC had denied first-year capital allowances on the gazebo firstly on the basis that it was premises from which the pub trade was carried on (and thereby outside section 11 CAA) and, in the alternative, that it was a building or fixed structure.

15. The *Andrews* judgment describes the gazebo as:

> "7. … made of wood. It has a regular polygon plan. Above a wooden floor up walls run up to a heigh of about 3 foot. Above the walls crosshatched wooden lattice work runs up to the wooden roof. The gaps in the lattice work are not filled in and the wind and elements may pass through. One side of the polygon is an open entrance. Thre is no door. Around the panelled sides of the gazebo is wooden seating. It is place on the ground in the garden: there is no base and it is not bolted to the ground or held down otherwise than by its own weight. It could be moved (although such an activity might require a couple of strong people) and we accept that Mrs Andrew is presently considering moving it."

16. The Tribunal determined that the gazebo was not the premises/setting from which the qualifying trade was operated and was therefore plant. It also concluded that it was not a building or fixed structure on the basis that it was moveable and not fixed to the ground and, in the context of "building", did not have substance or permanence nor did it provide the level of shelter and security to be considered a building. It was not therefore necessary to consider whether the gazebo met the terms of Item 21 List C but the Tribunal indicated that whilst it was plainly moveable the taxpayer in that case had not adduced sufficient evidence to show that it was intended to me moved rather than it might, in due course, be moved.

Issue 1

17. The Appellant contends that the Pods are not buildings. They rely on the dimensions of the Pods, the fact that they were delivered and moved to site as complete units and the terms of the BBNPA planning consents which, taken together, support the submission.

18. In this regard we were referred to HMRC's guidance (CA90250) which refers to the substance of a structure and acknowledges that structures "too small or insubstantial to be a building, such as a tool shed" fall outside the definition for CAA purposes of a building.

19. The Appellant also relied on the fact that the Pods did not provide living accommodation as they lacked the necessary facilities to live domestic life independently. Even the Teacher Pods lacked the facilities for cooking.

Issue 2

20. If we find that the Pods (or any of them) are buildings then the Appellant contends that they must be treated as movable buildings intended to be moved in the course of the qualifying activity of residential adventure holidays under Item 21 List C. This is on the grounds that the planning consent is not for permanent structures as identified in Policy 46. The Pods are considered by the BBNPA and the Appellant to be interchangeable with tents.

21. The Appellant challenges HMRC's contention that they should be required to demonstrate, by reference to documentary evidence, that there was an intention to move the

Pods in the accounting period in which the claim to AIA's was made. The Appellant relies on Mr Gardiner's oral testimony of the intention, the nature of the Pods and such documentary evidence as there is to substantiate that the Pods could have been moved at any time and had been purchased with the intention that they would be moved if and when need arose.

22. The Appellant resisted the view expressed by HMRC that in order for there to be a relevant intention the requirements and associated costs of moving must be minimal. It was contended that the majority of business decisions require that costs be incurred and/or that requirements need to be met.

23. Finally, in this regard, it was submitted that as the Appellant's qualifying activity required the provision of accommodation for both children and adults by reference to the needs and requirements of the various sites and to meet demand the movement of pod within or between sites was movement in the course of and not simply for the purpose of the qualifying activity.

Issue 3

24. By reference to the analysis of the Court of Session in *Inland Revenue Commissioners v Anchor International Ltd* [2004] ScotCS 281 (***Anchor***) the Appellant contended that the pods, whilst structures, were not fixed structures as they rested by their own weight on the ground and was fully moveable albeit using the right equipment.

HMRC's submissions

25. HMRC's primary contention is that each Pod is a building for the purposes of section 21 CAA.

26. In response to the Appellant's reliance on *Andrew* HMRC contend that there are significant differences between the gazebo and the pods in substance and attachment and because the pods are an enclosed space providing shelter and security. As such they contend that the judgment is of little relevance.

