



TC06928

**Appeal number: TC/2017/03948
TC/2017/03949**

INCOME TAX – capital allowances – facility for drying, conditioning and storage of grain – whether a “silo provided for temporary storage” (CAA s 23 List C) – whether “plant or machinery” (CAA s 11(4)(a))

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**(1) STEPHEN MAY
(2) STEPHEN MAY AND G MAY
T/A S.C. MAY**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR WILLIAM HAARER**

Sitting in public at Exeter on 6 November 2018

Charles Bradley, counsel, for the Appellant

Simon Foxwell, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against closure notices dated 9 December 2016, relating to tax
5 years 2011-12 to 2013-14, in which HMRC concluded that expenditure incurred by
the Appellants on the construction of a facility for the purposes of drying,
conditioning and storing grain did not qualify for plant and machinery capital
allowances.

2. It is common ground between the parties that the only issues that the Tribunal is
10 called upon to decide in this appeal are (1) whether this facility is a “silo provided for
temporary storage” within the meaning of List C in s 23 of the Capital Allowances
Act 2001 (“CAA”); and (2) whether this facility is “plant or machinery” within the
meaning of s 11(4)(a) CAA. The parties have stated that they will be able between
15 themselves to calculate the correct tax consequences arising from the Tribunal’s
decision on those two issues.

3. During part of the period to which this appeal relates, the farming land in
question was farmed by Mr Stephen May as a sole trader, and during part of that
period it was farmed as a partnership. That is why there are two separate appeals by
different Appellants, but both sides agree that nothing turns on this. For convenience,
20 the Tribunal refers throughout the decision below to Mr May as “the Appellant”, and
such references are to be understood where appropriate as references to the
partnership.

Background facts

4. In 2010, after he had been in a farming partnership with his brother for some 10
25 years, the Appellant had the opportunity to set up his own business. A large part of
the new business involved grain production for sale to local farms and feed mills. The
Appellant now has 900 acres, of which 700 are arable.

5. For this new business, the Appellant required a facility for drying and
conditioning the grain that he grew after it had been harvested, and for storing the
30 grain until it was sold. He had this facility constructed on his land by Matthew
Croker Steel Framed Buildings (“Matthew Croker”) in about 2011. A quote provided
by Matthew Croker, dated 31 December 2010, is stated to be for the following: “to
manufacture and supply a Grain store building purposely designed for customer to
include control of temperature and moisture levels for grain”. The Appellant
35 contends in this appeal that the facility is a “silo”. HMRC consider it to be a
“building”. As its correct description is the central issue in dispute between the
parties, the Tribunal will refer to it below using the neutral expression “facility”.

6. In the tax returns to which this appeal relates, the Appellant claimed plant and
machinery allowances under Part 2 CAA in respect of the expenditure incurred in the
40 construction of the facility.

7. HMRC subsequently raised enquiries into the tax returns in question. In the closure notices against which the Appellant now appeals, as subsequently upheld in HMRC review decisions, HMRC concluded that although certain individual items within the facility were eligible for plant and equipment capital allowances, the structure of the facility itself was first and foremost a “building” rather than a “silo” such that the expenditure on building this structure was ineligible. The effect of the HMRC decision is that only some 20% of the total amount claimed by the Appellant was eligible for capital allowances.

8. The Appellant now appeals to the Tribunal.

10 **Applicable legislation**

9. Section 1 of the Capital Allowances Act 2001 (“CAA”) relevantly provides:

- (1) This Act provides for allowances in respect of capital expenditure (and for charges in connection with those allowances).
- (2) The allowances for which this Act provides are those under—
 - 15 (a) Part 2 (plant and machinery allowances); ...

10. Section 11 CAA provides:

- (1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
- (2) “*Qualifying activity*” has the meaning given by Chapter 2.
- 20 (3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.
- (4) The general rule is that expenditure is qualifying expenditure if—
 - 25 (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
 - (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.
- (5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3.
- 30

11. Section 21 CAA provides:

- (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.
- 35 (2) The provision of a building includes its construction or acquisition.
- (3) In this section, “*building*” includes an asset which—
 - (a) is incorporated in the building,

- (b) although not incorporated in the building (whether because the asset is moveable or for any other reason), is in the building and is of a kind normally incorporated in a building, or
- 5 (c) is in, or connected with, the building and is in list A.

LIST A
ASSETS TREATED AS BUILDINGS

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

(4) This section is subject to section 23.

