WHAT'S IN A PLANT: AN ANALYSIS OF CASES REGARDING QUALIFYING PLANT EXPENDITURES

Introduction

Section 42 of the Income Tax Act ("**ITA 1967**") allows businesses to lower their tax burdens by claiming allowances for capital expenditures incurred for the purpose of business – the Initial Allowance ("**IA**")[1] and Annual Allowance ("**AA**")[2] are perhaps the most widely applied of such allowances.

Both IA and AA are claimed as qualifying expenditure on plants or buildings incurred in the course of business.[3] In this article, we'll be looking closely at Qualifying Plant Expenditure ("**QPE**") and the case law regarding the definition of "plant".

QPE is defined by Para 2, Sch 3, Income Tax Act 1967 as follows:

> "*2. (1) Subject to subparagraph (2) and paragraph 67, qualifying plant expenditure is capital expenditure incurred on the provision of machinery or plant used for the purposes of a business,...*"[4]

Thus, to count as a QPE the expenditure in question must be capital expenditure incurred on procurement of machinery or plant used for the purposes of business. Both "machinery" and "plant" are not defined in the ITA.

The Revenue's definition of "machinery" is generally something which has "moving parts".[5] Usually, definition does not give rise to disputes. Rather, it is whether a particular asset counts as "plant" that often brings the Revenue and the Taxpayer to court.

A Horse is a Plant?

As "plant" is not defined by the Act, whether a particular asset is a "plant" would be a question of law[6] for the courts to decide.

In the famous English case of Yarmouth v France[7] it was held that a horse used for pulling carts by the Defendant business constitutes a "plant". Lindley L.J. stated that:

> "*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*"[8]

Thus, whether or not a thing is a plant, depends on whether or not it is apparatus kept for permanent employment in carrying on the business.

This is known as the "apparatus test" which has been widely adopted by other jurisdictions and in the Malaysian jurisdiction, as we shall see later. Over time and through several notable cases, other tests were developed such the "premises test", "business use test" and the "functional test"[9].

The distinction between these tests may sometimes be unclear, but Hoffmann J gave a clear dissection of the tests that have developed. In the case of Wimpy International Ltd v Warland (Inspector of Taxes); Associated Restaurants Ltd v Warland (Inspector of Taxes)[10], Hoffmann J noted in his analysis of Yarmouth v France:

> "*It is important to notice the various discriminations which are stated or implied in this description.* ***First, it excludes anything which is not used for carrying on the business. Secondly, it excludes stock-in-trade*** *both expressly and because, although used for the purposes of the business,* ***its use lacks permanence****. Thirdly, it excludes things which are not 'apparatus... goods and chattels, fixed or moveable, live or dead' or not employed in the business.* ***This excludes the premises or place in or upon which the business is conducted****.*
>
> *It will be seen, therefore, that although the three distinctions in Yarmouth v France (1887) 19 QBD 647 each involves a test which can be called functional, they are subtly different from each other.* ***If the item is neither stock-in-trade nor the premises upon which the business is conducted, the only question is whether it is used for carrying on the business. I shall call this the 'business use' test. However, under the second distinction, an article which passes the 'business use' test is excluded if such use is as stock-in-trade****. And under the third distinction, an item used in carrying on the business is excluded if such use is as the premises or place upon which the business is conducted.* ***The fact that an item may pass the 'business use' test but fail what I may call the 'premises' test*** *is central to this case.*"[11] (emphasis added)

Thanks to the lucid analysis of Hoffmann J, we have a clearer picture of what the other tests are and where they stand. Each of the subsequent tests, may be seen as a refinement of Lindley LJ's apparatus test.

Premises Test

The "premises test", is usually considered in cases where the asset in question is a

building or structure. As illustrated in Lingfield Park (1991) Ltd v Shove (HM Inspector of Taxes)[12] where Mummery LJ stated as follows:

> "*The 'business use test' and the 'premises test' were to be applied in determining whether or not the All Weather Track ('AWT') was plant.* ***It was necessary to identify the item in question, consider its use in the business and then to ask whether it functioned as plant or premises*** *(Wimpy International Ltd v Warland [1989] BTC 58 applied). The only reasonable conclusion on a proper application* ***of the premises test was that the AWT functioned as premises on or in which the trade was carried on****. The purpose, use, construction and nature of the AWT were such that the AWT functioned as premises for horse racing, as did the grass race course running parallel with it.* ***It would be inaccurate use of language to describe any of them as the means, apparatus, equipment or tool by which or with which the trade of organising and promoting horse racing was carried on.***"[13] (emphasis added)

According to the "premises test", the question to be asked is whether or not the premise in question was **the means by which business was conducted** or, whether it was merely the premises **where business was carried on**.

