94TACD2021

BETWEEN/

[redacted]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeal Commission as an appeal against amended Notices of Assessment raised by the Respondent as follows:-

i. Amended Notice of Assessment for the period ended on the 31st of March 2008 received by the Appellant on the 3rd of January 2013;

ii. Amended Notice of Assessment for the period ended on the 31st of March 2009 received by the Appellant on the 1st day of February, 2013; and,

iii. Amended Notice of Assessment for the period ended on the 31st of March 2010 received by the Appellant on the 1st day of February 2013.

B. Facts relevant to the Appeal

2. The appeal was heard by me over the course of two days. I heard evidence on behalf of the Appellant during the course of the hearing, along with submissions on behalf of both the Appellant and the Respondent.

3. The Appellant is a limited liability company which constructed a combined cycle gas power station [hereinafter referred to as the "**Power Station**"] at [redacted], [redacted] between [redacted] and [redacted]. As part of the construction process, the Appellant required connection to both the electricity and gas national grids. As a result, the Appellant contracted with the Electricity Supply Board [hereinafter referred to as the "**ESB**"] by way of a Generator Connection Agreement to install input and output connections for electricity. The Appellant also contracted with Bord Gais Energy [hereinafter referred to as "**BGE**"] by way of a Gas Connection Agreement to install an input connection for gas.

4. The said connections along with the attendant equipment thereto were built and installed by ESB and BGE respectively in return for payment by the Appellant of the sums of €[redacted] and €[redacted] respectively**.**

5. The Appellant had an annual accounting period for tax purposes ending on the 31st of March.

6. The Appellant capitalised the expenditure on the said connections in its accounts and in its returns to the Respondent it claimed capital allowances for the cost of the power station, including the cost of the connections built and installed by ESB and BGE respectively. The Appellant did this on the basis that the said building and installation costs were capital expenditure on the provision of plant and machinery.

7. The effect of the large capital allowance deductions was to cause the Appellant to incur significant tax adjusted losses in the period ending on the 31st of March, 2003 which, after application against other profits, were carried over and applied against profits in later years pursuant to section 396(1) of the Taxes Consolidation Act, 1997 [hereinafter referred to as "**TCA1997**"].

8. The size of the losses carried over had the effect of eradicating the Appellant's tax liabilities for a number of years subsequent to the construction of the power station.

9. In January 2009, the Respondent commenced an audit of the Appellant's taxes and duties for the period from the 1st of April 2006 to the 31st of March 2007. On foot of the said audit, the Respondent raised amended Notices of Assessment on the Appellant for the accounting periods ending on the 31st of March 2008, the 31st of March 2009 and the 31st of March 2010. The said amended Notices of Assessment were issued by the Respondent to reflect a claw back of losses carried forward which accrued on the basis of the Appellant's claimed entitlement to capital allowances pursuant to section 284 of TCA1997.

10. The said amended Notices of Assessment and the claw back of losses carried forward form the subject matter of the within appeal.

C. Grounds of Appeal

11. The Appellant appealed against the amended Notices of Assessment raised by the Respondent on the following grounds:

i. The amended Notices of Assessments raised by the Respondent are out of time;

ii. The doctrine of legitimate expectation applied such that the Respondent should not be entitled to challenge the Appellant's entitlement to the relevant capital allowances;

iii. The connection fees the subject matter of within appeal should be relievable as ancillary expenditure on the provision of plant and machinery or, alternatively, the expenditure should be treated as revenue expenditure and therefore deductible.

D. Relevant Legislation

12. Section 284(1) of TCA1997 provides as follows:-

"*Subject to the Tax Acts, where a person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as a "wear and tear allowance") shall be made to such*

person for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to such person and is in use for the purposes of the trade at the end of that chargeable period or its basis period and which, while used for the purposes of the trade, is wholly and exclusively so used."

13. Section 396(1) of TCA1997 provides as follows:-

"*Subject to section 396C, where in any accounting period a company carrying on a trade incurs a loss in the trade, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods, and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot, on that claim or on a claim (if made) under subsection (2), section 396A(3) or 396B(2), be relieved against income or profits of an earlier accounting period.*"

14. Section 934 of TCA1997 provides *inter alia* as follows:-

"*(3) Where on an appeal it appears to the Appeal Commissioners by whom the appeals is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.*

(4) Where on any appeal it appears to the Appeal Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, they shall charge that person with the excess.

(5) Unless the circumstances of the case other require, where on an appeal against an assessment which assesses an amount which is chargeable to income tax or corporation tax it appears to the Appeal Commissioners

(a) that the appellant is overcharged by the assessment, they may in determining the appeal reduce only the amount which is chargeable to income tax or corporation tax,

(b) that the appellant is correctly charged by the assessment, they may in determining the appeal order that the amount which is chargeable to income tax or corporation tax shall stand, and

(c) that the appellant ought to be charged in an amount exceeding the amount contained In the assessment, they may charge the excess by increasing only the amount which is chargeable to income tax or corporation tax."

15. Section 949AK(1) of TCA1997 provides as follows:-

"*Subject to the other provisions of this Chapter, where an assessment is amended (not being an amendment made by reason of the determination of an appeal), the person assessed may appeal against the assessment as so amended in all respects as if it were an assessment made on the date of the amendment and the notice of the assessment as so amended were a notice of the assessment, except that the person shall have no further right of appeal, in relation to matters other than additions to, deletions*

from, or alterations in the assessment, made by reason of the amendment, than the person would have had if the assessment had not been amended."

16. Section 955 of TCA1997, now deleted, provided as follows:-

"*(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –*

(i) no additional tax shall be payable by the chargeable person after the end of the period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered

by reason of any matter contained in the return.

(b) Nothing in this subsection shall prevent the amendment of an assessment –

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a).

(ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).

17. Section 16 of the Electricity Regulation Act 1999 provides that:-

"(1) A person shall not construct or reconstruct a generating station, for the purpose of supply to final customers, unless an authorisation has been granted to the person by the Commission.

(2) Notwithstanding the Electricity (Supply) Acts, 1927 to 1995, the Board may not construct or reconstruct a generating station unless an authorisation has been granted to it by the Commission.

(3) Subject to section 17, the Commission may grant or may refuse to grant to any person an authorisation to construct or reconstruct a generating station, subject to such terms and conditions as may be specified in the authorisation including terms and conditions as to generating capacity of the proposed generating station."

18. Section 34 of the Electricity Regulation Act 1999 provides that:-

"(1) Subject to subsection (4), where an application is made to the Board by any person, the Board shall offer to enter into an agreement for connection to or use of the transmission or distribution system, subject to terms and conditions specified in accordance with directions given to the Board by the Commission under this section from time to time.

(1A) An offer under subsection (1) may, on request of the applicant, be on the basis that the applicant constructs, or that either or both the applicant and the transmission system operator arranges to have constructed, the connection to the transmission system, and any such connection constructed or arranged to be constructed by the applicant shall be the property of the person with whom the agreement is made, and shall, for the purposes of section 37(4), be deemed to be a direct line.

(1B) An offer under subsection (1) , made for the purpose of connecting a generating station to the distribution system, may, on request of the applicant, be on the basis that the applicant constructs, or that either or both the applicant and the distribution system operator arranges to have constructed, the connection to the distribution system, and any such connection constructed or arranged to be constructed by the applicant shall be the property of the person with whom the agreement is made, and shall, for the purposes of section 37(4), be deemed to be a direct line.

(1C) The Commission shall publish directions that are given by it to the Board under this section.

(2) Without prejudice to the generality of subsection (1), directions given by the Commission under this section may provide for:

> *(a) the matters to be specified in an agreement for connection to and use of the transmission or distribution system;*

(b) the matters to be specified in an agreement for use of the transmission or distribution system;

(c) the terms and conditions upon which an offer for connection to the transmission or distribution system is made;

(d) the methods for determining the proportion of the costs to be borne by the person making the application for connection to the transmission or distribution system and to be borne by the Board being costs which are directly or indirectly incurred in carrying out works under an agreement or making a connection or modifying an existing connection;

(e) the terms and conditions upon which applications for an agreement are to be made and the period of time within which an offer or refusal pursuant to an application is to be made by the Board; and

(f) any other matters which the Commission considers necessary or expedient for the purpose of making an offer for connection to or use of the transmission or distribution system,

and the Board shall comply with directions given by the Commission under this section within such time period as may be specified by the Commission.

(2A) In a case where the Agency is competent to fix and approve the terms and conditions or methodologies for the implementation of network

codes and guidelines under Chapter VII of the 2019 Internal Electricity Market Regulation pursuant to Article 5(2) of the 2019 ACER Regulation because of their coordinated nature, then subsection (1), in so far as it provides for the giving of directions by the Commission to the Board, and subsection (2) shall not apply and, in such a case, the terms and conditions to be specified in the agreement referred to in subsection (1) shall be those fixed and approved by the Agency.