12. Section 23 CAA relevantly provides:

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

LIST C
EXPENDITURE UNAFFECTED BY SECTIONS 21 AND 22

- 25 ...
The provision of—
silos provided for temporary storage ...

The issues

13. It was common ground between the parties that for purposes of s 11 CAA, the Appellant was carrying on a qualifying activity, that the expenditure on the facility was wholly or partly for the purposes of that qualifying activity, and that the Appellant owned the facility as a result of incurring the expenditure. Expenditure on the construction of the facility will therefore fall within the general provision in s 11 CAA if the facility is “plant or machinery” within the meaning of s 11(4)(a).

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14. However, s 21 contains an exception to this general provision, stating that expenditure will not be eligible if it is expenditure on the provision of a building. Section 23 then goes on to provide certain exceptions to this exception, including in the case of “silos provided for temporary storage”.

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15. The Appellant accepts that the facility in this case is a building within the meaning of s 21 CAA, and that this appeal will fail unless the facility falls within one of the categories in s 23. The only potentially relevant category identified by the Appellant is that of “silos provided for temporary storage”.

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16. The first question to be determined is therefore whether the facility in this case is a “silo provided for temporary storage”. If it is not, the appeal will fail. If it is, the

exception in s 21 will not apply, and the outcome of the appeal will turn on the remaining issue for decision, namely whether the facility is “plant or machinery” within the meaning of s 11(4)(a).

The hearing

5 17. The Tribunal conducted a site visit of the facility on 2 November 2018. In attendance at that site visit were the representatives of the parties, the Appellant and the witnesses. At the commencement of the site visit, the Tribunal proposed that statements made by witnesses during the site visit would be treated as evidence in the appeal, and neither party objected. During the site visit the Tribunal and the
10 representatives asked questions of the witnesses.

18. It was apparent to the Tribunal at the site visit that the facility would, to an observer with no specialist knowledge of agriculture, simply look like a large steel-framed barn or shed with a concrete floor, in which piles of grain were lying on the floor. At the site visit, Mr Down and the Appellant pointed out specific features of
15 the facility which are referred to and described below.

19. At the time of the visit, three types of grain were being stored in the facility, wheat, barley and oats. The wheat and barley were separated by a permanent concrete wall running down the middle of the interior of the structure, and the barley was separated from the oats by a movable barrier.

20 20. Inside the structure were devices referred to by the Appellant as “pedestals”. These are vertical tubes which stand on the floor, each a number of feet apart, in the areas where the piles of grain are located. In other words, each pile of grain has the tops of pedestals protruding from its surface. Each pedestal has a fan assembly on its top, which draws air up through the pedestal. The sides of the pedestals are not
25 airtight. High on the wall on one side of the main structure is an air inlet vent, and high on the wall on the other side of the main structure there is an extractor fan which draw air out of the main structure. When the air outside the facility is drier than the grain stored in the facility, the fans on the pedestals and the exhaust fan on the wall of the structure can be turned on, causing outside air to be drawn into the interior of the
30 structure through the inlet vent, through the piles of grain into the sides of the pedestals, up through the interior tubes of the pedestals and out the tops of the pedestals, and then out of the main structure through the extractor fan. This flow of drier air through the piles of grain has the effect of drying the grain.

21. The hearing was held in Exeter on 6 November 2018, at which witness evidence
35 was given by Mr Stephen May (the Appellant), Mr Nigel Down, Mr Mark Doodney, and HMRC Officer Helen Kyle. All were cross-examined. Only the parts of their evidence that are relevant to this appeal are set out below.

The witness evidence

The evidence of Stephen May (Appellant)

22. The witness statement of Mr May stated amongst other matters as follows.

23. He needed a grain silo to put the moist grain in, and to keep it in good condition until he sold it. He wanted a “proper grain silo” so that he could know that the grain would be of good enough quality to sell to local farmers and feed mills, and to ensure that the grain complied with regulations and farm assurance. He wanted something simple and efficient to reduce labour costs, and something suited to the local weather conditions. The design chosen was the only type that would work on the size of his business. He went to several agricultural shows to research different designs over a 2 year period. He looked at alternative designs (including solutions with underground ducting to aerate the grain) but rejected these as too expensive and complex. The facility has been designed to keep the air space between the grain and the roof to a minimum. The sides of the structure are made of concrete panels to a height of 10 feet to retain the maximum amount of grain. A solid middle wall, also to a height of 10 feet, enables different types of grain to be segregated easily. The restricted airspace enables the Appellant to control airflow more easily to remove the moisture. The power floated floor was essential but restricts the other uses to which the structure could be put.