This seems to be the approach taken in the case of KPHDN v Resort Poresia Sdn Bhd[14] where in deciding whether or not the taxpayer's golf course was a "plant", the Court of Appeal stated that:

> "*[22] Bearing in mind (a) the above, (b) the fact the golf course was such a facility upon which players could play golf and (c) that it would do violence to the language to say the golf course was a facility with which golf is played, or in other words* ***it is not a plant used in carrying out the business of Resort Poresia Bhd, but premises from which the business is carried on****, it cannot be said that the Special Commissioners, on the basis of case-law had erred in making its finding.*"[15] (emphasis added).

It should be noted that this does not mean that premises cannot also be considered a "plant" – the premises must also be a tool in carrying out the business.[16]

An oft-cited example of where premises can also function as a tool for business can be seen in the case of Inland Revenue Commissioners v Barclay Curle & Co Ltd[17]. In this case, the dispute arose over whether or not a dry dock was plant or mere premises. The Revenue contended that the concrete dry dock was a structure and not a plant. At first instance, the Special Commissioner of Income Tax noted that the dry dock performed several functions that were integral to the operations of repairing ships, including lowering the boat into position, holding it in place during inspection

and repair, raising them back to the water and more. These were functions that were essential to the conducting of business thus, they decided that it was “plant”[18]. Lord Reid, in handing down his judgment stated:

> “*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 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.*
>
> *... 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.*”[19]

This approach is similar to the one taken by the Malaysian Court of Appeal in the Tropiland Case, that we will discuss further down.

Business Use Test

As we saw above, the “business use test” asks whether an item has a business use that is neither as stock-in-trade nor as merely the premises where business is conducted.[20]

It should be noted that both the “business use test” and “premises test” are often applied together. Indeed, as noted by Hoffmann J in Wimpy International Ltd’s case[21]:

> “*I take Lord Lowry (in Inland Revenue Commissioners v Scottish & Newcastle Breweries Ltd[22]) to be saying that even if an embellishment for the purposes of trade passes the 'business use' test, it still has to pass the 'premises' test and something which 'becomes part of the premises' fails that test unless the premises are themselves plant.*”[23](citation added)

Functional Test

This test looks at the function of the item in dispute and asks whether it has a functional purpose that enables the business’ performance. As noted by Brightman J

stated in Dixon (Inspector of Taxes) v Fitch's Garage Ltd[24]:

> "*The proper test is whether the canopy had a functional purpose to enable the taxpayer company to perform the activity of supplying petrol to motor vehicles. I ask myself, 'Does the canopy help to supply petrol, or is it merely part of the setting where petrol is supplied?' To use the words of Lord Reid [Inland Revenue Commissioners v Barclay Curle & Co Ltd [1969] 1 All ER 732 at 741], which I have already read, is the canopy part of the means by which the operation of supplying petrol is performed?*"[25] (Citation added)

While this test is quite close to the "premises test", it can be applied to any subject matter as noted by Buckley LJ in Benson (Inspector of Taxes) v Yard Arm Club Ltd[26] where His Lordship stated:

> "*So, in the case at any rate of a subject-matter which is a building or some other kind of structure, regard must be paid to the way in which it is used to discover whether it can or cannot be properly described as plant.* ***This is what has been referred to as the functional test. Indeed I think that this test is applicable to every kind of subject-matter****. In some cases the effect of the functional test may be so immediately apparent that the character of the subject-matter as plant goes without saying and the test need not be consciously applied. But in cases nearer the line, in my opinion, the functional test provides the criterion to be applied.* ***Is the subject-matter the apparatus, or part of the apparatus, employed in carrying on the activities of the business?*** *If it is, it is no matter that it consists of some structure attached to the soil. If it is not part of the apparatus so employed, it is not plant, whatever its characteristics may be.*[27]"

The Malaysian Position

In the relatively brief discussion above, we've seen how the UK courts have considered the question of what qualifies as a "plant". The local position is pretty much the same and Malaysian cases concerning this question have discussed these cases in greater detail and adopted these tests. However, the Malaysian Court of Appeal has taken a holistic approach to this question.

In the case of Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd[28], the subject matter was a multi-storey carpark constructed and operated by the Respondent. The Revenue's contention, was that the carpark was merely the premises where the business was conducted and as such, should not qualify as a plant. This was not the court's view. Syed Ahmad Helmy Syed Ahmad JCA (as he then was) in delivering the Court of Appeal's judgment stated:

> "*The test of what passes as a "plant" in Yarmouth v France (supra) was coined in a general fashion to give the word the widest possible sense. Lindley J had the*

foresight that a whole host of considerations must be taken into account in determining what is a "plant" in any given set of facts and that a restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity since the tools or apparatus of a business man for carrying on his business undergo constant changes with passing time and advancing technology. It comes as no surprise then that Lord Lowry in Commissioners of Inland Revenue v Scottish & Newcastle Breweries Ltd (supra) considered questions such as the particular industry and the taxpayer's own trade in determining what constituted a "plant" in that case.