Issue 1

27. HMRC rely on the recent judgment in *Urenco Chemplants Ltd v HMRC* [2022] EWCA Civ 1587 to support their conclusion that the Pods are buildings. They contend that the Court were clear that "building" is an ordinary word which indicates a test intended to be "simple to operate and relatively unsophisticated" (paragraph [103]) and that, as directed by the Court we must respect the "unvarnished simplicity of the statutory language" (paragraph [119]. We were invited to consider the factual context and t "physical and functional considerations" as a mater of impression or common sense in order to determine that the pods are buildings.

28. HMRC point to the fact that the Pods are enclosed, they have a lockable door, windows and solid walls/roof and all provide some of the basic facilities of living ((sleeping for the Basic Pods and sleeping and washing/toilet facilities for the Teacher Pods) such that the Pods provide shelter, security and privacy, to those sleeping within them and, in the off season, are used for storage. Accordingly, HMRC invite us to conclude that the Pods have sufficient substance and in all regards, as a matter of common sense, should be considered to be buildings.

Issue 2

29. With regard to the terms of Item 21 List C HMRC contend that the Appellant bears the burden of proving that (1) the Pods (as buildings) are moveable, (2) there was a demonstrated or evidenced intention in the accounting period ended 30 September 2015 that the pods

would be moved and (3) any movement of the pods was to be in the course of the qualifying activity and not simply for the purpose of it.

30. As regards whether the Pods are moveable HMRC's skeleton "acknowledged" that the Pods had been moved onto site in a prefabricated form indicating that they were moveable. However, HMRC contended that as moving the Pods required the use of heavy equipment and would have necessitated consent from BBNPA the impediments to movement indicated that whilst the Pods were physically moveable for all practical purposes they could not be moved. During HMRC's oral submissions it appeared that these factors were more relevant to the question of intention to move, i.e. there could not be a relevant intention without, for instance, having obtained the necessary planning consent.

31. HMRC contended that it was critical, in the context of AIAs, that the Appellant be able to demonstrate in the Relevant Period that there was an intention to move the Pods. HMRC acknowledged that if the intention were not demonstrated for that period but could be demonstrated in a latter accounting period the Appellant would, subject to making the relevant claim, be entitled to claim writing down allowances by bringing the Pods into a relevant capital allowances pool but it was the evidenced intention to move which caused what was otherwise unallowable expenditure on a building to be allowable expenditure under Item 21 List C.

32. On the evidence, HMRC contended that there was no demonstrated intention that the Pods would be moved merely that they might, if the need arose, be moved. This they submitted was insufficient to meet the terms of Item 21 List C. HMRC invited us to consider predominantly the paucity of documentary evidence to support an intention to move in the Relevant Accounting Period (or at all) and, by reference to the judgment of the Upper Tribunal in *Shaw (as nominated member of TAL CPT Land Development Partnership LLP) v HMRC* [2021] UKUT 100 (TCC) because the intention of the Appellant is to be determined objectively, a stated intention must be tested by reference to all the available evidence. We were therefore invited, in essence, to take Mr Gardiner's evidence "with a pinch of salt" as it was not corroborated by any documentary evidence.

33. Finally, on Issue 2, HMRC contended that to be movement in the course of a qualifying activity the movement must be required or related to the performance of the activity. The example given was that a builder needs to bring temporary accommodation onto a building site at the start of construction and remove it at the end. Those movements are, in HMRC's submission, in the course of providing construction services. By comparison, HMRC considered that any movement of the Pods would have been for business reason, to meet varying demand on individual sites and thereby for the purpose of the qualifying activity but not in the course of it. Any movement of Pods did not, in HMRC's view, "enable" the performance of the qualifying activity as was implicit in the statutory language "in the course of" in Item 21 List C as opposed to "for the purpose of" in section 11 CAA. HMRC submitted that the fact that the Appellant had not, over the life of the Pods, ever moved them also suggested an infrequency of movement that precluded any intention that the Pods might be moved (were that sufficient at the second limb) from being a movement in the course of the qualifying activity.

