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Orsted West of Duddon Sands (UK) Limited (now named Orsted Schroders Greencoat WODS Holdco Limited) and others v HMRC[1]

Feedback from members and volunteers

1. About Us

1.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 20,000 members, and extensive volunteer network, in providing our response.

1.2. Our stated objective for the tax systems include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

2. Introduction

2.1. In a unanimous judgment published on 15 April 2026, the Supreme Court allowed HMRC's appeal overturning the Court of Appeal's earlier decision[2] in favour of the taxpayer in February 2025. The central question was whether costs associated with pre-construction studies such as environmental assessments, marine surveys and technical studies could be treated as spending incurred 'on' the provision of plant for capital allowances under CAA 2001 section 11(4)(a):

[1] [2026] UKSC 12
[2] [2025] EWCA Civ 279

(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 [our underlining]

2.2. Broadly, the Supreme Court held that the requirement for expenditure 'on' the provision of plant is a narrow test that requires a close connection with the plant. The Court rejected the argument that expenditure on studies that *inform* the design of the plant or machinery is 'on' the provision of plant as too remote.

2.3. The Court also rejected a purposive argument for a broader interpretation based on the wider purpose of capital allowances being to incentivise investment.

2.4. Following the Court of Appeal judgment on 17 March 2025, HM Treasury confirmed that the publication of a consultation on the tax treatment of predevelopment costs, announced at Autumn Budget 2024, was postponed to enable the government and stakeholders time to reflect.

2.5. Given the wide impacts of the decision, the technical uncertainties that remain and the need for policy that supports investment in infrastructure effectively, the CIOT has engaged with its specialist members and volunteers to gather initial feedback on the implications of the judgment and the application of the current law. This feedback is summarised below.

2.6. The feedback covers two aspects, which are interlinked; whether legislative change is required and HMRC's approach following the decision both in terms of existing capital allowances claims and their prospective approach.

3. What are the implications of the judgment?

Who is affected?

3.1. Feedback from our members indicates that the uncertainty on the dividing line between eligible and ineligible design costs adversely affects businesses' ability to plan for capital projects involving pre-development expenditure. Large infrastructure and energy projects have been the focus of commentary immediately after the judgment, but the uncertainty affects all real estate construction projects across the board that rely on upfront analysis and design surveys. Any business undertaking a capital project that requires feasibility studies, ground investigations, design research and technical or environmental surveys is affected, as well as real estate funds that invest in the sector.

3.2. Members report that the judgment has created nervousness in the renewables sector. There is a high level of acquisitions activity in the renewables sector including of sites under development and as part of consolidation of energy provision by corporate acquirers, including for example by private equity funds. However, members are concerned that the decision and uncertainties surrounding capital allowances are already beginning to influence this activity. There is concern that buyers will factor these uncertainties into pricing mechanisms potentially slowing deal activity. Management of this uncertainty is likely to become a key focus of the due diligence process. Overall, this creates a degree of commercial uncertainty that could affect transactional activity in the sector.

3.3. Capital allowances flow into the financial models of Offshore Transmission Owners (OFTOs) bidders and other renewables bids e.g. battery storage bids (BESS). The availability of capital allowances frees up cashflow to meet funding costs. Changes to eligibility for capital allowances therefore affects the modelling and risk and therefore feeds into the bids. Uncertainty is potentially distortive if bidders are making slightly different assumptions.

3.4. The uncertainty has implications for other parts of the tax system where similar wording is used in statute, for example the test for Business Premises Renovation Allowance (BPRA) claims was for expenditure 'on or in connection' with the physical conversion of a property. Although BPRA was withdrawn in 2017, there are ongoing claims under HMRC enquiry (see further 3.16 below).

3.5. Known disallowable costs are built into financial modelling and rates of return however the concern is the uncertainty of the remoteness test means it is unclear what preparatory works can be claimed with confidence and factored into funding structures.

3.6. Members report clients asking if they should consider scaling back. Anecdotally there is nervousness; clients are considering their options particularly on smaller scale projects where the proportion of disallowable costs is potentially more consequential than may be the case for large scale multi-million energy projects. For larger projects, the absence of an allowance on costs that comprise a low percentage of total expenditure is unlikely per se to prevent a project going ahead.

3.7. Taxpayers with projects involving at least £1bn of qualifying expenditure may be able to use HMRC's advance tax certainty service to achieve certainty but that is limited to the largest projects.

3.8. The uncertainty is compounded by the fact that the capital project costs are clearly legitimate commercial costs for which no relief is available ('a tax nothing'), some being incurred as a statutory obligation or regulatory requirements. It therefore seems commercially illogical that relief is not available (at the time it is incurred, or, if later, when the trade commences[3]) as businesses would regard the costs involved as natural business expenses.

3.9. A firm view was that a rational business tax system that promotes and underpins investment, both domestically and internationally, should not deny tax relief for genuine capital expenditure.

3.10. The uncertainty arising from protracted litigation affects initial investment and ongoing capital expenditure once the investment decision is made. Feedback from members is that it is not an effective way to run a tax system to wait for years for litigation to establish the tax treatment and once concluded to wait for government to decide whether to provide relief for expenditure through new legislation.

