



TC04299

Appeal number: TC/2013/07423

CORPORATION TAX – capital allowances – plant and machinery – conservatory-type enclosure for swimming pool – whether a building or a structure – yes – just and reasonable apportionment of consideration paid for qualifying assets – appeal dismissed, subject to any further hearing necessary to determine the value of the swimming pool

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BOWERSWOOD HOUSE RETIREMENT
HOME LTD**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR ALAN REDDEN FCA**

Sitting in public in Manchester on 16 September 2014

**Mr Iain Clarke of Downham Mayer Clarke & Co Chartered Accountants for the
Appellant**

Mr John Helm of HM Revenue and Customs for the Respondents

DECISION

Background

5 1. The appellant owns and operates a retirement home known as Bowerswood House near Preston. It purchased Bowerswood House, we understand as a going concern, in September 2004 for £940,000. Within the grounds of Bowerswood House there is a swimming pool which was, at some stage, used by the residents of the nursing home. The swimming pool is enclosed by a large conservatory-type covering
10 which we describe in more detail below. For want of a better word we shall refer to this as “the Conservatory”.

2. We are concerned in this appeal with the appellant’s entitlement to capital allowances in relation to the swimming pool itself and the Conservatory. The parties agree that the appellant was entitled to capital allowances in relation to the swimming
15 pool itself. The issues which arise may be summarised as follows:

- (1) Whether the Conservatory is plant for the purposes of capital allowances;
- (2) The appropriate method of apportionment of the purchase price in 2004 for capital allowances purposes; and
- (3) The cost of the swimming pool for capital allowances purposes.

20 3. The appellant claimed capital allowances in relation to plant and machinery included in the purchase price of Bowerswood House in an amended corporation tax return for the period ended 30 September 2005. On 23 October 2007 an enquiry was opened into the amended return. By the time of the hearing the amount claimed by way of capital allowances in relation to the swimming pool and the Conservatory was
25 £216,570.

4. In a closure notice issued on or about 13 May 2013 HMRC reduced the claim to capital allowances in respect of the swimming pool using an apportionment formula and using a valuation for the swimming pool of approximately £45,000. The appellant contends that the value of the swimming pool ought to have been some
30 £84,000. The claim to capital allowances in relation to the Conservatory was refused in its entirety.

5. One ground of appeal was that the Respondents were precluded from amending the return because they had already agreed the amount of capital allowances due and because of the time the enquiry had taken before it was closed. Mr Clarke did not
35 pursue either of these grounds before us. We do note that the enquiry took an inordinate length of time but we have not explored the reasons for that and say no more about it.

Statutory Provisions

6. The *Capital Allowances Act 2001* (“CAA 2001”) provides for allowances in respect of certain capital expenditure by taxpayers. Allowances are available for qualifying expenditure on plant and machinery by a taxpayer carrying on a qualifying activity.
- 5 7. Section 21 CAA 2001 provides that expenditure on the provision of plant and machinery does not include expenditure on the provision of a building, including the acquisition of a building. For this purpose walls, floors, ceilings, doors, gates, shutters, windows and stairs are treated as buildings.
- 10 8. Section 22 CAA 2001 provides that expenditure on the provision of plant and machinery does not include expenditure on the provision of a structure or other asset in List B. List B then sets out specific structures and other assets in items 1 to 6 such as tunnels, canals and sea walls. Item 7 is, for present purposes, “*any structure not within items 1 to 6 other than ... a structure (but not a building) within Chapter 2 of Part 3 (meaning of ‘industrial building’)*”.
- 15 9. For the purposes of section 22, a “structure” is defined as “*a fixed structure of any kind, other than a building*”.
10. The effect of sections 21 and 22 is that expenditure on any building does not qualify for capital allowances as plant and machinery. Expenditure on any structure which is not a building does not qualify for capital allowances as plant and machinery
20 if it falls within List B.
11. Section 23 CAA 2001 then goes on to disapply sections 21 and 22 in relation to certain specific types of expenditure, including expenditure on items in List C. We were referred in particular to the following types of expenditure in relation to which sections 21 and 22 are disapplied:
- 25 (1) Thermal insulation of industrial buildings (section 23(2));
- (2) Expenditure in List C, which comprises 33 items but for present purposes the following were said to be relevant:
- Item 16 – Swimming pools (including diving boards, slides and structures on which such boards or slides are mounted);
- 30 Item 17 – Any glasshouse constructed so that the required environment (namely, air, heat, light, irrigation and temperature) for the growing of plants is provided automatically by means of devices forming an integral part of its structure.
- 35 12. We are also concerned in this appeal with identifying the consideration paid for the swimming pool and, if it qualifies for capital allowances, the Conservatory. Where property is sold together with other property as part of a single bargain, section 562 CAA 2001 applies. In particular, section 562(3) provides that:

“(3) *If an item of property is sold together with other property, then, for the purposes of this Act –*

(a) ...

5 (b) *the expenditure incurred on the provision or purchase of that item is to be treated as being so much of the consideration given for all the property as, on a just and reasonable apportionment, is attributable to that item.”*

The Issues

10 13. For present purposes therefore the issues which arise in relation to the Conservatory are as follows:

(1) Is the Conservatory a building? If so, no capital allowances are available unless it falls within section 23(2) or List C

(2) Is the Conservatory a structure? If so, no capital allowances are available unless it falls within section 23(2) or List C

15 (3) If the Conservatory is not a building or a structure, does it otherwise fall within the meaning of plant?

14. In relation to the swimming pool, and in relation to the Conservatory if it qualifies for capital allowances, there is an issue as to what is a just and reasonable apportionment of the price paid by the Appellant for Bowerswood House as a whole.
20 The purpose of apportionment is to identify the cost of the swimming pool and the Conservatory for capital allowance purposes.

15. The Respondents contend that an apportionment formula based on the value of the land and the replacement cost of the building and all assets purchased, as at the time of purchase, is just and reasonable. The Appellant contends that the
25 apportionment should be made on “an asset by asset basis”. We describe these competing approaches in more detail below.

Findings of Fact

16. The appellant did not rely on any evidence. The Respondents relied on evidence
30 from Mr Jeffrey Grand, a building surveyor in the Valuations Office Agency and Mr Colin Fayers, a Chartered Quantity Surveyor in the Valuations Office Agency. Mr Grand originally had responsibility for dealing with the appellant’s capital allowances claim on behalf of HMRC. Sometime later Mr Fayers took over responsibility. Both had visited Bowerswood House and viewed the swimming pool and Conservatory.

17. Based on their evidence and the documentary evidence before us we make the
35 following findings of fact.

18. The swimming pool and the Conservatory are in the grounds of but separate to Bowerswood House itself. The swimming pool itself is rectangular with dimensions

11m x 5.5m x 2m. Both the swimming pool and the Conservatory were in situ at the time the appellant purchased Bowerswood House, although it is not clear if the swimming pool was in use by residents at that time or has been at any time since.

5 19. The swimming pool is enclosed on three sides and above by the Conservatory. One gable end was formed from an existing brick wall up to roof height. There is space inside to walk around the pool. The Conservatory is constructed of a steel frame with Upvc glazed windows attached to low brick walls built on the 3 sides around the swimming pool. It has a low pitched roof comprising the steel frame and clear polycarbonate sheeting panels.

10 20. An old services room was incorporated within the indoor space utilising the existing brick wall. The services room spans the whole of the gable end. It included pipework for the pool. It is not clear whether there were ever toilet facilities in the services room but it seems likely that it was used as some form of changing area.

15 21. The existence of the old services room is consistent with the swimming pool being originally constructed as an outdoor pool, with the Conservatory being added at a later date. Having reflected on all the evidence we find that was in fact the case. That finding is consistent with notes of a meeting on 6 May 2010 in relation to the capital allowances claim which was attended by, amongst others, Mrs Nicola Theobald, a director of the appellant. She is recorded as saying that the pool was built
20 before the nursing home was opened when Bowerswood House was a private dwelling. The conservatory was added so that residents of the nursing home could use it.