Issue 3

34. As regards the section 22 CAA exclusion HMRC rely on the dictionary definition of fixed: "place or attached firmly, fastened securely, made firm or stable in position" and "definitely and permanently placed, stationary or unchanging in relative position" as justifying a conclusion that the statutory exclusion applies as the Pods are heavy and cannot

be lifted or moved without equipment and were anchored to the ground to prevent movement caused by wind.

35. HMRC contend that a structure may be fixed by its own weight where the structure in question is so substantial that it does not require alternative fixing. We were invited to determine the nature of "fixing" was determined by reference to the context of the structure itself.

DISCUSSION

36. We are grateful to the parties for their detailed skeleton arguments, comprehensive oral submissions and responses to the additional questions raised by the Tribunal during the hearing. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission and evidence. It is, however, inevitable, given the detail of the arguments and the quantity of material before us, that not everything in the appeal is given specific mention in this judgment.

Our approach

37. It is significant to note that in this appeal HMRC do not contend that the Pods are premise/setting from which the Appellant's qualifying trade is conducted. We are therefore looking at apparatus capable of representing plant eligible for capital allowances. We consider this a concession rightly made. The Pods are plainly assets used in the provision of the residential adventure holidays; sleeping in pods, as with the tents, is all part of the experience and adventure offered by the Appellant to the children and young people and their accompanying adults.

38. In our view, the concession is significant given the statutory purpose of section 21 CAA and Item 21 List C Section 23. In *Urenco* Henerson LJ summarises the case law which led to the enactment of section 21 CAA. Over many decades the courts and tribunals had accepted a distinction between plant on the one hand (the apparatus used to carry on a business) and the premises from which the business was carried on – the former being eligible for capital allowances and the latter not. However, in the view of the Treasury, the demarcation between the two categories of expenditure had become blurred and difficult to apply. In 1994, the provisions of what is now section 21 CAA, were introduced with the legislative purpose of promoting certainty for both taxpayers and HMRC and to prevent the erosion of the boundary between premises/setting on the one hand and plant on the other. Henderson LJ quotes at paragraph 101 from the ministerial statements on the amendments introducing the provisions (Standing Committee A of the House of Commons on 10 March 1994 *Hansard, 10 March 1994 column 602*).

39. Henderson LJ notes (at paragraph 99) that the question whether expenditure has been incurred on the provision of a building arises only where the expenditure in question is on plant and machinery (and not on premises) and represents a further hurdle "in cases where the disputed item has at least some premise-like characteristics, but nevertheless functions as plant in the taxpayer's trade".

40. He goes on:

> "[102] It is a striking feature of section 21 that, although there is now a blanket exclusion of buildings from the scope of 'plant or machinery', Parliament has chosen not to provide a full definition of 'building' in this context. Some assistance, however, may be gained from the partial definition in section 21(3), which tells us that certain assets are included in the term, or (if contained in List A) are to be 'treated as buildings'. Thus, the term includes assets which are fixtures ('incorporated in the building', subsection (3)(a)), or which are of a similar nature but not fixtures (subsection (3)(b)),

or which are 'in, or connected with, the building' and in List A (subsection (3)(b)). The List A assets comprise standard physical features of many ordinary buildings ('walls, floors, doors, gates, shutters, windows and stairs'); utility services for water, electricity and gas; systems for waste disposal, sewerage, drainage, and fire safety; and 'shafts or other structures in which lifts, hoists, escalators and moving walkways are installed'.

[103] It is therefore tolerably clear from the wording of section 21 itself that the meaning of 'building' in this context requires a focus on the physical features of the relevant structure or premises, as well as the services and systems which enable it to function in the taxpayer's trade or business. This is turn suggests that a consideration of both structure and function may be required in deciding what kind of structure or premises answer to the description of 'building'. Furthermore, the fact that Parliament has chosen to use an ordinary word in everyday use, which is not a legal term of art, indicates that the test was intended to be simple to operate and relatively unsophisticated.