(3) An offer made under subsection (1) to a person who is not the holder of a licence under section 14 or an authorisation under section 16 or an eligible customer shall be subject to the grant of a licence or authorisation to that person or to that person becoming an eligible customer.

(4) The Board shall not be required under subsection (1) to enter into an agreement where—

(a) it has demonstrated to the satisfaction of the Commission that it is not in the public interest to provide additional capacity to meet the requirements to be imposed by that agreement,

(b) to enter into an agreement under this section would be likely to involve the Board:

(i) in a breach of this Act;

(ii) in a breach of regulations made under this Act;

(iii) in a breach of the grid code or distribution code; or

(iv) in a breach of the conditions of any licence or authorisation granted to the Board under this Act,

or

(c) the person making the application does not undertake to be bound by the terms of the grid code or distribution code in so far as those terms are applicable to that person.

(5) Where the Board refuses to offer to enter into an agreement under this section the Board shall serve notice on the applicant of the reasons for such refusal.

(6) (a) Any dispute between the transmission system operator or the distribution system operator and any person who is, or claims to be, a person to whom the transmission system operator or the distribution system operator, as the case may be, is obliged –

(i) to make an offer for connection to and use of the transmission system or distribution system, or

(ii) to consult with regarding proposed charges in accordance with section 36(2) ,

as the case may be, whether as to the terms and conditions (including proposed charges) or otherwise, shall, upon the application of such

person, be determined by the Commission, and the Commission shall issue a direction regarding its determination and the transmission system operator or the distribution system operator, as the case may be shall comply with and be bound by any such direction.

(b) Any dispute between a transmission system operator or a distribution system operator in regard to duties under the 2019 Internal Electricity Market Directive and a person as respects matters specified in section 9(1B) in relation to electricity shall, upon the application of such person, be determined by the Commission, and the Commission shall issue a direction regarding its determination and such direction shall be binding on all parties concerned.

(c) *(i) The Commission shall issue the determination referred to in paragraphs (a) and (b) within 2 months from the date of the receipt of the complaint.*

(ii) The period referred to in subparagraph (i) may be extended by 2 months where the Commission seeks additional information in the matter, and such further extension as may be consented to by the applicant.

(iii) Where the applicant concerns connection tariffs for major new generation facilities, the period concerned may be extended by the Commission without the consent of the applicant.

(d) In the event of cross border disputes, the Commission has jurisdiction if the transmission system operator licensed under section 14(1) (e) is the system operator which refuses use of or access to the transmission system.

(7) In order to secure compliance with a determination made under this section the Commission may apply in a summary manner on notice to the High Court for an order requiring the Board to comply with the determination of the Commission made under this section.

(8) Where providing for use of the transmission or distribution system or where offering terms for the carrying out of works for the purpose of connection to the transmission or distribution system of the Board, the Board shall not discriminate unfairly as between any persons or classes of persons."

E. Evidence on behalf of the Appellant

19. At the hearing of the appeal, I heard evidence from four witnesses on behalf of the Appellant.

Witness 1

20. The first witness was Mr [redacted], a chartered engineer and the technical director at [redacted], who gave evidence that the Power Station was commissioned and commenced operation in [redacted]

and is a Combined Cycle Gas Turbine [hereinafter referred to as "**CCGT**"] plant which utilises gas turbine and steam turbine technology to produce electricity. The power station has an electricity output of [redacted] MW and is connected to the national grid at [redacted] by means of a dedicated electrical connection consisting of an underground 220kV transmission cable and a transmissions switching station.

21. Mr [redacted] explained that the power station is a multi-shaft CCGT plant comprised of one gas turbine with electrical generator, one heat recovery steam generator, one steam turbine with a separate electrical generator, one air cooled condenser and a bypass stack.

22. Mr [redacted] stated that in order to bring the power station from the shutdown condition to normal operational mode, it is necessary to engage the start-up sequence. During the start-up sequence, electricity is imported from the grid connection to power essential auxiliary systems including the static frequency converter (an electronic device which drives the gas turbine generator) and other systems [hereinafter collectively referred to as the "**Essential Auxiliaries"**] as well as the control room and all control systems required to operate the power station. He stated that the generator is mechanically attached to the gas turbine and is operated as a synchronous motor initially, using the powered static frequency converter to accelerate the unit. At approximately 500rpm gas imported from the gas connection is introduced to the turbine combustion chamber by the grid-powered control system. The unit then accelerates further using a combination of gas combustion and the powered static frequency converter. At approximately 2000rpm the static frequency converter drops out and the turbine continues to accelerate up to 3000rpm (50 Hz). At this point the electrical system

synchronises with the grid and the gas turbine electrical generator reverts to its normal mode as a producer of electrical energy.

23. Mr [redacted] stated that the start-up process is an integral part of the operation of the power station and that it is often necessary to shut down the power station as part of its commercial offering to the Single Energy Market [hereinafter referred to as the "**SEM**"] which operates in Ireland or to facilitate maintenance checks. He stated that up to the end of December 2016, the power station had shut down on [redacted] occasions or an average of approximately [redacted] times per annum.

24. Mr [redacted] stated that the supply of gas is essential to the operation of the power station and is required as part of the start-up process and also to drive the turbine when the power station is operating at normal mode. This gas is supplied via a dedicated connection between the power station and the high pressure gas network operated by BGE (now known as Networks Ireland). He stated that without the dedicated connection it would not be possible to operate the power station to generate electricity.

25. Mr [redacted] stated that the import and export of electrical power is also essential to the operation of the power station. The power station is configured with a single dedicated connection to the national grid using a 220kV cable which is used to both import and export electricity. He stated that without the grid connection, the Power Station would be de-energised and it would not be capable of starting. During the start-up process, the power required is imported from the [redacted] 220kV station to the Appellant's 220kV generator transformer and unit transformers to be stepped down for distribution at 6.6kV to power the Essential Auxiliaries required for the start-

up. He stated that during operation of the Power Station, electrical power to the Essential Auxiliaries must be maintained as a loss of such power would cause the Power Station to immediately shut down.

26. Mr [redacted] stated that the Power Station operating in normal mode generates electricity and that electricity must have an output source. As it is not possible to store the electricity generated and there is no other use for the electricity on the Appellant's site, the only option is to export the electricity through the national grid connection.

27. Mr [redacted] stated that the application process for an electrical connection for a large generating station is managed by EirGrid (and was managed by ESB at the time of construction and commission of the Appellant's power station) as approved by the Commission for Energy Regulation [hereinafter referred to as the "**CER**"]. Prior to the commencement of construction, commissioning and subsequent operation of a power station, a number of legal and regulatory documents, licences and permissions must be obtained. One such document which must be obtained is an "*Authorisation to Construct or Reconstruct a Generating Station*" [hereinafter referred to as an "**ATC**"] which is issued by the CER. The application process for an ATC to the CER involves, *inter alia*, submitting full details of the technical characteristics and design of the power station and in particular a description of the design measures to ensure the safety and security of the electrical system and also details of the electrical grid Connection Agreement. Before issuing an ATC, the CER fully assesses the application including all submitted permissions and agreements, and including the EirGrid (or ESB at the time of the construction and commissioning of the Appellant's power station) Connection Agreement to

ensure compliance with the criteria for approving the application and granting the relevant licence.

28. Mr [redacted] stated that the design of the electrical supply to the Essential Auxiliaries is a key consideration for the compliance, reliability and security of the power station. He stated that while it would be physically possible to obtain the power required for the Essential Auxiliaries from a separate ESB distribution voltage connection, this was not acceptable to the CER or to EirGrid (or ESB at the time of the construction and commissioning of the Appellant's power station) as the reliance on a distribution connection for start-up and normal operation would not comply with the EirGrid Grid Code or good industry practice. In addition, he stated that such a distribution voltage connection would have amounted to a significant extra financial cost.

29. In addition, he stated that the EirGrid Grid Code, compliance with which is a condition of the Power Station Connection Agreement and the CER Generation Licence, states: "*Each Generation Unit shall be designed, where practicable, to mitigate the risk of common mode failure with other Generation Units. In particular each Generation Unit shall be designed so that it can operate with its essential auxiliaries supplied through a unit transformer which shall be connected between the Generation Unit circuit breaker and the Generator Transformer LV terminals…*" He stated that the design of the Power Station fully complies with this Grid Code requirement.

30. Mr [redacted] stated that the Power Station was therefore designed to comply with the requirements of the CER, the EirGrid Connection Agreement, the EirGrid Grid Code and good industry practice for power station design.

31. Mr [redacted] stated in summary that the electrical grid and gas connections are integral and essential to the operation of the Power Station. In order to meet the compliance requirements of both the CER and EirGrid, there is no delineation between the electrical import connection that is required to start the Power Station and the electrical export connection that is required for normal operation.