24. Mr May discussed the design with Nigel Down knowing he had considerable experience. Matthew Croker, an agricultural construction specialist, was chosen to build it. The structure cost about double what a general purpose agricultural building would have cost. This building would be unsuitable for livestock. The facility works so well that he has so far never had any grain rejected. He now sells oats for porridge, which have to be of a very high standard, and he was previously unable to do this. By being able to keep grain in a controlled environment economically, he has been able to maximise his sale price at the lowest possible cost.

25. In cross-examination, Mr May said amongst other matters as follows.

26. The process of drying, cooling and conditioning the grain continues throughout the entire period that the grain is in the facility. The grain when harvested has a moisture content of 18% to 25%, but to be sold it must have a moisture content below 15%. It takes some weeks for the grain to get down to 15%. Thereafter it will continue to become drier until it is sold, but that is not a problem as the moisture level will never get to zero. The drying mechanism would not work if the pedestals were removed from the structure. The grain harvest begins about 20 July each year and continues until the first week of September. The grain is sold throughout the period from September to May the following year, but January to March is the time that grain fetches the best price, and 80% of the grain is sold in that period. The facility thus has grain in it for about 9 months of the year. There is only a 6-8 week period in May-June when it is empty, during which it is cleaned to be ready for the next harvest. When grain is sold, it is taken to a holding bin outside the facility, which has machinery to clean it and deliver it into the customer’s lorry. The main structure of the facility itself does not deliver grain to the customer.

The evidence of Nigel Down

27. The witness statement of Mr Down states amongst other matters as follows.

28. Mr Down has over 40 years' experience of farming and advisory work. From 2000, he and a business partner formed their own farming consultancy service. In this capacity, he was engaged in 2011 for the development of a brand new farmstead for the Appellant on a green field site. The main structure on the site is the grain facility used for the drying, conditioning and storage of grain through the year prior to selling to local farmers and feed manufacturers. The design was for a purpose-built facility, to contain grain harvested from the land during the July-September period. Mr Down was involved in the design.

29. The type of storage facility used on larger farms, vertical silos, would not have been acceptable to the local planning authorities, and would have proved difficult in storing a number of different crops. The Appellant produces 4 or 5 crops per annum in a rotation to suit the ground. The crops are accordingly in smaller quantities that would lead to uneconomic use of space should a vertical silo have been chosen.

30. It was decided that the optimum type of grain facility was the "horizontal silo" where the drying mechanism is a set of grain pedestals on which each has a fan that draws air up through the pile of grain to remove the moisture. There is a central electronic unit to control the balance between the relative humidity of the outside air and the moisture content of the grain. As the grain is air dried, it is important that the air drawn through the grain is drier than the grain itself. A large fan is situated on the side of the wall to remove the moist air out of the restricted air space above the grain. The building, roof and area above the grain are specifically designed for this extraction system to work.

31. The grain harvested in North Devon can have a moisture level between 15% and 25%. If a vertical silo was used, the grain could be too moist for the cold air drying technique to remove the moisture and retain the quality. If a vertical silo was used there would be the necessity to keep moving the grain from one silo to another to avoid hot spots or condensation areas. This type of constant moving of grain is expensive and labour intensive. The Appellant's particular circumstances were better suited to a horizontal silo where the pedestals are removing moisture from a lesser height of grain, and where the pedestals can be spaced closer together if the grain is of a higher moisture content. The facility that was constructed was able to meet all the standards set by the Home Grown Cereals Authority ("HGCA").

32. During harvest the grain is tipped in the building and levelled to provide a constant depth of grain for initial drying and continuous conditioning throughout the period until it is sold. To be sold, grain must be below 15% moisture content. If the moisture content and bushel weights are not to the required standards, the grain is rejected and will need to be re-dried before it is suitable. This rejection can result in a lower price for the grain in addition to the extra drying costs.

33. The grain facility required walls that are much thicker than those of normal agricultural buildings, to prevent any possibility of the weight of the grain cracking

the walls. Normal walling for agricultural buildings would be 100 to 150 mm. This building has 210 mm thick walling. This building cannot be used for any other purpose during the year because the walls, very smooth flooring and airspace is suitable for grain but unsuitable for livestock, machinery or forage storage. The conditioning with blowers (pedestals) throughout the year is essential to meet HGCA standards. Higher prices are achievable later in the year when grain becomes scarce, and the Appellant benefits economically by being able to sell grain throughout the year. The facility is emptied in late June, and there is then a thorough cleaning and pest control treatment to make the facility ready to receive the next harvest.