[104] Although 'building' is not a term of art, I consider that Parliament must be taken to have been aware of, and endorsed, the guidance on the meaning of the word which can be derived from the judgment of Sir Donald Nicholls V-C in *Carr v Sayer* in 1992, not long before the enactment of the 1994 amendments. It will be recalled that one of the principles identified by the Vice-Chancellor in the predecessor legislation then in force was that plant 'does not convey a meaning wide enough to include buildings in general'. He also observed (65 TC 15, at 23) that:

> 'one of the functions of a building is to provide shelter and security for people using it and for goods inside it. That is a normal function of a building. A building used for those purposes is being used as a building. Thus, a building does not partake of the character of plant simply, for example, because it is used for storage by a trader carrying on a storage business. This remains so even if the building has been built as a specially secure building for use in a safe-deposit business. Or, one might add, as a prison'.

So, the provision of shelter and security are typical features of a building, and as Sir Donald Nicholls also observed (ibid):

> 'A purpose-built building, as much as one which is not purpose-built, prima facie is no more than the premises on which the business is conducted'.

[105] It is true that in the cases where the 'premises test' has been applied, a contrast is not normally drawn between 'buildings' and 'structures'. Rather, the contrast is between 'plant' on the one hand, and buildings or structures on the other. It is, therefore, a new and relevant feature of the 1994 amendments that there is a separate blanket exclusion for expenditure on the provision of a structure in what is now section 22 of CAA 2001, subject to various exceptions. For the purposes of section 22 , 'structure' is defined as meaning 'a fixed structure of any kind, other than a building (as defined by section 21(3))': see section 22(3)(a). However, this point is of little assistance in determining what constitutes a 'building' for the purposes of section 21 . The wording of section 22 simply makes it clear that there are fixed structures which are not buildings for the purposes of the Chapter, and that while every building is likely to be a fixed structure, the converse is not always true. Examples of fixed structures which are not buildings might

include, for example, pylons, wind turbines, mobile telephone masts, or bus shelters.

[106] It is common ground that there is no previous authority on the meaning of 'building' in section 21. That is why I have concentrated on the statutory language of the section and the remainder of the Chapter of which it forms part, together with such guidance as may be gleaned from the case law on the 'premises test' in relation to plant. We were also referred to a few cases which have discussed the meaning of 'building' in other statutory contexts. For the most part, they seem to me to provide little useful guidance, because the question is always so context specific. I would, however, make an exception for the judgment of Lord Neuberger of Abbotsbury MR (with whom Moore-Bick and Etherton LJJ agreed) in *R (Ghai) v Newcastle City Council* [2010] EWCA Civ 59, [2011] QB 591. The claimant in that case was an orthodox Hindu, who asked the local authority to dedicate land for traditional open air funeral pyres. The local authority refused, on the basis of legislation relating to cremation contained in the Cremation Act 1902 and associated regulations. The relevant issue for present purposes was whether open air funeral pyres fell within the definition of a crematorium in section 2 of the 1902 Act, as a 'building fitted with appliances for the purpose of burning human remains'.

[107] In dealing with this issue, Lord Neuberger MR reasoned as follows:

> '[21] On behalf of the Secretary of State, Mr Swift contended that a structure could only be a "building" within the Act if it was "an inclosure of brick or stonework, covered in by a roof". This contention was supported by three arguments, namely (i) the view of Lord Esher MR in *Moir v Williams* [1892] 1 QB 264, 270 that this was "what is ordinarily called a building", (ii) the desirability of having a clear and simple meaning for the word, as breach of the Act would be a criminal offence, and (iii) the need to ensure that cremations could not be seen by the general public. I turn to consider those three arguments in turn.
>
> [22] The first argument is based on the normal meaning of the word "building". The meaning of the word "building", or, to put the point another way, determining whether a particular structure is a "building", must depend on the context in which the word is used. Interpreting a word in a statute or a contract, or indeed in any other document, can, of course, only be sensibly done by considering the context in which it is being used. However, where, as is the case here, the word is one which is used in ordinary language and has no established special legal or technical meaning and is not defined in the document in question (in this case, the Act), one can usefully take as a starting point the word's ordinary meaning.
>
> …
>
> [24] Particularly as it appears that Lord Esher's statement as to the "ordinary" meaning of the word "building" may be treated as some sort of authoritative guidance as to the normal meaning of the word, I take this opportunity to say that it would be wrong to see it as having any such effect. In my opinion, the word "building" in normal parlance is naturally used to describe a significantly wider range of structures than would be included within Lord Esher's "inclosure of brick or stonework, covered in by a roof".
>
> [25] There are many wooden or other structures not made of "brick or stonework", such as chalets, stables, or industrial sheds, and there are

> many structures which are not "inclosures", such as wood-drying stores, bandstands, or Dutch barns, all of which, on the basis of the normal use of the word, are "buildings". Other structures come easily to mind, such as the pyramids or the colosseum, which are buildings in normal parlance, but do not fall within Lord Esher MR's "ordinary" meaning. So, too, at least some prefabricated structures, particularly if attached to a concrete, or similar base, are naturally described as buildings.
>
> [26] Deciding what a word means in a particular context can often be an iterative process, and the ultimate decision should not be affected by whether one starts with a prima facie assumption as to the meaning of the word and then looks at the context, or one starts by looking at the context and then turns to the word. However, if one approaches the issue by making a preliminary assumption as to the meaning of a word such as "building", then, in agreement with what Etherton LJ said in argument, I do not think that it would be right to take a somewhat artificially narrow meaning of the word, and then see whether the context justifies a more expansive meaning. It is more appropriate to take its more natural, wider, meaning and then consider whether, and if so to what extent, that meaning is cut down by the context in which the word is used'.

[108] It is also relevant to note what Lord Neuberger MR went on to say, at [33]:

> 'At least in general, it appears to me that, both in principle and in practice, it is inappropriate for the court to seek to define a word or expression used in a statute, where the legislature has not done so. It would virtually be a judicial encroachment onto the legislative function. Judicial guidance on such an issue, through the court's reasoning in a case where the meaning of a word is in issue, is inevitable, and, it is to be hoped, helpful. But a conscious and unnecessary definition of the word by the court is another matter'.

41. What we take from this rather lengthy quotation, and in particular paragraph 105 of the judgment is that there are structures which are fixed which are not buildings, but all buildings will be likely to be fixed structures. Thus, we decided that it was appropriate for us to start with determining whether the pods are fixed structures and within the scope of section 22 CAA. If they are not fixed structures then, by reference to the test directed by Henerson LJ, we must then determine whether the function and substance of the Pods would drive a conclusion that they were buildings and if so whether they meet the terms of item 21 List C in section 23..

Issue 3

42. In assessing whether the Pods are fixed structures we take as out starting point the analysis provided by the Court of Session in *Anchor*.

43. That case concerned whether capital expenditure incurred by Anchor on the construction of five-a-side football pitches qualified for capital allowances. The expenditure in question had been incurred in respect of 1) excavation of the ground, 2) the cost of acquitting and laying of two geotextile terram; 3) the cost associated with laying MOT type 1 which was compacted and rolled together with a blinding layer; 4) the synthetic grass carpet and its installation. Before the Special Commissioners Anchor had successfully argued that the carpet was to be considered in isolation, with the excavation and preparation works representing alteration of land for the purposes of installing the carpet. Anchor contended that the carpet was not a structure let alone a fixed structure.