Witness 2

32. The Appellant's second witness was Mr [redacted], senior consultant and director of [redacted], an independent expert on the connection of large conventional and wind generators to the Irish transmission system. Mr [redacted] gave evidence outlining the background to connection policy in Ireland and how it relates to the Appellant's Power Station.

33. He stated that from the late 1980s onwards, the majority of new fossil fuelled generators that were connected to the Irish system were CCGTs fuelled by natural gas, which were relatively large in scale, ranging from approximately 350MW to 450MW, and these power stations are the largest producers of electricity, supplying approximately 40% of total demand in the Irish system.

34. He stated that the transmission system allows for the transport of large volumes of electricity from large generators to bulk supply points near the main population centres, where it interconnects with the distribution system. He stated that all of the CCGTs in Ireland are connected to the transmission system at 220kV which is comprised of overhead lines and underground cables operating at 400kV, 220kV and 110kV. For capacities in excess of

200MW, transmission circuits operating at 220kV or above are required. He stated that only very large demand customers are connected to the transmission system, and gave as examples Intel, HP, cement factories, large pharmaceutical manufacturers and large data centres. The Transmission System Operator [hereinafter referred to as the "**TSO"**] is currently EirGrid but prior to 2006 it was ESB National Grid. The TSO is responsible for operating and developing the transmission system. The transmission system is owned by ESB Networks, which is the Transmission Asset Owner [hereinafter referred to as the "**TAO**"].

35. Mr [redacted] stated that the distribution system allows for the flow of electricity from the transmission system to demand customers. It comprises the networks operating at 38kV, 20kV, l0kV and low voltage. He stated that ESB Networks is the Distribution System Operator and Distribution Asset Owner.

36. Mr [redacted] stated that the Irish electricity system and market is regulated by the CER. There is competition in the electricity supply market such that customers can choose their own Electricity Supply Company. The supply companies bundle the costs of power, transmission and distribution into a tariff for their customers. The Transmission and Distribution Systems are natural monopolies and as a result the CER regulates their charges by means of five-year price reviews. Through these agreed charges, ESB Networks is allowed to recover and earn a return on the cost of new system assets, listed in their Regulated Asset Base [hereinafter referred to as "**RAB"**]. He stated that the costs of assets paid for upfront by customers, such as the generator connection asset for which the Appellant paid €[redacted] million, are not treated as new system assets and are not added to ESB's RAB.

37. Mr [redacted] stated that the CER regulates the connection process, rules and charges for the connections of new demand customers or generators. There are, he stated, substantially different processes, rules and charges for the connection of demand customers compared with generators. For example, there is no initial charge for applying for a demand connection; the offer is issued within approximately 2-3 months and demand customers initially only pay for 50% of the cost of new connection assets. In contrast, he stated that new generators have to pay substantial application fees, potentially wait years for an offer to connect and pay 100% of the cost of the new assets required to connect the generator to the system.

38. The System Operators, EirGrid and ESB Networks, are responsible for determining how and where the generator connects on the electricity system, known as the "connection method". As part of the charging rules approved by the CER, the System Operators have to charge the generator the Least Cost Technically Acceptable [hereinafter referred to as the "**LCTA**"] connection method.

39. He stated that for generators connecting in Ireland there is a "shallow charging policy". This means that the generators must pay 100% of the costs of any new assets required to connect the generator facility to the existing electricity system, that is to say the cost of the LCTA connection method for the Shallow Connection Works. The cost of the Shallow Connection Works must be paid before the generator is allowed to connect to the electricity system.

40. Mr [redacted] stated that it is important to note that the Shallow Connection Works for CCGTs are dedicated to the connection of the particular generator

and are charged fully to that generator as the new assets are not beneficial to other users of the electricity system. The Shallow Connection Works are also not remote: they are the new assets from the connection point on the generator premises to the existing electricity grid.

41. He stated that as well as paying 100% of the cost of the Shallow Connection Works, generators also must pay the System Operators an annual payment for the operation and maintenance of the Shallow Connection Works. For transmission connections, this charge is referred to as the On-Going Service Charge. This charge includes 100% of the cost of the occupation, operation, maintenance and council rates for the shallow connection assets.

42. He stated that when connecting a new generator, there can also be new reinforcements required deeper into the existing electricity system, known as Deep Reinforcements Works. Deep Reinforcements Works are not charged directly to the generator as these works strengthen the wider transmission system and provide benefits to other users.

43. The connection method for a generator is determined by the System Operators following detailed analysis of multiple connection options to determine the LCTA. The generator provides the location of the new generator and the Maximum Export Capacity [hereinafter referred to as "**MEC**"] required for the generator in the connection application documentation. The location and MEC are critical to determining the ultimate connection method. He stated that if the new generator is located near an existing substation with capacity, then a relatively short section of new circuit will be required. In contrast, if it is located further away from the existing system, a relatively long section of new circuit will be required. If the MEC

requested is 4MW, then a connection at l0kV or 20kV will be provided, whereas if a MEC of 200MW is required a connection at 220kV will be required.

44. He stated that generators also require a Maximum Import Capacity [hereinafter referred to as "**MIC**"]. This is to allow import of electricity from the electricity system to feed the ancillary equipment of the generator at times when the generator is not producing electricity, including times when the generator is in start-up mode. He stated that the MIC is usually 1-3% of the total MEC of the generator. The System Operators size the connection based on the MEC and thereafter the connection is sufficient for the MEC and the MIC required.

45. Mr [redacted] stated that it is not technically possible to provide a separate connection for the MIC required for generators. He stated that for safety reasons the System Operators, in accordance with good industry practice, do not generally allow multiple connections onto one premises. He stated that a connection from the distribution system, even if deemed technically acceptable, would also not provide the same security of supply as a connection direct from the transmission system. The ancillary loads are essential to the safe and reliable operation of the CCGT and therefore a relatively high security of supply is required. He stated that for these reasons the requirement to have auxiliary supplies fed from the generator connection was set down in ESB National Grid's Grid Code document, which is the TSO's technical specification document with which all generators connected to the transmission grip must comply.

46. Mr [redacted] stated that during the application process, the Appellant requested an MEC of [redacted] MW and an MIC of [redacted] MVA. To minimise connection costs, CCGTs are located near to existing electrical and gas transmission infrastructure with capacity for new generation. He stated that without the availability of these connections to the electrical and gas transmission networks, with sufficient capacity and at a reasonably low cost, CCGTs would not be technically or commercially viable.

47. He stated that, put simply, CCGTs are essentially factories that efficiently convert gas into electricity and put this energy on the electricity transmission system for the use of electricity customers. For the technical and commercial viability of the business, the Shallow Connection Works to the electricity networks are as essential as the CCGT equipment itself.

48. Mr [redacted] stated that ESB National Grid, having considered multiple connection options, determined that the LCTA connection method for the Power Station was a 1.35km 220kV underground cable connection to [redacted] 220kV substation. A new 220kV substation was required at the location of the Power Station and works were also required in [redacted] substation to facilitate the new 220kV connection. These were the Shallow Connection Works for the Power Station. The connection cost charged by ESB Networks for these works were €[redacted] million. The System Operators also charge an ongoing Service charge for the operation and maintenance of these works. He stated that although ESB Networks own the Shallow Connection Works, the Appellant had paid for the Shallow Connection Works to be completed and it also pays for the operation and maintenance of the asset.

49. In summary, Mr [redacted] stated that CCGTs are critical generation infrastructure for the Irish electricity system. Due to their MEC size, they have to be connected onto the transmission system at 220kV. The new connection works from the generator to the existing electricity grid are the Shallow Connection Works and are fully chargeable by the System Operator to the generator. These assets are dedicated for the use of the Appellant's Power Station. He stated that it is standard practice for ESB to take legal title for shallow connection assets, but nevertheless these assets have been fully paid for by the Appellant and the Appellant also pays an annual charge for the occupation, operation, maintenance and council rates of the shallow connection assets. The cost of these assets is not added to ESB's RAB. The Appellant does import at times when the generator is not producing electricity and when in start-up mode, but due to the relatively low capacity of the import capacity relative to the export capacity (about 1.5%), this does not impact on the sizing or cost of the Shallow Connection Works. He stated that from his experience of due diligence of multiple generation projects, there is a substantial sale value put on the grid connection of a generator when being sold to an investor.

Witness 3

50. The third witness to give evidence on behalf of the Appellant was Mr [redacted], head of strategy and corporate development at the [redacted], Finance Director of the Appellant between [redacted] and [redacted] and a Director and Company Secretary of the Appellant.