25 22. Photographs taken of the Conservatory by Mr Grand in April 2007 show that it was then in a somewhat dilapidated state with a sag to the roof-frame, hanging trim, missing external guttering and the presence of mould.

23. We accept that an open air swimming pool would be of less utility to a nursing home than an indoor swimming pool. We do not accept that an open air swimming pool would be of no utility to a nursing home.

30 24. In a report dated March 2013 Mr Fayers set out his application of the apportionment formula to identify the total capital allowances claim for all plant and machinery included in the purchase price in 2004. The formula he applied was straightforward as follows:

35

$$Q = P \times \frac{A}{B + C}$$

40 Where: Q is the qualifying expenditure
P is the purchase price (£940,000)
A is the replacement cost of qualifying assets (£265,592)

B is the replacement cost of the building (£1,562,542)
C is the cleared value of the land (£255,000)

5 25. The parties have previously agreed that the value of the land in 2004 was £255,000.

26. Applying the formula gave the qualifying expenditure on plant and machinery as £137,359. The replacement cost of the qualifying assets used by Mr Fayers included a sum of £45,596 for the swimming pool with no sum included for the replacement cost of the Conservatory.

10 27. All values used by Mr Fayers are as at the date of purchase in 2004 and the replacement cost of the building includes the replacement cost of the qualifying assets. Replacement cost is brand new rather than second hand and so does not take into account any dilapidations or disrepair.

15 28. Mr Fayers' evidence was that this is a formula which has been used extensively over many years in this context. Mr Clarke did not accept that evidence but there is no evidence to contradict it and we accept Mr Fayers' evidence in this regard.

20 29. There was some discussion in evidence as to whether the figure given by the formula for qualifying expenditure on plant and machinery as a percentage of the purchase price was reasonable for a nursing home. The material before us does not enable us to make any finding of fact in that regard.

Decision and Reasons

30. The first matter we have to consider is whether the Conservatory is plant for the purposes of capital allowances. This can be broken down into the following issues:

- 25 (1) Is the Conservatory a building?
(2) Is the Conservatory a structure?
(3) Does the Conservatory fall within section 23(2) or List C?
(4) Does the Conservatory otherwise fall within the meaning of plant?

30 31. The Conservatory fully encloses the swimming pool making use of an existing wall and three later walls upon which the frame, Upvc windows and polycarbonate sheeting are attached. Mr Helm submitted that it provided warmth and shelter for residents using the swimming pool and as such it fulfilled one of the basic functions of a building.

35 32. Mr Clarke's submission was essentially that HMRC had failed to recognise the setting of the Conservatory. It was covering a swimming pool in the grounds of a private nursing home. The Conservatory was essential to the enjoyment of the swimming pool because the likely users would be aged in their 70s and 80s.

33. Mr Helm relied on *Carr v Sayer* [1992] STC 396 where Sir Donald Nicholls V-C was concerned with whether permanent quarantine kennels were plant. He stated at 402g:

5 “ ... buildings ... do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity. Such a distinction would make no sense. Thus the stables of a racehorse trainer are properly to be regarded as buildings and not plant. A hotel building remains a building even when constructed to a luxury specification. I say nothing about particular fixtures within the building. Similarly with a hospital for infectious diseases.
10 This might require special lay-out and other features but this does not convert the buildings into plant. 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.

15 ... 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
20 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. Again, I say nothing about particular fixtures within such a building.

25 When those principles are applied in the present case they seem to me to lead inevitably to the conclusion that the permanent quarantine kennels are not plant. On the primary facts found by the commissioners the kennels are purpose-built permanent buildings or structures and they are used as such.”