34. In examination in chief, Mr Down said amongst other matters as follows. Grain is a living organism. If it was simply stored in a building without being cooled, it would quickly become very hot. Furthermore, warm air from the pile of grain would condense as it rises and hits the cooler air above it in the building, which would cause a crust to form on the top of the grain pile. The crust would then form a barrier preventing further hot air inside the pile from rising, making the core of the pile even hotter. This would damage the quality of the grain.

35. In cross-examination, Mr Down said amongst other matters as follows. The facility was designed to be suitable for the size of the Appellant's business. A vertical silo would have been impracticable and in Mr Down's view would not have been acceptable to the planning authorities. The pedestals, although moveable and not fixed to the building, are integral to the drying mechanism. The spacing of the pedestals can be changed depending on the moisture levels. His understanding is that a "silo" is a generic term for a place where grain is stored and maintained in a condition such that it is fit to be sold.

The evidence of Mr Doodney

36. The witness statement of Mr Doodney states amongst other matters as follows.

37. Mr Doodney worked for HMRC as a capital allowances technical specialist until 2015. While working with HMRC he was asked to provide technical advice on the basis of the Appellant's capital allowances claim. Internally within HMRC he expressed the view that there was merit to the Appellant's claim, but he produced a report stating that the expenditure did not qualify because he was told that it was HMRC policy to "hold the line" that such structures did not qualify. In 2016, while working as a tax consultant, he was asked to assist with the present case.

The evidence of HMRC Officer Kyle

38. The witness statement of Officer Kyle states amongst other matters as follows.

39. Officer Kyle is an HMRC officer of some 26 years' experience. She was asked to give technical advice to the HMRC caseworker on the Appellant's claim, in the light of further information provided to HMRC since Mr Doodney's advice. After consulting with HMRC's head office capital allowance specialists, it was agreed that the new information did not change HMRC's view. HMRC consider that the

expenditure in this case was on a “building”, since the facility is similar in nature and construction to many other types of buildings, including warehouses. The fact that it is constructed in a particular way for a particular purpose does not make it any less a building or structure.

- 5 40. In examination in chief, Officer Kyle added as follows. HMRC did in this case allow capital allowances on the free-standing equipment at the facility. What is in dispute in this appeal is the roof, floor, walls and door of the building.

The Appellant’s submissions

- 10 41. The word “silo” is not defined in the CAA and should be given its ordinary English meaning. The grain is stored from the time it is harvested until it is sold, so that storage is temporary. Reliance is placed on the definitions of “silo” and “temporary” in the Shorter Oxford English Dictionary. The facility is therefore a “silo provided for temporary storage” within the meaning of List C. There is a strong presumption that if an item falls within a description in List C it will be “plant” for purposes of the CAA, since items in List C are shorthand references to cases in which the courts have held that such items are plant (reliance was placed on *JD Wetherspoon plc v Revenue and Customs Commissioners* [2012] UKUT 42 (TCC), [2012] STC 1450 (“*JD Wetherspoon*”) at [17]). “Plant” means “whatever apparatus is used by a businessman for carrying on his business”, and the test is essentially a functional one (reliance was placed on *Yarmouth v France* (1887) 19 QBD 647, 658 (“*Yarmouth*”); and *Commissioners of Inland Revenue v Barclay, Curle & Co Ltd* (1969) 45 TC 221 (“*Curle*”), 238-9, 224 and 250). In *Schofield v R & H Hall Ltd* (1974) 49 TC 538 (“*Schofield*”), the Northern Ireland Court of Appeal held that grain silos were plant.

- 25 42. In the present case, the Appellant’s trade is arable farming, which involves growing grain and selling it at a profit. To achieve the best price, the Appellant needs to be able to keep the grain in suitable condition pending sale, and to achieve the best price the Appellant needs to be able to supply it over a period of months. The whole of the facility in this case has been specifically designed to perform the function of drying and cooling grain, and keeping it in a condition suitable for sale, in a way that is most cost-efficient to the Appellant. The whole facility is a coherent unit that actively dries and cools grain and thus plays an essential function in the Appellant’s farming trade.

The HMRC submissions

- 35 43. The burden of proof is on the Appellant to show on a balance of probability that he is overcharged by the assessments.