51. He stated that the Power Station was commissioned and commenced operation in [redacted]. The commercial purpose for the construction of the Power

Station was to generate profit from the production and supply of electricity in Ireland. In order to build the Power Station, it was necessary for the Appellant to enter into a commercial agreement with BGE to secure a dedicated connection to the high pressure gas network for the supply of gas to be used by the Power Station to generate electricity. This, he stated, was possible after the Appellant was granted an allocation of gas network capacity under a competition administered by the CER. The competition was necessary due to the limited gas transmission capacity within the Irish network, and the need to allocate network capacity. He stated that the Appellant was ranked first in the competition and that this was the only way for the project to access the gas network and source fuel supply for the Power Station's operations as BGE was, and remained, the sole gas network owner and operator in Ireland.

52. Mr [redacted] stated that in order to build the Power Station, it was also necessary to enter into a commercial agreement with ESB, in its capacity as the State-owned electricity transmission system operator in Ireland (which functions have since been transferred to EirGrid plc), to connect the Power Station to the national grid. The ESB was at that time the sole operator of the electricity transmission network in Ireland.

53. He stated that the connections to the national grids of gas and electricity are essential to the operation of the Power Station.

54. Mr [redacted] stated that in accordance with the terms of the connection agreement with BGE, the Appellant paid an amount of €[redacted] to construct the pipeline which forms the connection between the power station and the gas network.

55. He stated that the capital cost of constructing the connection works from the Power Station to the electricity transmission system amounted to €[redacted]. The original cost of connection under the connection agreement with ESB was €[redacted] but that figure was reduced as a result of a determination by the CER following a dispute raised by the Appellant.

56. He stated that Regulation 33 of the European Communities (Internal Market in Electricity) Regulations 2000 [hereinafter referred to as the "**2000 Regulations**"] amended section 34 of the Electricity Regulation Act 1999 [hereinafter referred to as the "**1999 Act**"] to allow an applicant to build its grid connection works itself or to request the transmission system operator to undertake the construction on its behalf. The Appellant contracted with ESB to have it carry out the connection works. The cost of the connection works charged by ESB included the following elements:

i. construction of a 200kV tail-fed outdoor transmission station (with no busbar) with one generator transformer bay and other equipment of the transmission station;

ii. laying of [redacted]kms of underground transmission cable between the transmission station and ESB's [redacted] 220kV station;

iii. remote station work at [redacted] 220kV station which comprises a 220kv line bay and associated equipment;

iv. Construction of allocated equipment including a 220kV double busbar station with associated protection, auxiliaries and control;

v. All works at the [redacted] 220kV not within the civil works for air insulated switchyard to include:

a. Insulation of the Earth Grid at [redacted] 220kV station;

b. Termination of Control Cables at [redacted] 220kV station;

c. 220kV Cable supply and laying including "sand and slab".

57. He stated that the electrical connection agreement was subject to a number of amendments at different times including, but not limited to, the decision by the CER on the applicable connection charges, a reduction in the MIC of the Power Station and general market changes such as the transition of EirGrid to be the TSO and the introduction of the SEM in November 2007.

58. Mr [redacted] stated that as part of the gas connection agreement, the Appellant was obliged to transfer the site on which BGE constructed the gas connection to the Power Station, together with such wayleaves, easements and otherwise as BGE considered reasonably necessary or desirable in connection with the gas connection and the transportation of natural gas to the Power Station. At the time of the appeal hearing, this transfer of land had not yet occurred. He stated that since the gas connection was activated in [redacted], BGE had maintained the gas connection site and the Appellant did not have access to the site without permission from BGE.

59. As part of the electricity connection agreement with ESB, the Appellant was also obliged to transfer the site on which the electricity connection switchyard was constructed, together with a wayleave over land held by the Appellant to allow access to that site by ESB in its capacity as transmission asset owner. The transfer of the land to ESB occurred on the [redacted] 2013.

60. He stated that the electricity connection switchyard site has been maintained by ESB since first energisation of the power station in [redacted]. He

stated that on the 1st of July 2006, EirGrid assumed the role of the TSO and that since that date ESB has continued to maintain the connection switchyard under the terms of an Infrastructure Agreement between ESB and EirGrid. He stated that since the electricity connection was activated, the Appellant has not had access to the site without permission from the TSO.

61. Mr [redacted] stated that the obligation to transfer ownership of the Customer Connection Works is a standard provision of a transmission connection agreement, the form of which is approved by CER under section 34 of the 1999 Act. He stated that once such assets are energised, they form part of the transmission system and therefore must be owned by a licensed transmission asset owner pursuant to section 16 of the 1999 Act. By virtue of Regulation 5 of the 2000 Regulations, a licence to own the transmission system may only be issued to ESB and as a consequence ownership is transferred to the ESB both to comply with the legislation and also to allow them to have full control and access to the assets to ensure continued, reliable operation of this strategically important infrastructure. He stated that while ownership of the assets passes to the ESB, they do not form part of the RAB upon which revenues are generated for ESB.

62. Mr [redacted] stated that the Appellant pays an Ongoing Service Charge [hereinafter referred to as "**OGSC**"] to EirGrid on an annual basis to compensate EirGrid for the operation and maintenance cost of the dedicated connection between the power station and ESB's 220kV station at [redacted], as opposed to the wider transmission system which is covered by Transmission Use of System [hereinafter referred to as "**TUoS**"] charges which are also paid by the Appellant. The OGSC is calculated based on a methodology and suite of charges approved and published annually by the CER.

63. The charge for the recovery of costs is calculated using a quasi-scientific methodology which tracks the usual obsolescence of the equipment based on the size of the dedicated connection from the Power Station to the 220kV station at [redacted]. Mr [redacted] stated that in this way the Appellant essentially bears the burden of wear and tear of the connection to the national grid.

64. He stated that the TUoS charge is the broader main network charge for transporting power in bulk across the wider Irish power system. TUoS charges are approved by the CER pursuant to section 35(1)(a) of the 1999 Act and are separate from the cost paid by customers for energy. He stated that pursuant to section 35(4) of the 1999 Act, TUoS charges are to be set so as to enable ESB to recover the appropriate proportion of the costs directly or indirectly incurred in carrying out any works and a reasonable rate of return on the capital represented by such costs. He stated that the right to TUoS charges is therefore limited to remunerating the ESB for its investment in its RAB through recovery of costs incurred by ESB in carrying out works. TUoS charges do not include any element related to dedicated connection works undertaken by connecting parties such as the Appellant.

65. He stated that TUoS charges are designed to recover two components, namely:-

i. Network Charges: for the use of the transmission system infrastructure for the transportation of electricity. Use of the network occurs by users importing from the system (Demand TUoS) and by users exporting to the system (Generation TUoS); and

ii. System Services Charges: for the recovery of the costs arising from the operation and security of the transmission system.

66. Mr [redacted] stated that the Appellant claimed capital allowances for the capital expenditure incurred on the construction of the Power Station including the connection fees paid to BGE and to ESB. The capital allowances were claimed in the tax returns filed for the Appellant for the accounting periods ending on the 31st of March [redacted] and on the 31st of March [redacted] (and subsequent years until fully claimed). As a result of a number of factors, including the capital allowances deductions, the Appellant incurred significant losses in those years which were carried forward and applied against profits in later years.

67. He stated that corporation tax returns were filed by the Appellant every year since its incorporation and that the tax returns were not challenged by the Respondent until December 2008 when it commenced the audit for the twelve month accounting period ending the 31st of March 2007.

68. Mr [redacted] stated that all electricity on the island of Ireland is required to be traded through the SEM and that prior to November 2007, electricity was not required to be sold through a compulsory pool, but instead was sold through bilateral contracts.

69. He stated that the wholesale electricity market was reformed in 2007 to operate on an all-island basis and that the SEM comprises a gross mandatory pool that provides a transparent wholesale electricity price and a guaranteed outlet for all electricity production on the island. The market rules require that all electricity generated in or imported into Ireland must be sold into the

pool, and that all wholesale electricity for consumption in, or export from, the all-island market must be purchased from the pool.

70. He stated that a comprehensive set of rules regulate bidding behaviour and give the regulatory authorities a high degree of direct control over the market. The Trading and Settlement Code [hereinafter referred to as the "**TSC**"] constitutes the market rules for the SEM and the market is operated and administered by the Single Electricity Market Operator [hereinafter referred to as the "**SEMO**"], an unincorporated joint venture between EirGrid and SONI Limited, the companies responsible for the safe, secure, efficient and reliable operation of the electricity system in Ireland and Northern Ireland respectively.

71. He stated that it is the responsibility of the SEMO to ensure that at all times the electricity system is balanced, that is to say that generation is matched by demand at all times. Generators wishing to participate are required to bid their Short Run Marginal Cost [hereinafter referred to as "**SRMC**"] into the SEM and all generators receive the System Marginal Price [hereinafter referred to as "**SMP**"] for their scheduled output in each half-hourly trading period. The SMP for each trading period is determined by the SEMO which, using Market Scheduling and Pricing [hereinafter referred to as "**MSP**"] software, stacks each of the bids according to their SRMC to create an unconstrained merit order. The MSP seeks to identify the lowest cost solution at which generators provide sufficient generation to meet demand so that the system remains balanced.