There is thus clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety instead of taking particular facts in isolation. The need to refrain from viewing the taxpayer's business in a fragmented fashion when determining whether an apparatus is a 'plant' was reinforced by the High Court of Australia in W Nevill & Co Ltd v Federal Commissioner of Taxation (1937) 56 CLR 290 where it was held: 'In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary for income tax purposes, to look at a business as a whole set of operations directed towards producing income.' "[29]

Thus, to determine if an apparatus was a "plant", the court would have to look at the entirety of the taxpayer's business to consider the role or function it played in producing income if any.

This approach was later followed in the case of Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri[30] where the Revenue disputed the Appellant's allowance claims for telecommunication towers which they constructed and then leased to telecommunication providers. After a lengthy analysis of the available tests, the Learned High Court Judge stated that:

"*[124] As Tropiland is the highest authority to date, this court had followed the approach taken by the Court of Appeal in determining what constitutes a 'plant' that is due consideration must be given to the particular industry concerned as well as the specific circumstances of the individual taxpayer's own business (see Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd [1982] 2 All ER 230).*

[125] This court was of the opinion that further considerations to be taken by the court are that, a liberal and holistic approach should be taken and that a restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity. As such it was the considered opinion of this court that the time has come for the court not to restrict the meaning of 'plant' as was applied in the various 'tests' such as the 'premise test', 'business test' etc.

[126] Towards this end, this court is inclined to apply the 'functional test' whereby as stipulated in Tropiland the court must consider the totality of the evidence and facts in respect of the functions of the telecommunication towers in the appellants business — ie the 'function test' and 'apparatus' tests.[31]"

More recently, the Tropiland case was applied by the KL High Court in the case of Ketua Pengarah Hasil Dalam Negeri v CIMB Bank Berhad[32] which held that the Bank's core deposit and credit card customer's databases were a plant[33].

Conclusion

The line of cases is long and varied, but from them, certain practicable principles may be noted for the taxpayer looking to claim capital expenditure allowances.

Generally, to be considered a plant for the purpose of QPE, the apparatus must, when considered in the holistic context of the business, be:

- Goods and chattel, whether moveable or fixed, living or dead;
- That is used for carrying out business;
- Not stock-in-trade;
- Nor the mere premises where business is conducted.

With this in mind, a taxpayer or their tax agent in preparing to make a claim for such allowances should consider their own business' unique circumstances and industry, to decide for themselves if the apparatus in question is a plant for them.

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1 Income Tax Act 1967, Para 10, Schedule 3
2 Ibid, Para 15, Schedule 3
3 Ibid, Para 2 to 6, Schedule 3.
4 Ibid, Para 2 (1), Schedule 3
5 Qualifying Plant and Machinery For Claiming Capital Allowances, Public Ruling No. 12/2014. See also the case of Majlis Daerah Tapah v Tenaga Nasional Berhad [2017] MLJU 607 where the Ipoh High Court considered "machinery" in the context of Cukai Taksiran Tahunan levied by the Tapah District Council.
It should be noted that Para 9, Sch 7A, ITA 1967 defines "machinery" as meaning "a device or apparatus consisting of fixed and moving parts that work together to perform function...", though this interpretation only applies to Sch 7A Reinvestment Allowance for Manufacturing, it is still useful for the reader to understand how the law has treated "machinery" in different but similar contexts.
6 Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd [2013] AMTC 389 at 395
7 (1887) 19 Q.B.D. 647
8 Yarmouth v. France (1887) 19 Q.B.D. 647, at 658
9 There is also a "settings test" as illustrated in the case of J. Lyons & Company, Limited v. Attorney-General. [1944] Ch. 281 where the disputed expenditure was on electric lighting and fittings. The court there asked whether the lamps and fitments could be properly regarded as "part of the setting in which the business is carried on or as part of the apparatus used for carrying on the business?"
10 [1988] STC 149
11 [1988] STC 149 at 170
12 [2004] CA 89
13 Ibid, at p95
14 (CA)(2015) MSTC 30-090

15 Ibid, para 22
16 Inland Revenue Commissioners v Barclay Curle & Co Ltd [1969] 1 All ER 732 at 740 where Lord Reid stated “As the commissioners observed, buildings or structure and machinery and plant are not mutually exclusive, and that was recognised in Jarrold's case.”
17 [1969] 1 All ER 732
18 Ibid, at 740
19 Ibid, 740 & 741
20 [1988] STC 149 at 170 & 171
21 ibid
22 [1982] STC 296
23 [1988] STC 149 at 172
24 [1975] 3 All ER 455
25 Ibid, p461
26 [1979] STC 266
27 Ibid, at 273
28 [2013] AMTC 389
29 [2013] AMTC 389 at 396
30 [2017] 7 MLJ 35
31 Ibid, at 67
32 Civil Appeal No: WA-14-1-01/2017 (unreported judgment dated 11 March 2019)
33 Ibid

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