44. The Special Commissioner determined the appeal in the taxpayer's favour. The Court of Session upheld the Special Commissioner's decision but also considered the question as to whether if all the works taken together to create the pitches were to be determined as the asset in question whether it would be determined to be a fixed structure. On this issue the Court of Session stated:

> "[27] … on the basis of the agreed facts the excavation works were such that it was likely that a vegetation and top-soil strip reducing levels by approximately 200-300mm would be required to expose the formation. A layer of terram geotextile was laid on the prepared and rolled formation and on the terram was laid a layer of stone. Between 200-300mm of stone … was usual for most conditions. Once the stone base had been prepared, rolled and levelled it received a further layer of terram geotextile material. The synthetic grass carpet, which was some 25mm deep, was then laid on the terram later and approximately 25-35kg of sand was applied per square meter. Accordingly, it appears that the excavation was relatively shallow, the layers of terram and the layers of stone were placed in the excavation and the carpet was laid on top of the upper layer of terram, being effectively held down by the weight of the sand which was applied. If part of the carpet became worn, that part could be patched. After a period of between five to nine years it would be expected that the carpet would be removed and replaced by a new carpet. Two days would be spent taking up the new carpet. In the circumstances we tend to the view that the pitch, comprising both the carpet and the works underneath, did not constitute a 'fixed structure' and that the Special Commissioner reached the correct conclusion on this matter. …"

45. We note that the Court does not provide a view on the test to be applied in determining the existence of a fixed structure. Ordinary words have been used by Parliament without a statutory definition. The Court simply evaluated the facts taken together and determined that if all components of the pitch were considered together did not constitute a fixed structure.

46. Applying the same approach: we consider that all the Pods are plainly structures, in the ordinary sense of the word as they are assembled from parts (predominantly timber) to form a solid object (this was a matter we also understand to be agreed between the parties). However, we do not consider that the Basic Pods are fixed as they are considerably less "fixed" than the pitches in *Anchor*. It is right that they are heavy, but they rest under their own weight on concrete block and beams and are anchored only for safety. Whilst we were given little information about the nature of the anchor, from the pictures we saw it was possible to see under the Pods from all angles and any anchor was considerably less substantial than 25-35kg of sand per square meter applied. We cannot see how, in light of the approach and decision in *Anchor* that the Basic Pods can be considered to be fixed.

47. We note a similar conclusion was reached in the judgment of the FTT in *Andrews*.

48. However, we consider on balance, that the Teacher Pods are fixed as a consequence of the plumbing facilities. The photographs demonstrated that there was a permeant foul water drain under each of them to which each Teacher Pod was securely attached (as they must have been). To have been plumbed in required that the Teacher Pods be in a fixed and identified place where there was access to the unground drain and then attached in a way which had a degree of permanence. That in our view amounts to fixing within the ordinary meaning of the word.

Issue 1

49. We consider that our conclusion that the Basic Pods are not fixed structures leads to a very strong inference that they cannot therefore be buildings. However, we note that Counsel

for the taxpayer in *Urenco* submitted that all buildings would be fixed structures and Henderson LJ's determination reflected only that it was "likely" that all buildings would be fixed structures.

50. Whilst it might be argued that Henerson LJ had accepted the submission of Counsel in this regard we consider that it cannot be the case that all buildings must be fixed structures because if that were the case section 21 would have no utility and Parliament is presumed (under the general rules on statutory interpretation) not to legislate for no purpose. It must therefore be the case that it is at least possible for a building not to be a fixed structure and that is also implicit in the Item 21 List C exclusion because a moveable building may not be fixed or might only be fixed temporarily

51. We must therefore consider whether the Basic Pods are buildings. With respect to Henderson LJ we find the paragraphs from *Urenco* set out at paragraph 40. above anything other than simple to apply. We bear in mind the statutory purpose and context of the provision was to exclude a taxpayer from claiming capital allowances in respect of buildings as an expedient and (presumably) less subjective way of analysing the complex premises/setting issue which had plagued the courts prior to 1994. However, it must also be the case that the blanket exclusion applies even where the buildings in question were not, as a matter of fact, premises from which the qualifying activity was conducted this is because the exclusion of buildings does not preclude the antecedent question as to whether the asset is plant.