72. He stated that as a result of these market conditions and the requirement to keep the electricity system balanced, the Power Station is often required to be

shut down and restarted as part of its commercial offering. He stated that the Power Station had been shut down and restarted 616 times up to and including 31 December 2016.

Witness 4

73. The fourth witness to give evidence on behalf of the Appellant was Mr [redacted], Partner in [redacted], who stated that the Appellant completed construction and commission of the Power Station in [redacted].

74. The Appellant's statutory financial statements for the period ending on the 31st of March [redacted] showed fixed assets with a total cost of €[redacted]m in the "Generation Plant" category.

75. €[redacted]m of electricity connection fees were paid by the Appellant to ESB in the financial years ending on the 31st of March [redacted] and on the 31st of March [redacted] during the construction, and capitalised as a directly attributable cost of bringing the plant into the condition required for its intended use.

76. €[redacted]m of gas connection fees were paid by the Appellant to ESB in the financial years ending on the 31st of March [redacted] and on the 31st of March [redacted] during the construction and capitalised as a directly attributable cost of bringing the plant into the condition required for its intended use.

77. The fixed asset accounting policy described in the Appellant's statutory financial statements at the 31st of March [redacted] and on the 31st of March [redacted] was "*all fixed assets are initially recorded at costs. In accordance with FRS15,*

the cost of a fixed asset comprises its purchase price and any costs directly attributable to bringing it into working condition for its intended use."

78. The Appellant's financial statements were prepared in accordance with applicable account standards which were the UK & Irish GAAP standards in force at the time, as issued by the Financial Reporting Council and the Accounting Standards Board.

79. Mr [redacted] stated that in his opinion the Appellant's power station was clearly a tangible fixed asset as defined by FRS 15. He stated that it was an asset that "*has physical substance and is held for use in the production or supply of goods";* in the instant appeal, this meant the generation and sale of electricity.

80. He stated that in his view, the gas and electricity connection charges were costs that were directly attributable to bringing the asset into working condition for its intended use. The Power Station would not be operational without the gas connection which supplies fuel for energy production. The Power Station would also not be operational without the electricity connection which enables the Power Station to start the process of generating electricity and which further provides the Power Station with the outlet to export the energy generated into the grid.

81. He stated that the connection costs meet the definition of directly attributable costs as defined in FRS 15 - the connection costs are "*incremental costs to the entity that would have been avoided only if the tangible asset had not been constructed*." In addition, he stated that the connection costs include

installation costs, which are given as specific examples of directly attributable costs in paragraph 10 of FRS 15.

82. He stated that the capitalisation of the electricity and gas connection costs are also consistent with the asset recognition requirements set out in the Statement of Principles for Financial Reporting. The electricity and gas connection charges that were capitalised give "*access to future economic benefits, controlled by an entity as a result of past transactions or events.*"

83. He stated that the electricity and gas connections give the Appellant access to future economic benefits as they provide access to the gas pipeline network and electricity grid which allows the Power Station to operate in its intended, that is to say profitable, manner. The economic benefits are the returns and cash-flows generated by the Appellant through the operation of the Power Station and the export and sale of electricity. The Appellant controls the access to future economic benefits as it has the ability to obtain for itself any economic benefits that will arise and also to prevent or limit the access of others to those benefits. He stated that no other entity has benefitted from the Appellant's access to the gas pipeline and electricity grid.

84. He stated that the payment of the connection fees are considered to be the past event or transaction, fulfilling all of the asset recognition requirements set out in the Statement of Principles for Financial Reporting.

85. He stated that he was satisfied that the electricity and gas connection charges that were capitalised in the Appellant's statutory financial statements of the 31st of March [redacted] and the 31st of March [redacted] in relation to the development of the Power Station meet the capitalisation requirements of the accounting

standards in effect at that time. He specifically stated that these costs met the recognition requirements of FRS 15 Tangible Fixed Assets and are consistent with the overall asset recognition principles outlined in the Statement of Principles for Financial Reporting.

F. Submissions of the Appellant

86. It was submitted by Counsel for the Appellant that the connections and the connection equipment were installed on separate parcels of land that were, at the time of installation, owned by the Appellant. These connections, it was contended, were dedicated to and exclusively used by the Appellant.

87. It was further submitted that, in accordance with standard accounting practice and given the enduring nature of the benefit, the expenditure on the connections was capitalised in the Appellant's accounts. In its returns, the Appellant claimed capital allowances for the cost of the Power Station including the connection fees on the basis that they were capital expenditure on the provision of plant and machinery. It was submitted that the effect of the large capital allowance deductions was to cause the Appellant to incur significant tax adjusted losses in the period ending on the 31st of March [redacted] which, after application against other profits, were carried over and applied against profits in later years pursuant to section 396(1) of the TCA1997. The size of the losses available to be carried over had the effect of eradicating the Appellant's tax liabilities for a number of years subsequent to the construction of the Power Station.

88. It was submitted that the Appellant had an annual period for tax purposes ending on the 31st of March and that it had filed corporation tax returns in respect of all periods from its incorporation. None of the Appellant's returns were audited up until December 2008, when the Respondent commenced an audit for the twelve month accounting period ending on the 31st of March 2007.

Section 955

89. In relation to the first ground of appeal, Counsel submitted that the Respondent's claim that the Appellant was not entitled to claim capital allowance on the connection fees paid to ESB and BGE in the years [redacted] to [redacted] is out of time. It was submitted that the provisions of section 955 of TCA1997 which provided a limitation period within which the Respondent could deliver an assessment, make enquiries or amend an assessment was set at four years and that this four year period began at the end of the chargeable period in which the return being subject to an assessment or enquired upon was delivered.

90. It was submitted that the Respondent was seeking to challenge the returns made by the Appellant for the periods ending on the 31st of March 2008, 2009 and 2010 but that this challenge was out of time because in reality the Respondent was seeking to challenge the losses which were dealt with in the return for the period ending on the 31st of March [redacted]. It was further submitted that the period ending on the 31st of March [redacted] was outside the four year period provided for in TCA1997 as the amended Notices of Assessment were raised in January and February 2013. The basis for this submission was that the Appellant originally claimed capital allowances to

include connection fees expenditure in their return for the period ending on the 31st of March [redacted] and that, because the Appellant was unable to apply the entirety of the allowance against trading or other profits in that period, the unused capital allowances were carried forward as losses pursuant to section 396(1) of the TCA1997.

Legitimate expectation

91. It was originally submitted on behalf of the Appellant that the doctrine of legitimate expectation was associated with and underpinned its argument in relation to time limits. The Appellant's written submissions contended that even if I was to conclude that the amended Notices of Assessments raised by the Respondent were not out of time, the Appellant had a legitimate expectation that the Respondent would not challenge the validity of a loss created and carried forward in circumstances where the Respondent did not challenge the validity of the original capital allowance claim contained in the [redacted] return.

92. In support of this submission, the submissions referred me to the ***Fortune – v- The Revenue Commissioners*** **[2009] IEHC 28**, where O'Neill J cited and applied Keane CJ's statement in ***Glencar Exploration plc –v- Mayo County Council*** **[2001] IESC 64** that:-

> *"Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms*

part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or groups has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

93. It was submitted on behalf of the Appellant that the Respondent's failure to challenge, enquire about or raise an assessment in respect of its capital allowance claim for the said connection fees in the year immediately subsequent to the tax account period ending on the 31st of March [redacted] was a position adopted by the Respondent which amounted to an implied representation made directly in the relationship which subsisted between the Appellant and the Respondent to the effect that it would permit the capital allowance claim. It was further submitted on behalf of the Appellant that its reliance upon this implied representation, and its expectation that the Respondent would not resile from its position, can be seen in the fact that the Appellant carried forward the accumulated losses into which the capital losses were incorporated.

94. The Appellant further submitted that the representation which the Appellant wanted the Respondent to adhere to was purely procedural in nature and that, by asking that the Respondent be bound by its representation, the Appellant did not seek to obtain substantive benefits which the courts have traditionally been reluctant to grant. In support of this position, Counsel referred me to ***Wiley –v- Revenue Commissioners*** **[1994] 2 IR 160** where the Court stated:

"*The applicant is not concerned with seeking fair procedures in the sense of submitting that he should have been heard by the Revenue Commissioners before they granted their evidentiary requirements in relation to the granting of a refund. Rather does he submit that he should continue to have conferred on him a substantive benefit by way of exemption in the circumstances that he was not informed in advance of the more stringent requirements that the Revenue Commissioners had put in place to satisfy themselves so that they could properly discharge their duty in accordance with the scheme that they had set up under the relevant legislation.*

It will be clear immediately that acceptance of this submission would involve a radical enlargement of the scope of legitimate expectation. It would involve the Court saying to the administration that it was not entitled to set more stringent standards, so that it might discharge statutory obligations, without giving notice to anyone who might have benefitted in the past from a more relaxed set of rules."