34. No authority was cited to us as to the meaning of the word “building” in this
30 context, nor as to what distinguishes a building from a structure. It is noticeable that in *Carr v Sayer* it was held that the kennels were “*permanent buildings or structures*” because there was no significance in the distinction between a building and a structure for the purposes of that case. Similarly, there is no significance in the distinction for present purposes. If the Conservatory is a building or a fixed structure of any kind
35 then it will not qualify for capital allowances unless it falls within section 23(2) or List C.

35. We are satisfied that the Conservatory is plainly a building or a fixed structure. Indeed it was difficult to come up with a description of it without using the word structure. The fact that it is used to provide shelter and warmth for residents of the
40 nursing home using the swimming pool does not alter that conclusion. It performs the functions of a building.

36. The issue which then arises is whether the Conservatory falls within section 23(2) or List C. Mr Clarke relied on the thermal insulation of industrial buildings in section 23(2) and Items 16 and 17 in List C.

37. Section 28(1) expressly provides for capital allowances as plant for a taxpayer who incurs expenditure on “*adding insulation against loss of heat to an industrial building occupied by him for the purposes of the trade*”.

5 38. Quite apart from the fact that the Conservatory does not fall within the definition of an industrial building because no qualifying trade is carried on, this measure is plainly aimed only at adding thermal insulation to an existing building. Mr Clarke did not identify any separate building to which thermal insulation was added. Clearly one of the purposes of the Conservatory was to provide warmth for users. That does not mean that the Conservatory itself falls within section 28 or thereby
10 section 23(2).

39. Item 16 of list C is limited to swimming pools and HMRC accept that the swimming pool itself qualifies for capital allowances. Treating a swimming pool as plant derives from a decision of Megarry J in *Cooke v Beach Station Caravans Limited* 49 TC 514. The purpose of Item 16, as with other items in List C, is to
15 preserve the effect of previous judicial decisions as to the meaning of plant for capital allowance purposes. The case was not concerned with a building or structure in which a swimming pool was housed.

40. Mr Clarke argued that in the context of a nursing home the Conservatory ought to be treated as part of the swimming pool because otherwise the pool would be of no
20 commercial utility. Further, that the Conservatory was an integral part of the swimming pool facility.

41. The swimming pool was originally built as an outdoor pool and the Conservatory was added at a later date. However, we accept that at the date of purchase the Conservatory was in place.

25 42. As a matter of fact we have found that a swimming pool without the Conservatory would have some utility in the setting of a nursing home. More importantly, it is clear from cases such as *Carr v Sayer* that buildings and structures are generally treated for these purposes as separate items from the plant and machinery which they house. See for example the High Court of Australia in
30 *Wangaratta Woollen Mills Ltd v Federal Comr of Taxation* (1969) 119 CLR 1 which was cited by Sir Donald Nicholls V-C. There a dye-house, other than the external walls and roof, was held to be plant. The provisions of List C are so prescriptive that we have no doubt Parliament would have expressly referred to buildings or structures enclosing swimming pools if it intended they should qualify for capital allowances.

35 43. Item 17 of List C refers to certain glasshouses for the growing of plants. It is plain that this item has no relevance to the Conservatory in the present case. As we understand Mr Clarke’s argument, he suggested that there was no logical basis to distinguish glasshouses from the Conservatory in the present case. However it is clear that the provisions referred to above are highly prescriptive. We are not able to
40 rewrite them in a way which might, in Mr Clarke’s submission, provide a more logical result.

44. We are satisfied therefore that the Conservatory is a building or fixed structure and is excluded from capital allowances by sections 21 or 22. Those sections are not disapplied by section 23 because the Conservatory does not fall within section 23(2) or List C.

5 45. It is not necessary for the purposes of this decision for us to go on and consider whether the Conservatory would otherwise fall within the normal meaning of the word plant. There is extensive case law relating to the meaning of plant going back to Yarmouth v France (1887) 19 QBD 647. In the light of our firm conclusions set out above it would be a sterile exercise to analyse how that case law applies to the facts of
10 the present case.