- 40 44. The facility is a grain store building, not a silo for temporary storage. This is a building and not plant. It is not a silo within the ordinary dictionary meaning, nor does it perform as apparatus or a tool of the trade. List C does not work by analogy. General agricultural buildings like barns are not included in List C, but silos for temporary storage are included. A “silo” is a “pit or airtight structure in which green

crops are pressed for fodder, undergoing fermentation” or a “pit or tower for the storage of grain, cement etc”. The correct approach is to decide if expenditure is specifically excluded by ss 21 or 22, then decide if it is specifically included under s 23, and only then to consider it in the light of the case law. There is no question that the facility in this case is a building. It provides the passive storage of grain. It is specifically excluded by ss 21 and 22. It is not included in s 23 as List C does not work by analogy.

45. It is perfectly normal for the Appellant to want his grain stored in the best circumstances, but this is achieved by having a well-suited building with the correct fittings that is kept clean, not by an item of apparatus or plant. The facility provides no active function in the farm business beyond suitable storage, in much the same way as a barn. The present case is distinguishable from *Schofield*, which involved a grain importer who had concrete storage bins designed to allow a lorry to drive underneath and be filled, in order to ensure a rapid flow of grain from ships to lorries, and in which grain was stored for only 7 days. In the present case, the grain is stored for months, and is a primary function. In the present case, if the temperature control equipment was removed from the facility, all that would be left is a building.

The Tribunal’s findings

Whether the facility is a “silo”

46. Both parties agree that the word “silo” in List C is not further defined by the legislation, and that the word is therefore to be given its ordinary dictionary definition. Both parties further agree that an appropriate dictionary definition is that given in the fifth edition of the Shorter Oxford English Dictionary. This definition is as follows:

A pit or underground chamber used for storing grain, roots, etc.; *spec.* one in which green crops are compressed and preserved for fodder as silage. Also, a cylindrical tower or other structure built above ground for the same purpose.

47. The Tribunal notes that according to this definition, a silo may have no purpose other than “storing” grain. There is no suggestion in this definition that a structure, in order to be a “silo”, must have any other additional purpose beyond this.

48. The Tribunal further notes that this definition does not require a structure, in order to be a “silo”, to be either a pit or an underground chamber or a cylindrical tower built above ground. According to this definition, a “silo” can also be any “other structure built above ground”.

49. There can be no question that the facility in this case is built above ground. It is difficult to see how it could not come within the ordinary dictionary definition of a “structure”. Neither party provided the Tribunal with any dictionary definition of a “structure”, but the Tribunal is prepared to take judicial notice of the fact that in ordinary English usage, the word “structure” would include a building. On that basis,

the Tribunal considers that the Shorter Oxford English Dictionary definition of “silo” would include a building built for the purpose of storing grain.

50. The Tribunal accepts that the word “structure”, as defined for purposes of s 22 CAA, expressly excludes buildings (see s 22(3)(a)). That is no doubt because
5 buildings are dealt with specifically in s 21 CAA. However, s 22(3)(a) CAA, which provides a statutory definition for purposes of one specific statute, cannot be taken as demonstrating that the ordinary English meaning of the word “structure” excludes buildings. Indeed, the very wording of s 22(3)(a) CAA if anything at all suggests that but for that provision, the word “structure” *would* include a building.

10 51. HMRC have not submitted any evidence or authority to suggest that the word “silo” has some more specific meaning, that would exclude a building used for the storage of grain.

52. Mr Down gave evidence that his understanding is that a “silo” is a generic term for a place where grain is stored and maintained in a condition such that it is fit to be
15 sold. The Tribunal does not understand Mr Down to be purporting to give expert evidence as to the meaning that the word “silo” has in the agricultural industry. However, given his expertise, his evidence on this point can certainly be taken into account in determining the ordinary meaning of the word. His definition is in fact narrower than that referred to in the last sentence of paragraph 49 above, in that he
20 suggests that a “silo” must have the function not merely of storing grain, but also of maintaining the condition of grain.

53. This appears to be consistent with what is stated in a number of publications relied on by the Appellant, dealing with the need for appropriate aeration of grain in storage and the different methods of achieving this, setting out formulae for
25 calculating the necessary aeration having regard to matters such as grain bulk density and resistance to air flow, and noting the economic considerations that may point to the adoption of one possible method over another.