95. It was contended on behalf of the Appellant that the Respondent's failure to act upon the loss recorded in the Appellant's [redacted] return constituted a representation as to a procedure that the Respondent would adopt. It was submitted that the Appellant was not seeking to bind the Respondent to providing a relief, but merely sought to impose a minimum standard of fairness in preventing the Respondent from challenging the Appellant's claim for relief, having failed to question or query the claim for a number of years after it was made.

96. At the hearing before me, Counsel for the Appellant advised me that the Appellant was no longer pursuing the legitimate expectation ground of appeal. Nonetheless, given that the point was contained in the Notice of Appeal and given that the issue may be of relevance in future appeals, I have briefly considered the argument in the Analysis and Findings section of this Determination.

Ancillary or revenue expenditure

97. It was further argued on behalf of the Appellant that the connection fees which it paid to ESB and BGE constituted ancillary expenditure necessary for the provision of plant and machinery, in the form of turbines and other related equipment, for the Power Station. It was submitted that a taxpayer's entitlement to claim ancillary expenditure is well-established in case law and that the relevant case law endorses a test that asks whether the expenditure was required to bring the plant and machinery into operation. It was contended that, given that the connections to the electricity and gas networks were necessary to allow the Power Station to operate for the intended trade purpose of generating electricity, the connection fees which it paid were precisely the type of ancillary expenditure which should be relieved by way of capital allowance.

98. In support of this the Appellant referred to section 284 of TCA1997 which at the relevant time provided as follows:-

> *"(1) Subject to the Tax Acts, where a person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this*

Chapter referred to "wear and tear allowance") shall be made to such person for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to such person and is in use of the purposes of the trade at the end of that chargeable period or its basis period and which, while used for the purposes of the trade, is wholly and exclusively so used."

99. It was submitted on behalf of the Appellant that the important clause in section 284(1) for the purposes of the within appeal states that expenditure will be allowed if it is "*…on the provision of machinery or plant…*". It was submitted that the equivalent provision contained in English legislation had been subject to consideration in a number of cases which unequivocally established an entitlement to claim ancillary expenditure required to bring plant and machinery into operation.

100. One of the leading cases on the question of allowable ancillary expenditure is the case of ***IRC –v- Barclay Curle & Co. Ltd*** **[1969] 1 WLR 675** decided by the House of Lords. In that case, the taxpayer incurred capital expenditure in building a dry dock for use in its trade. The expenditure covered a number of works, including excavation, construction of the dock and installation of various pieces of mechanical equipment required to operate the dock. The dispute which arose between the taxpayer and the HMRC was summarised by Reid LJ in the following terms at page 680:-

"*So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of the plant for the purposes of the trade of the dock owner.*"

101. Reid LJ answered this question by stating:-

> "*In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed, until then it is of no use for the purpose of the trade. This plant, the dock, could not even be made until the necessary excavating had been done. All the Commissioners say in refusing this part of the claim is that this expenditure was too remote from the provision of the dry dock. There, I think, they misdirected themselves. If the cost of the provision of the plant can include more than the cost of the plant itself, I do not see how expenditure, which must be incurred before the plant can be provided, can be too remote.*"

102. It was submitted on behalf of the Appellant that this extract established that any costs required to support the machinery and plant can be relieved by way of capital allowances, on the basis that these costs were all required to bring the machinery and plant into operation for the purpose of the intended trade. In further support of this, the observations of Donovan LJ in his separate concurring opinion at page 690 were relied upon on behalf of the Appellant:-

> "*My Lords, if the various components of this dry dock are considered in piecemeal, it is easy to regard the concreted basin itself as a structure and not as plant. For then the basin is simply a large hole in the earth the bottom and three sides of which have been faced with concrete.*

This approach to the problem, however, carries the Crown too far. For such a basin, regarded by itself would be no use to the respondents in their trade…

Furthermore I regard the "piecemeal" approach as unreal. The dry dock ought, I think, for the present purposes to be regarded as a whole with all its appurtenances of operating machinery, power installations, keel block, tubular side shores, and so on."

103. Donovan LJ further stated at page 690:-

"*As regards the cost of the necessary excavation, I think this comes within the words 'expenditure on the provision of machinery or plant' in section 279(1), again regarding the dry dock as a whole. Similar expenditure incurred in relation to a building or structure is now regarded as 'expenditure on the construction' of such building or structure for the purposes of section 265(1) without any further or more express provision, and I think rightly so. The Crown say that if a comparable construction be given to the relevant words in section 279(1) relating to plant and machinery, then section 300 of the same Income Tax Act, 1952, would be unnecessary.*

But that section related to 'alterations to an existing building incidental to the installation of machinery or plant'; and its wording suggests that it was enacted simply as an assurance to remove doubts about a particular kind of case."

104. Similar comments were made by Guest LJ, who found at page 686 that the expenditure was captured by a proper interpretation of "…*in the provision of…*" as follows:

"*It only remains to deal with the second point raised by the Crown. This is that even if the concrete work were 'plant' the costs of excavation did not qualify under Chapter II. The Commissioners upheld the contention of the Crown upon this point, their view being that the expenditure was 'too remote' from the provision of the dry dock and, in my view, they were wrong in excluding this expenditure. The excavation was a necessary preliminary to the construction of the dry dock and, in my view, was covered by the provision of plant and machinery under section 279. 'Provision' must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid.*"

105. The later case of ***Cooke (Inspector of Taxes) –v- Beach Station Caravans Ltd*** **[1974] WLR 1398** was also relied upon by the Appellant. It was submitted that in this case the High Court was called upon to consider what expenditure can properly be considered as ancillary to the cost of plant and machinery. The dispute concerned a taxpayer who constructed a pool along with various other related items, such as filtration and heating equipment, plumbing, fittings and electrical installation, and sought to claim capital allowances on the entire expenditure. The Court found in favour of the taxpayer and in doing so it applied a broad interpretation of the phrase "*…in the provision of …*" as follows at page 1402:-

"*Nobody, I think, would find the subject free from difficulty, or assert that he could draw a clear line with a steady hand. To some extent the matter must be one of impression, though it is important that the impression should not be untutored. Many interesting difficulties emerged during the argument which I forbear to pursue: for my duty is merely to decide this case, and not to attempt to define and rationalise the whole of this difficult branch of the law. Doing the best I can, with the aid of the*

authorities that I have mentioned and the other authorities that have been put before me, my conclusions are as follows.

First, the two pools should be considered as a unit, with all the attendant apparatus for purifying and heating the water and so on: for it is as a unit that they were constructed and as a unit that they are run. Second, the pools should be considered not on their own but in relation to the business carried on by the Company, namely, running its caravan park. It is plain that the pools were provided in order to attract custom to the caravan park of which they form part.

Third, I do not think that the pools can be regarded as being merely passive in any relevant sense of that word. For example, a springboard, or for that matter a trampoline, is in a sense passive, in that it does nothing until someone does something to it: but I would have thought it plainly plant, and Mr. Woolf did not seek to assert the contrary when I mentioned the springboard. So with the water in the swimming pool: leave it alone and it does nothing, and so to this extent it is passive. But the water in the pool is not provided in order to remain passive and unused: it is no mere ornamental pool, nor is it only the water behind a dam or in a reservoir, being simply stored until it is required and is drawn off. The purpose of the pool is to provide and retain a suitable body of water which is circulated, cleansed and heated, and so will provide a medium in which the visitors to the caravan park can safely disport themselves, affording them a pleasurable and safe buoyancy. I do not think that the water that the pool is designed to contain can be divorced from the structure of the pool and its apparatus. What the Company

intended to provide, and did provide, was a filled pool, not an empty pool…"

106. It was submitted on behalf of the Appellant that the precise nature of the test to be applied in assessing whether expenditure was properly "*…on the provision of…*" plant and machinery was further considered in the House of Lords decision in ***Ben-Odeco Ltd v Powlson*** **[1978] WLR 1094**. This case concerned a taxpayer company which was incorporated in order to exploit commercial opportunities tied to drilling for oil. Part of the company's activities involved obtaining finance to allow it construct an oil rig. In order to obtain this finance, the company was required to pay out almost £500,000 in commitment fees and interest charges. The Inspector of Taxes rejected the company's treatment of these fees and charges as capital expenditure on plant and machinery but the taxpayer appealed this determination. Wilberforce LJ made the following comments on the meaning of the statutory provision at page 1098:-

> *"An important principle of the laws of taxation is that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment. The taxpayer's argument in the present case does not bring this about. On the contrary, a different result would follow according as he pays for the provision of plant out of his own resources, or borrows it. In the latter case he would get an allowance, in the former he would not– this may amount to treating an investor worse than a speculator. Moreover, on the same argument, a different allowance in respect of identical plant would result according as he (i) borrows from a bank, (ii) raises money by a public issue of debentures, (iii) obtains money from his shareholders. And, again, a different result would follow according as (i) he is able to capitalise the*

interest on the money borrowed or (ii) (because he is carrying on a profit-making trade or for other reasons) does not or cannot capitalise it. If the law is such that it offers the taxpayer these options he is of course entitled to select that which suits him best, but an interpretation which introduces such a large element of subjectivity is to be avoided. The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant–not limiting it necessarily to the bare purchase price, but including such items as transport and installation, in any event not extending to expenditure more remote in purpose."