46. Mr Clarke submitted that the appropriate way to identify the cost of plant and machinery was simply to identify the replacement cost of the pool and structure, which he contended was £216,000, together with the replacement cost of other plant and machinery which he contended was some £240,000. The value of the land was
15 agreed at £255,000 which would leave the building without plant and machinery valued at £230,000 and give a total value of £940,000.

47. The approach which the appellant contends for is that where the value of assets can be separately identified for capital allowances purposes, an apportionment formula is not necessary.

20 48. It seems to us that Mr Clarke's approach leaves the land and building as a balancing figure out of a total consideration of £940,000.

49. Mr Fayers accepted during the course of his evidence that an alternative approach to his formula would be to take the value of the house and land in 2004, say £940,000, and to deduct the value of the house and land without the qualifying plant and machinery. That would give the value paid for the qualifying plant and
25 machinery. However it was not an approach that either party invited us to adopt.

50. We observe that the alternative approach accepted as possible by Mr Fayers leaves the qualifying plant and machinery as a balancing figure having taken out the value of the land and building. In that sense it is similar to Mr Clarke's approach.
30 Neither is a very reliable estimate of the sum actually paid by the appellant for the qualifying plant and machinery.

51. Mr Fayers' apportionment formula, described at [24] above, apportions the purchase price by reference to the replacement cost of the building and assets purchased together with the value of the land. That assumes that the actual value of
35 the building and all assets bear the same relationship to their replacement cost as each other. In other words, that they are all in the same state of repair or disrepair.

52. The appellant's approach was simply to take the replacement cost of the swimming pool and Conservatory which it alleged was £216,000. The balance of purchase price was £724,000 and covered the replacement cost of other plant and
40 machinery (agreed at £240,000). This would leave £484,000 for the land and

buildings. As Mr Fayers pointed out, the agreed value of the land was £255,000 so this would give the cost of the building as £229,000.

53. We consider that approach is flawed. It does not identify the value of all assets purchased on the same basis. It identifies the replacement cost of the assets qualifying for capital allowances and simply leaves all other assets to be valued by reference to a balancing figure. In our view that does not amount to a just and reasonable apportionment. The purpose of apportionment is not simply to indentify the replacement cost of assets qualifying for capital allowances.

54. It may be, as Mr Clarke suggested in cross examination of Mr Fayers that nursing homes are “targeted” by capital allowances consultants because transactions involving them often involve a significant value of capital allowances. Indeed in this case the appellatant instructed Capital Allowance Company (UK) Limited to give advice. However we accept Mr Fayers’ evidence that in considering a capital allowances claim every business should be considered on its own merits.

55. The appellatant’s approach implicitly accepted that it was appropriate to use replacement costs. Mr Fayers’ formula uses replacement costs but for all the assets being purchased including the building. In the light of all the circumstances and also taking into account our finding that the formula used by Mr Fayers has been used over many years in this context we accept that it does give a just and reasonable apportionment on the facts of this case.

56. If there were to be a valuation on an asset by asset basis it would have to be undertaken in relation to all assets and on the same valuation basis. The provision in section 562(3) is designed to avoid the inherent difficulties with such an approach. Indeed neither party suggested an approach which would include a piecemeal valuation of all assets. Similarly, neither party invited us to adopt an approach which would take into account any dilapidations or disrepair in the building or the plant and machinery.

57. In the circumstances we are satisfied that Mr Fayers’ formula gives a just and reasonable result and that the approach contended for by Mr Clarke does not give a just and reasonable result.

58. In order to apply Mr Fayers’ formula it is necessary to identify the replacement cost of the swimming pool. As we have indicated above, the Respondents have included a replacement cost of £45,596 in their apportionment formula. The appellatant contends that a figure of £84,000 ought to be used.

59. Mr Helm invited us to refer this valuation issue to the Upper Tribunal (Lands Chamber) pursuant to section 46D Taxes Management Act 1970 which provides as follows:

“ In so far as the question in dispute on an appeal to which this section applies-