54. The witness statement of Mr Down refers to the facility in this case as a “horizontal silo”. A letter from Matthew Croker dated 15 September 2014 refers to a
30 “flat grain store/silo”. A factsheet published by the Ontario Ministry of Agriculture and Food in May 1981 states that types of silos include both “vertical silos” and “horizontal silos”, and that there are three types of “horizontal silos”, including “bunker silos”, which are built above the natural grade line and may have walls constructed of wood or concrete. An article taken from the website of the Food and
35 Agricultural Organisation, entitled “Factors influencing the choice of bulk store”, indicates that bulk grain may be stored in a store that is round or rectangular, tall or short, steel or concrete, flat floored or hoppers, permanent or temporary. The article does not suggest that the word “silo” refers only to stores that have a particular combination of these possible features. The article refers to “Tall concrete bins ...
40 constructed using slip-formed techniques”, and then goes on immediately to say that “Another common method of concrete silo construction uses ‘jump’ forms”. This wording seems to suggest that the expressions “concrete bins” and “concrete silos”, to an extent at least, are interchangeable or overlap. The Appellant has also submitted

an extract from a book, McLean, *Drying and Storing Combinable Crops* (Farming Press, 1989), which also refers to bulk grain “stores” (drawing a distinction, for instance, between level-loaded stores and peak-loaded stores), without suggesting that certain types of such stores are “silos” while others are not.

5 55. The Tribunal has not been referred to any case law dealing with the question of
what does and does not fall within the definition of a “silo”. At the hearing, the
representatives of both parties agreed that the only case of which they were aware
dealing with capital allowances in the case of silos was *Schofield*. However, in that
10 case it was undisputed that the structures in question were silos, and the issue in
dispute between the parties that was decided by the Northern Ireland Court of Appeal
was whether or not those silos, in their entirety, constituted single units of plant.

15 56. The Tribunal finds as follows. The facility to which this appeal relates is a
building used not only for the storage of grain. It is also used for the process of
drying grain after it has been harvested, which is an essential process that needs to be
undertaken in order for the grain to be able to be sold. Furthermore, even after the
grain has been sufficiently dried, the facility has the function of maintaining the grain
in an optimum condition for so long as it remains in storage, through a continuing
process of aeration. The building is not only *used* for all these purposes. It was
specifically *built* with the intention that it would serve these purposes, and was
20 specifically *designed* to make it suitable to serve these purposes. The cost of
constructing the facility containing the necessary design features to serve the intended
uses was significantly higher than the cost of constructing a general purpose
agricultural building. These specific features furthermore make the building
unsuitable for other uses, such as for livestock, machinery or forage storage. While a
25 layperson looking at the facility might think that it is “just” a shed or barn, on
consideration of the evidence the Tribunal is satisfied that it is not. On the contrary, it
would in fact not be suitable to be used for various purposes for which an ordinary
shed or barn would typically be used. The Tribunal is satisfied that it is a “silo”.

Whether the facility is provided “for temporary storage”

30 57. In order to fall within s 23 CAA, the silo must be provided “for temporary
storage”.

58. The Tribunal has been pointed to no statutory definition of “temporary” or
“temporary storage”.

35 59. The relevant part of the Shorter Oxford English Dictionary definition of
“temporary” is as follows: “Lasting or meant to last for a limited time only; not
permanent; made or arranged to supply a passing need”.

60. The inclusion of the word “temporary” in this item in List C assumes that there
will be cases in which silos are used for permanent, or at least indefinite or long-term
storage, as opposed to temporary storage.

61. The evidence is that the grain in this case is stored in the facility from the time that it is harvested in about July, until the time that it is sold, which will be at the latest in May the following year. The Appellant argues that storage for a period of up to 9 or 10 months at a maximum, between being harvested and being sold, is “temporary” storage.

62. HMRC argue that storage for such a period is long term, and is not “temporary”. HMRC seek to contrast the circumstances of the present case with those in *Schofield*, in which grain was stored in silos for only 7 days.

63. The Tribunal accepts that the item “silos provided for temporary storage” may have been included in List C with the case of *Schofield* specifically in mind (see *JD Wetherspoon* at [17]), and on that basis it can be concluded that in the particular circumstances in *Schofield*, the silos were for “temporary” storage within the meaning of s 23 CAA. However, in *Schofield* the question whether the storage was “temporary” or not was not one of the issues that the court was called upon to decide, and is not dealt with in the judgment. The facts of *Schofield* are therefore not of assistance in determining precisely which other factual circumstances would fall within that expression, and which would not.