107. Russell LJ in a separate concurring judgment did not refer to the same touchstone of "remoteness" but made comments that appeared to indicate that a test of this nature should apply at page 1106, stating:-

"*In my opinion the effect of the expenditure was the provision of finance and not the provision of plant. I would add that I do not seek to confine qualifying capital expenditure to the price paid to the supplier of the plant. I should have thought, for example, that if the cost of transport from the supplier to the place of user is directly borne by the taxpayer it would be expenditure on the provision of plant for the purposes of the taxpayer's trade. And there may well be other examples of expenditure, additional to the price paid to the supplier, which would qualify on similar grounds. But such matters are not for decision in this appeal.*"

108. Salmon LJ gave a separate dissenting judgment allowing the appeal and stated the following at page 1101:-

"*The crucial question which arises on this appeal is whether the whole of the sum of approximately £5,700,000 constituted capital expenditure*

incurred on the provision of the rig. The Appellants contend that it did. The Crown contends that the capital expenditure of approximately £500,000 in respect of interest and commitment fees was not part of the capital expenditure so incurred. The argument on behalf of the Crown is that, on the true construction of s 41(1), the interest and commitment fees were too remote to constitute any part of the capital expenditure incurred on the provision of the rig but should be regarded only as capital necessarily expended on acquiring the capital expended on the rig. I confess that I regard this narrow construction of s 41(1) to be too artificial and unreal to be accepted.

The case for the Crown can, I think, best be tested in this way. If the Crown were asked firstly 'what was the capital cost incurred by the Appellants in acquiring the rig?' the answer must be £5,700,000; for this was the capital cost appearing in the Appellants' audited accounts which have been conceded by the Crown to be correct. If, however, the question I have formulated were to be translated into the language of the Statute it would then read 'what capital expenditure was incurred by the Appellants on the provision of the rig for the purpose of their trade?' Both questions though worded differently have precisely the same meaning and can only be answered in the same way. The Crown, however, would answer the second version of the question 'only £5,200,000 in round figures. The balance of £500,000 was incurred in providing the Appellants with the £5,200,000 and is too remote to have been incurred on providing them with the rig.' I confess that this does not seem to me to make any commercial sense and that it is also wholly inconsistent with the concession which the Crown has rightly made in relation to the first question.

I entirely agree with my noble and learned friend, Lord Hailsham of St. Marylebone, when he says that the actual words of the Statute are capable of bearing either the narrower meaning for which the Crown contends, or the wider meaning for which the Appellants contend. I am afraid, however, that I do not agree that the context of the material words in s 41(1) of the Act of 1971 affords any support to the meaning attributed to that subsection by the Crown.

…

I find it difficult to believe that when Parliament introduced a new system of capital allowances in order to offer the highest incentives for industrial concerns to acquire new machinery and plant, it could have intended s 41(1) of the Act of 1971 to bear the narrow meaning for which the Crown contends rather than the broader meaning attributed to it by the Appellants and which it is admittedly capable of bearing."

109. Salmon LJ further reasoned at page 1103 that expenditure which is repeatedly made over a period of time can move from being designated as allowable to not allowable based on whether the plant and machinery has or has not come into operation:-

"…whilst the rig was being completed, and the interest payable to the banks was being correctly capitalised and, in my opinion, qualified for the first year's capital allowance, once the rig was completed and delivered and came into operation in the Appellants' trade, the interest then accruing no longer qualified for a capital allowance because it could be deducted in computing, for the purposes of tax, the profits or gains of the Appellants' trade."

110. It was submitted on behalf of the Appellant that this extract highlights the fact that ongoing fees can, on one interpretation, be viewed as being on the provision of machinery and plant whilst this machinery and plant is being brought into operation, and that this expenditure can evolve over time to be expenditure in the course of trade.

111. It was further submitted on behalf of the Appellant that the entirety of the connection fees the subject matter of the within appeal were paid during the process of bringing the plant and machinery into operation.

112. The Appellant submitted that the basic principles of statutory interpretation should be applied when considering the meaning of the terms "*provision*" and "*belongs to*" and in particular submitted that it should be given its ordinary meaning and that thereafter section 5 of the Interpretation Act 2005 [hereinafter referred to as the "**2005 Act**"] should be applied if I found it necessary to do so.

G. Submissions of the Respondent

113. No direct evidence was proffered on behalf of the Respondent, which made the following submissions in relation to the Appellant's grounds of appeal:-

Section 955

114. It was submitted on behalf of the Respondent that the amended Notices of Assessment in respect of the periods of the years ended on the 31st of March 2008, the 31st of March 2009 and the 31st of March 2010 were issued within the statutory timeframe provided for by section 955 of the TCA1997.

115. It was submitted on behalf of the Respondent that the Appellant's position in this regard is incorrect. The Respondent had issued assessments in relation to specified taxable periods within the statutory timeframes provided for.

116. It was submitted on behalf of the Respondent that in issuing assessments in relation to the taxable periods concerned, the Respondent took the view that the Appellant was not entitled to carry forward losses. It was submitted that the fact that the carrying forward of those losses arose as a result of facts and circumstances dating back to [redacted] was wholly unremarkable.

117. It was further submitted on behalf of the Respondent that it was vital to note that reference to losses carried forward was included in each of the returns for the years ended on the 31st of March 2008, the 31st of March 2009 and the 31st of March 2010.

118. It was submitted that section 955 of TCA1997 is a full and comprehensive statutory scheme which governs the limitation of time for the purpose of issuing an amended assessment in respect of a particular chargeable period.

119. It was submitted that what the Appellant sought to do was ask that I take into account an extra-statutory consideration in the context of a time limit argument. It was submitted that it was not open to me to do so, and that the criteria which I must take into account on an appeal pursuant to section 955 of TCA1997 are as follows:-

1. Whether a notice of amended assessment has issued more than 4 years after the end of the chargeable period in which the return to which it relates is delivered. It was submitted that the answer to that question is in the negative. However, in cases where the answer to this is affirmative, one then turns to the following:
    a. If so, I must go on to consider whether any of the saving provisions in sub-section 2(b) of section 955 of the TCA1997 apply, that is to say:
    b. Whether the relevant return contains a full and true disclosure of the material facts necessary for revenue to issue an amended assessment;
    c. Whether the amended assessment was Issued to give effect to a determination on any appeal against an assessment;
    d. Whether the amended assessment issued to take account of any fact or matter arising by reason of an event occurring after the return was delivered;
    e. Whether the amended assessment issued to correct an error in calculation; or
    f. Whether the amended assessment issued to correct a mistake of fact.

Legitimate Expectation

120. The Respondent's written submissions argued that the Appellant's reliance on the doctrine of legitimate expectation was wholly misplaced. It was submitted that it is a doctrine which the Appellant would be entitled to invoke before the High Court on a judicial review, but that it is not a doctrine which the Appellant can invoke before the Appeal Commissioners.

121. In that regard it was submitted that the scope of jurisdiction conferred on the Appeal Commissioners was dealt with by the High Court in ***Menolly Homes –v- Revenue Commissioners*** **[2010] IEHC 49** as follows:-

> "*Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modem concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually*

by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure on that appeal and the remedies available to the appellate body."

122. It was further submitted that under the provisions of the Finance (Tax Appeals) Act 2015 [hereinafter referred to as the "**2015 Act**"], the Appeal Commissioners enjoy a jurisdiction broadly commensurate with that in place prior to the coming into effect of that Act on the 21st of March, 2016. The 2015 Act introduced a new Part 40A into TCA1997 which includes, *inter alia*, the following:-

"*949AK. (1) In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—*

(a) an appellant has, by reason of the assessment, been overcharged, determine that the assessment be reduced accordingly,
(b) an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or
(c) neither paragraph (a) nor (b) applies, determine that the assessment stand.