Technical uncertainties remain

3.11. At paragraph 95 of the judgment, it was noted that '*HMRC wished to reserve their position on whether the cost of producing the final technical drawings and specifications which are then 'made real' by the manufacturer could be recoverable*' and further '*Ms Wilson was also prepared to accept that if further surveys and studies were carried out during the final stages of fabrication or during the course of the installation of the windfarm, they may qualify as being 'on provision' either because they are part and parcel of the production process or because they are part of installing the windfarm.*' The Supreme Court did not express a view on this proposition.

3.12. There are nuances and grey areas in determining the required close connection; for example, the design costs that were the subject matter of the case *informed* or *fed into* the design[4] rather than being *of* the design. If design fees relate to the actual construction of the machinery, is that sufficient or is the test not met because

[3] Many projects are undertaken in new SPVs.

[4] Lady Rose at para 85: '*The 'limiting curve' as Lord Wilberforce put it in Ben-Odeco is around the plant and the provision of it. The costs, commonly incurred, of carrying out studies and surveys which provide the business with advice about how to choose or design plant fall, in my view, well outside the limiting curve*.'

say, the machinery might not be brought into existence. Counsel for HMRC, for example, referred to plant having to be 'in your sights' at paragraph 97. The way the 'limiting curve' operates will differ depending on the nature of the business; the nature and timing of design costs for developing an onshore solar renewables site, for example, will differ to that of a large offshore windfarm.

3.13. Paragraphs 55-58 of the judgment considers HMRC's Capital Allowance manual in relation to 'preliminaries at CA20070 - Plant and Machinery Allowances (PMA): introduction: professional fees and preliminaries. The manual confirms the valid use of a pro-rata basis following the Upper Tribunal decision in JD Wetherspoon v HMRC Commissioners [2012] UKUT 42(TCC) : '*Thus, apportionment of preliminaries between items which do, or do not, qualify for capital allowances is the only solution in relation to un-attributable preliminaries, and may be the sensible solution where attribution is uneconomic.*'. It was noted (at paragraph 58 of the judgment) that HMRC say preliminaries were correctly dealt with by the FTT at paragraphs 205-2011 and therefore do not take the matter further. However, it is not entirely clear whether HMRC's current approach to preliminaries is wholly consistent with the narrow test established by the Supreme Court. It is also not clear why design fees should be treated differently to say, architects' fees.

3.14. How will the judgment affect HMRC's approach to the pragmatic pro-rata apportionment and what elements are included in the apportionment? Apportionment has provided a longstanding approach that effectively factors in a disallowance of certain project fees on account of remoteness, removing otherwise significant administrative burdens for business and HMRC. Members and volunteers comment that there is generally not a material difference in tax terms between a detailed line by line analysis of expenditure to arrive at the disallowable element and an appropriate apportionment basis. However, the judgment throws into doubt the established and pragmatic approach to apportionment.

3.15. As the decision overturns the Court of Appeal's decision, it is likely that some taxpayers have made claims based on the Court of Appeal's approach giving rise to:

- potentially complex and practical difficulties in considering filing positions,[5] and
- affecting valuation of share sales and due diligence.

3.16. The Court of Appeal decision in *London Luton Hotel BPRA Property Fund LLP v The Commissioners for HM Revenue and Customs* [2023] EWCA Civ 362 in relation to a BPRA claim concerned a broader statutory test of qualifying expenditure ('qualifying expenditure' means capital expenditure incurred before the expiry date on, or in connection with…). The Court of Appeal's decision effectively restricts availability of BPRA to physical conversion works in circumstances where the statutory test is in fact broader than CAA 2001 section 11(4)(a). Although BPRA is no longer available, we understand there are BPRA cases still to be resolved and both *Orsted* and *London Luton* will need to be taken into account in considering the approach to the common statutory language.

Significant technical uncertainties therefore remain unresolved.

[5] See PCRT Helpsheet C para 43 et seq.: https://www.tax.org.uk/professional-conduct-in-relation-to-taxation-pcrt

4. Considerations for a possible consultation

4.1. It is vital that HMRC guidance is updated to clarify their position as soon as possible (and this clarification is needed sooner than any consultation) to resolve the uncertainty (noting also the current consultation on Opportunities to Extend Uncertain Tax Treatment). However, given the impact of the decision, that arguably undermines the policy itself and is anti-investment, moving forward with consultation sooner rather than later is also important to enable these issues to be addressed with a targeted legislative solution.

4.2. In terms of a consultation, we think these are issues that it would be beneficial to include:

- Interaction and alignment with wider government policies for net zero and promotion of alternative energy.
- Absence of relief for legitimate business expenses and the extent to which it undermines the coherence of the tax system.
- Consideration could be given to extending any consultation beyond relief for pre-construction expenditure towards wider structural reform including reforming the archaic schedular system to eliminate the need for analyses for tax purposes that do not reflect commercial reality and lead to ad hoc changes and piecemeal reform discussions.
- In terms of the policy intent for capital allowances, feedback indicates a gulf in understanding – capital allowances perceived (apparently) in some quarters of government as akin to a tax-free loan whereas businesses, on the other hand, see delayed relief for expenditure incurred upfront that adversely affects cash flow.
- If relief is to be given within the current tax system, consideration of how it should be given and at what rate. We note paragraph 87 of the judgment that references HMRC's submission that the Court of Appeal's broader interpretation undercuts the allowances given for qualifying expenditure for buildings and structures under CAA 2001 Part 2 Chapter 3.
- International comparatives and the attractiveness of the UK as an investment location.

The Chartered Institute of Taxation

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