64. The Tribunal specifically asked Mr Down at the hearing how long the Appellant’s grain could potentially be stored in the facility, and his answer indicated that it could not in fact be kept much longer than 9 or 10 months without deteriorating in quality. That evidence might be argued to support the HMRC position that the storage in this case is more than temporary. However, the words “silos provided for temporary storage” in List C apply to all kinds of silos used for storing all kinds of commodities, and it is possible that there are silos which are used for indefinite storage of certain kinds of commodities (for instance, as reserves in case of future shortages, which may or may not arise, and the timing of which can never be known in advance).

65. The Tribunal considers that the storage of the grain in this case needs to be considered in the context of the Appellant’s business as a whole. His business is not the storage of grain. His business is the growing of grain, and the selling of the grain that he grows. The storage of the grain is merely one part of the process by which that business is conducted.

66. The grain is placed in the silo initially for the purpose of drying it, in order to process it into a marketable quality. Thereafter it is kept in storage only until it is sold. The evidence is that the grain is sold throughout the period from September to May the following year, but that 80% is sold in the January to March period when it fetches the best price. It is understandably in the Appellant’s commercial interest to sell the grain at a time when it reaches the highest price, and subject to this, it is presumably in the Appellant’s commercial interest to sell the grain as quickly as possible. The evidence is that sales of grain commence virtually immediately after the grain drying process has been completed in September, and that the sales are then continuous until all of the grain has been sold by the following May, with the Appellant aiming to sell the bulk of the grain in the January to March period.

67. The Appellant thus knows from the outset the periods in which the grain will be stored, and the periods in which the sales will take place. The Appellant's business involves a process presumably beginning with ground preparation prior to planting seeds, or possibly beginning with a stage even prior to this. The process then
5 continues with the tending of the crop, followed by harvesting, which then leads on to the drying process, followed by the sale of the crop. Storage of the grain in the silo is only for a limited part of that regular process. Furthermore, length and timing of the period of storage is known in advance. Given that the process is the same every year, the length and timing of the period of storage in a given year is known years in
10 advance.

68. Additionally, it is known in advance that the facility will be empty for cleaning for a 6-8 week period every year. This in itself is an impediment to indefinite storage, or storage for a period longer than some 10 months.

69. In these circumstances, the Tribunal is satisfied that the storage of the grain in the silo is in this case "temporary". This intended timing of the storage of the grain
15 was known at the time that the silo was constructed. It was therefore known at the time of construction that the storage would be "temporary".

Whether the facility is "plant or machinery"

70. In *Yarmouth* at 658, it was said that:

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

25 71. In *Curle*, the House of Lords found by majority that a dry dock for use in a company's trade of ship-builders, ship repairers and marine engineers was "plant for the purposes of the trade" of that company within the meaning of the then Income Tax Act 1952. The House of Lords rejected an argument by the Crown, relying on *J Lyons & Co Ltd. v Attorney-General* [1944] Ch 281, 287, that plant does not include
30 the place in which the business is carried on, and that the dry dock was merely the setting or part of the premises where the business was carried on. Lord Reid said at 238-239:

35 As the commissioners observed, buildings or structure and machinery and plant are not mutually exclusive... Undoubtedly this concrete dry dock is a structure but is it also plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that it fulfils the function of plant in the trader's operations. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that
40 every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient.

5 Here it is apparent that there are two stages in the respondents' operations. First the ship must be isolated from the water and then the inspection and necessary repairs must be carried out. If one looks only at the second stage it would not be difficult to say that the dry dock is merely the setting in which it takes place. But I think that the first stage is equally important, and it is obvious that it requires massive and complicated equipment. No doubt a small vessel could be got out of the water by the use of comparatively simple plant and machinery but clearly that is impossible with a very large vessel. It seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or plant with which, the operation is performed.

72. Lord Guest said at 244-245:

20 The question, therefore, is whether, notwithstanding that it may be also a structure, the dry dock is "plant" within the terms of section 279. The conjunction of "machinery" and "plant" suggest to me that they both must perform some active function. In order to decide whether a particular subject is an "apparatus" it seems obvious that an inquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary. The function which the dry dock performs is that of a hydraulic lift taking ships from the water onto dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides. It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary.

35 It is said that the dry dock is similar to premises like a factory building in which the trade is carried on. But this comparison is not, in my view, accurate. The factory is by itself a building or structure in which trade can be carried on. But the excavation and concrete work is useless for any trade purpose unless used in conjunction with the rest of the equipment.