52. In determining whether something is a building we must consider its characteristics and its functions. By virtue of the nature of their construction and form, the pods provide an enclosed space offering shelter and security for the occupants during the trading season and storage for tents and equipment in the off season. Those characteristics fall squarely within the scope of what has previously been considered to be a building (see paragraphs 106 and 107 of *Urenco*). However, HMRC accept in their guidance and accepted in argument before us, that not all structures offering shelter and security are buildings, in their view it depends on the substance of the structure providing those features.

53. We have not found this an easy task but on balance we consider that the Basic Pods are not buildings.

54. We so conclude because, in addition to not being fixed to the ground:

(1) The Basic Pods do not have walls and rooves in a traditional sense, and they certainly do not look like a conventional building, they look like an upturned boat and are designed to be as integrated with the landscape as possible.

(2) They do not provide living accommodation only a very crude place to sleep such that whilst they provide shelter in a basic sense, in our view the shelter offered whilst greater than a tent is not significantly so.

(3) The function they perform is as part of the residential adventure holiday experience and in that regard they perform the same function as the canvas tents. The tents and the Basic Pods all provide crude sleeping accommodation for up to five children.

(4) It is plain that the BBNPA view expressed in Policy 46, the application granted for the pods at Royal Oak and the indication given as to what was acceptable at Tan Troed is that the Basic Pods are non-permanent accommodation akin to the tents in which the children otherwise sleep. Not quite interchangeable but serving the same purpose of giving the outdoor adventure experience.

(5) We do not consider that the use of hook up electricity affects this conclusion, not least of all because the tents also have electricity.

55. On that basis we conclude that the structures lack sufficient substance to be considered buildings and the expenditure on the basic pods is not excluded under section 21 CAA.

56. Despite our conclusion that the Teacher Pods are fixed structures we must nevertheless also determine whether they are buildings because if they are buildings and meet the terms of Item 21 List C the Appellant would be entitled to capital allowances on them.

57. We have concluded the Teacher Pods are fixed to the ground in consequence of the foul water plumbing. In terms of external appearance they look identical to the Basic Pods, but they provide more facilities for living than the Basic Pods with a greater level of comfort both because of the fewer number of occupants to be accommodated and the additional facilities. Though we did not understand there to be cooking facilities provided within them (because catering was provided centrally for both children and adults) there were basic kitchenette facilities which, we assume but do not know, will have included either an electric kettle or a single/double ring gas burner for boiling a kettle. The substance of the shelter offered to occupants is therefore far greater.

58. Considering the factors identified as meaning the Basic Pods were not buildings, the factors set out in paragraph 54.(2) and (5) are, in our view materially different.

59. The question we must ask is whether weighing all the factors together we consider the differences sufficient to justify a conclusion that not only are the Teacher Pods fixed structures are they also buildings. Having considered the detail of the differences carefully, and on balance, we conclude that the Teacher Pods are buildings they are all but living accommodation providing sufficient security and shelter and they are fixed to the ground.

Issue 2

60. Issue 2 is relevant only to the Teacher Pods.

61. As set out above, in the summary of HMRC's submissions, they contended that there were three factors which must be demonstrated to have been met before Item 21 List C applies to a structure which is a building: (1) it is moveable, (2) at the time of making the claim to capital allowances it must be intended that the buildings be moved, and (3) movement must be in the course of and not only for the purposes of the qualifying activity.

62. We take each of these factors in turn.

63. HMRC's position on whether the Pods (now relevant only to the Teacher Pods) were moveable was not entirely clear. It is plain that to move the Pods BBNPA would have needed to agree to their movement, but our interpretation of the planning consent is that written agreement and not full planning consent was required at least to move them within Royal Oak. The correspondence between BBNPA and the Appellant regarding Tan Troed indicated that whether written agreement or full planning consent was required for a move to Tan Troed it was almost certain that it would be given. We do not see the agreement if BBNPA as inhibiting the movability of the pods.