73. Lord Donovan said at 249-250:

40 ... *Jarrold v. John Good & Sons Ltd.* [1963] 1 W.L.R. 214, spoke of plant being that with which the trade is carried on, as opposed to the place where it was carried on. ... All these definitions are helpful, but in the nature of things they cannot be exact, and so provide an answer incapable of reasonable dispute in every case. ...

45 At the end of the day I find the functional test propounded [in *Yarmouth*] to be as good as any, though, as was said in *Jarrold v. John Good & Sons*, some plant may perform its function passively and not actively. But in the present case this dry dock, looked upon as a unit,

5 accommodates ships, separates them from their element and thus exposes them for repair; holds them in position while repairs are effected, and when this is done returns them to the water. Thus the dry dock is, despite its size, in the nature of a tool of the respondents' trade and, therefore, in my view, "plant." I think it differs from a dam which, for the moment at least, I regard more as a storehouse for water.

74. In *Schofield*, Jones LJ (with whom Curran LJ agreed) said:

10 The silos are not just buildings capable of being put to any purpose. They were specially built, having been presumably specially designed, for the purpose of rendering better and more efficient the process of unloading and distribution, rendering possible the process of bulk unloading, without which in the case of the Old Silo, as is stated in the Case, the Respondents could not have remained in business. ... In the
15 circumstances of this case, and in the light of the principles applicable, I consider that the silos, being as they are an essential part in the trade activity of grain importing, are plant. I cannot accept that it was necessary for the finding to indicate to what function the function of the silos was analogous, and in fact the finding did specify the separate function, within the overall operation, the silos do perform. ... If one
20 puts oneself in the place of the Respondents' directors back in 1940 one can well visualise them saying that to remain in business ... they would have to install new plant, or had had to install new plant, and, taking that in the ordinary sense of words, I think that any ordinary person would have taken them as referring, *inter alia*, to the Old Silo,
25 which was the one first installed.

75. On the evidence before it, the Tribunal is satisfied that the facility to which this appeal relates is not merely part of the premises where the Appellant's business is carried on. The Appellant's business occupies some 900 acres of land, of which 700 are arable. The core business activity of growing grain is conducted on those 700
30 acres. There are various structures on the land. The facility to which this appeal relates is one of these. This facility performs one particular function within the overall activities constituting the Appellant's business, namely the active function of drying the grain after it has been harvested, and then of keeping it conditioned in storage until it has been sold. This function is just one part of a longer process that
35 makes up the Appellant's business.

76. This particular function of drying and conditioning grain is not performed simply by the movable items located in the main structure of the facility. Rather, the very structure of the building itself is integral to its successful performance. If the structure of the building had been designed differently, the facility would not work.
40 The features of the building that are essential to the successful performance of its function include the height at which the roof is pitched, the power floated concrete floor, the thicker than normal concrete walls and the air inlet and exhaust fan located on the walls. These specific features led to the construction costs being considerably higher, as well as making the building unsuitable for other uses.

45 77. The Tribunal is satisfied of the following. The building as a whole is kept for permanent employment in the Appellant's business. The building as a whole

5 performs an operation that is essential to the conduct of that business, namely drying and conditioning the grain. There is positive evidence that it is unsuitable for use for various other purposes, and there is no positive evidence that there is any other specific trade purpose for which it would be suitable. The building as a whole was especially designed and built for the specific purposes that it serves.

10 78. HMRC argue that the drying and conditioning process would not work if the movable equipment was taken out, suggesting that this means that the main structure of the facility is merely a building in which grain is dried and cooled. However, it is equally the case that the drying and conditioning process would not work if the building did not have the power floated concrete floor, the thicker than normal concrete walls and the air inlet and exhaust fan located on the walls. Both the main structure of the building and the movable parts are thus essential to its functioning. All of these components together constitute the apparatus.

15 79. The Tribunal therefore finds that the facility as a whole is “plant or machinery” within the meaning of s 11(4)(a) CAA.

Conclusion

80. The parties agree that there are only two questions for determination by the Tribunal in this appeal (see paragraph 2 above).

81. For the reasons above, the Tribunal allows the appeal, and finds that:

- 20 (1) the facility to which this appeal relates is a “silo provided for temporary storage” within the meaning of List C in s 23 of the Capital Allowances Act 2001; and
- (2) this facility is “plant or machinery” within the meaning of s 11(4)(a) of the Capital Allowances Act 2001.

25 82. 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

30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **DR CHRISTOPHER STAKER**
TRIBUNAL JUDGE

RELEASE DATE: 10 JANUARY 2019