64. Neither do we consider the fact that costs would be incurred in their movement as affecting their moveability. It is true that the sanitary/foul water drainage connection would need to be removed but we do not consider that sufficient to preclude a conclusion that the Teacher Pods were moveable. Nor do we consider the fact that the Pods required a forklift truck to move them short distances and a lorry and trailer to move them further precludes a conclusion that they are moveable. HMRC accept that builder's portakabins will be

moveable, we can see no material difference in the complexity of the requirements and cost of movement of a builder's portakabin to the movement of a Teacher Pod.

65. As such we conclude that factor 1 has been evidenced the Teacher Pods are moveable buildings.

66. Next we consider whether HMRC are correct to state that there must be a demonstrated intention in the accounting period in which the claim to allowances is made.

67. In this regard we have reviewed and considered the judgment in *Shaw*. That case concerned industrial buildings allowance and in particular whether the building in question had ceased to be used temporarily such that the terms of a provision concerning deemed continuous use was met. The Upper Tribunal was clear that as industrial buildings allowances were determine on an accounting period by accounting period basis the relevant intention that the building only be temporarily unused needed to be demonstrated in each period in which the allowances were claimed.

68. Here the Appellant claimed AIA in respect of the full cost of the Pods in the year in which they were purchased. We take the view that in order to do so, and in line with the binding analysis in *Shaw*, the relevant intention to move the pods must be demonstrated in the period of the claim. As HMRC conceded following questions put to them by us in the hearing, an absence of the relevant intention to move in the Relevant Period could not deprive the Appellant of capital allowances forever. HMRC accepted that at the point that an intention to move (if in the course of the qualifying activity) the Appellant would be entitled to claim writing down allowances by pooling the Pods (pursuant to sections 53 – 64A CAA). We consider that must be right and reinforces that a claim to capital allowances in respect of expenditure on assets described in Item 21 List C must be by reference to an evidenced intention to move moveable buildings in the course of a qualifying activity in the period of claim.

69. As regards the meaning of "in the course of" we note that we were not referred to any authority supporting HMRC's position but recognise that Parliament chose different statutory language for Item 21 List C and section 11 CAA (the latter explicitly refers to "for the purposes of").

70. As set out in paragraph 6.(24) we have found that the Appellant did not have an intention to move any of the Pods in 2015 with the consequence that there was no entitlement to claim AIAs claimed in respect of the Teacher Pods in the Relevant Period.

71. Thankfully, that conclusion avoids the need for us to actually determine whether there is a difference between "in the course of" and "for the purposes of" a qualifying activity. However, we note that we do not consider it easy to discern a substantive difference between "in the course" and "for the purpose" of a qualifying activity as defined in section 15 CAA. Had we needed to decide whether the intention to move the Pods (which we have identified to have been proven for 2019) was an intention to move in the course of the qualifying activity we would have found that it was. The qualifying activity involves taking decisions about what accommodation and where accommodation is to be provided on a season basis, and when to acquire new accommodation (whether that be tents or pods). We therefore consider that a decision to move accommodation between sites would be a decision made in the course of and not simply for the purposes of the qualifying activity.

DISPOSITION

72. For the reasons set out above we have determined that:

(1) the expenditure on the Basic Pods does represent expenditure on plant which is not excluded by sections 21 or 22 CAA; and

(2) the expenditure on the Teacher Pods is excluded under both section 21 and section 22 and not, in the Relevant Period "saved" by Item 21 List C in section 23 CAA.

73. Accordingly, the appeal is allowed in part.

74. We were not invited to determine the quantum of the appeal. By virtue of our decision the Appellant is entitled to claim the expenditure associated with the acquisition and installation of the 20 Basic Pods which we hope is a matter which can be agreed between the parties. The parties are directed to agree the quantum of the appeal and to notify the Tribunal within 72 days of the release of this judgement that they have so reached agreement subject to either party seeking permission to appeal within the prescribed 56 days in which case this direction will be suspended pending resolution of any further appeal proceedings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 22nd NOVEMBER 2023