(2) If, on an appeal against an assessment that—

(a) assesses an amount that is chargeable to tax, and
(b) charges tax on the amount assessed,

the Appeal Commissioners consider that the appellant is overcharged or, as the case may be, undercharged by the assessment, they may, unless the circumstances of the case otherwise require, give as their determination in the matter a determination solely to the effect that the amount chargeable to tax be reduced or increased."

123. It was submitted that prior to this section 934 of TCA1997 provided, *inter alia*, that:-

"*(3) Where on an appeal it appears to the Appeal Commissioners by whom the appeals is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.*

(4) Where on any appeal it appears to the Appeal Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, they shall charge that person with the excess.

(5) Unless the circumstances of the case other require, where on an appeal against an assessment which assesses an amount which is chargeable to income tax or corporation tax it appears to the Appeal Commissioners

(a) that the appellant is overcharged by the assessment, they may in determining the appeal reduce only the amount which is chargeable to income tax or corporation tax,
(b) that the appellant is correctly charged by the assessment, they may in determining the appeal order that the amount which is chargeable to income tax or corporation tax shall stand, and
(c) that the appellant ought to be charged in an amount exceeding the amount contained In the assessment, they may charge the excess by increasing only the amount which is chargeable to income tax or corporation tax."

124. The Respondent accepted that the Appellant had correctly identified the test to be applied in a case of legitimate expectation, as expressed by the Supreme Court in ***Glencar***, but contended that there was no statutory provision giving the Appeal Commissioners jurisdiction to declare that Revenue is effectively estopped from raising assessments.

125. It was submitted that it was very clear that I do not have jurisdiction to decide points which properly belong in an application for judicial review.

126. The Respondent further submitted that even if I decided that I did have jurisdiction to strike down an assessment on the basis of the doctrine of legitimate expectation, the Appellant had wholly failed to explain how the alleged "*failure to act*" referred to could be or ought to be regarded as a "*representation made*" to the Appellant.

127. It was further submitted that, while the Appellant contended that it did not, by means of invoking an argument as to legitimate expectation, argue for

the conferral of a substantive benefit, it was impossible to ignore that the desired result of the Appellant's argument was to obtain the benefit of capital allowances to which the Respondent contended it was not entitled. It was also submitted that it was an ancillary argument to the misconceived argument that the assessments raised were out of time, in that it would have the effect of striking them down where they issued within the time afforded by statute.

Ancillary or Revenue expenditure

128. It was further submitted that the Appellant argued that the expenditure at issue was ancillary to the purchase of the generator turbines themselves because absent the expenditure the turbines would not be capable of being commissioned.

129. It was submitted that, in effect, the Appellant was calling in aid the importance or necessity of the expenditure, in the context of the Appellant's operation of the Power Station, in order to ask me to depart from the statutory test.

130. The Respondent submitted that it was very clear that for a claim for capital allowances to be allowable, the expenditure concerned must relate to the provision of plant. That plant must belong to the taxpayer. It was submitted that there is no authority for the proposition that capital allowances are allowable, whether in respect of plant or ancillary expenditure, in respect of items that do not belong to a taxpayer.

131. Counsel for the Respondent submitted that in ***Stokes –v- Costain Property Limited*** **1984 1 WLR 763**, the Court of Appeal considered whether expenditure by a lessee under a 99-year lease on plant in the form of lifts and central heating on sites held under such a lease could qualify for capital allowances. It was held by Fox LJ at page 770 that the lessee could not claim capital allowances on that expenditure because the items on which the expenditure was incurred did not belong to the taxpayer. It was submitted that this was so notwithstanding that such an outcome was unsatisfactory, the purpose of the provisions being to encourage investment in machinery and plant. The Court noted that the lessee could not claim capital allowances because it did not own the items concerned. The landlord could not claim capital allowances because it did not spend the money. That said, the Court was quite properly not prepared to alleviate the situation by applying a different statutory test to that actually provided for in the relevant legislation. Nor, the Respondent submitted, should I in the instant appeal.

132. In response to the Appellant's contention that the connection fees should be construed as "ancillary" expenditure, the Respondent submitted that this was incorrect. It submitted that the expenditure on the connection fees was too remote to qualify as ancillary, and I was referred to the ***Ben-Odeco*** decision in this regard.

133. The Respondent submitted that in the ***Ben-Odeco*** case, the taxpayer company acquired an oil drilling rig. Its business was to be the hiring out of the rig. In order to purchase the rig, the taxpayer company negotiated loans that were essential for the construction of the rig. The obtaining of the loans involved payment of commitment charges and interest fees. The taxpayer sought to argue that those payments qualified for capital allowances as

ancillary to the provision of the plant; they formed part of the cost of the plant. This argument was rejected by the House of Lords. The majority (Wilberforce, Hailsham, Russell and Scarman) focussed on the meaning of the words "*on the provision* of" in section 41 of the Finance Act 1971, which said words also appear in section 284. In considering the issue the Court contrasted section 41 with a Canadian provision that had been considered in a case opened before it ***Sherritt Gordon Mines Limited –v- Minister for National Revenue* [1968] 2 ExCR 459.** The Canadian provision included the phrase "*capital cost to the taxpayer*" whereas section 41 concerned "*expenditure on the provision of*". Wilberforce LJ noted that:-

> "*One draws a line round the taxpayer and the plant; the other confines the limited curve to the plant itself.*"

134. It was submitted that Hailsham LJ at page 1100 drew a clear distinction between money spent on the provision of plant and machinery and money spent in obtaining finance, albeit for the purpose of the provision of plant and machinery. He also pointed out that it was for the taxpayer to "*…bring himself within the conditions set by the benevolence of Parliament."*

135. It was submitted that this essential starting point was echoed by Russell LJ who said at page 1105:-

> "*I start my Lords with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in the precise balance the taxpayer on that basis would lose. But in upholding the view of the Special Commissioners and Brightman J as I do, I find the balance is in fact against the appellant.*"

136. It was submitted that this is also the position in this jurisdiction and I was referred to ***Texaco –v- Murphy*** **[1991] 2 IR 449**, where McCarthy J in the Supreme Court considered the principles of statutory interpretation as follows at page 454:

> "*It is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposes the obligation. In a much quoted observation in Cape Brandy Syndicate v. I.R.C. [1921] 1 K.B. 64 and 71, Rowlatt J. said:-*
>
> > '… In a taxing Act one has to look merely at what is clearly said. There is not room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."
>
> *I am happy to adopt that observation, borne out, as it is, by the decision of this Court in McGrath v. McDermott [1988] I.R. 258, where reference was made to Revenue Commissioners v. Doorley [1933] I.R. 750 and Inspector of Taxes v. Kiernan [1981] I.R. 117. In Doorley's case Kennedy C.J. at p. 765, said:-*
>
> > 'The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be

subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.

I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject matter under consideration and is complimentary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.'"

137. Returning to ***Ben-Odeco***, it was submitted that Russell LJ also found that the expenditure in that case was on finance and not on plant and

machinery. While Russell LJ was careful to point out that his decision did not mean that capital allowances were confined to the price paid to the supplier of plant, it was submitted that this caveat added nothing to the Appellant's argument in the instant appeal. This, the Respondent submitted, was because the Appellant must always bring itself within the words of section 284 of TCA1997, which words include the stipulation that expenditure must be on the provision of plant and machinery, which plant and machinery must belong to the Appellant. It was submitted that the Appellant cannot satisfy this test and therefore cannot succeed on this appeal.

138. It was further submitted that the Appellant's reliance on the dissenting judgment of Salmon LJ in ***Ben-Odeco*** was wholly misplaced on the following bases:-

i. The judgment of Salmon LJ did not have the support of the majority, or any of the other members, of the Court;

ii. The reasoning of Salmon LJ ought not to find favour in this jurisdiction because it does not accord with established principles of statutory construction;

iii. The Appellant was wrong to emphasise that part of Salmon LJ's judgment which suggests that ongoing fees might be regarded as being expenditure on the provision of plant and machinery, and that such expenditure might evolve into expenditure on trade. It was submitted that it is of little or no assistance to the Appellant to rely on the time at which expenditure was incurred, that time being a time during which plant and machinery was being brought into operation. It was submitted that the legal test does not require expenditure to occur at a particular time; rather it requires that

expenditure be made on the provision of plant and machinery, and that such plant and machinery must belong to the taxpayer.

139. It was submitted that in the instant appeal, the limiting curve provided for in the legislation surrounds the plant and machinery which belongs to the Appellant. It does not allow for capital allowances in respect of expenditure on other plant and machinery not belonging to the Appellant, no matter the importance of that plant and machinery to the Appellant. It was submitted that in ***Ben-Odeco*** the commitment fees were essential to the purchase of the oil rig, just as in the Appellant's case it is contended the sums paid to the ESB and BGE were essential to the Power Station. This is not the test however, the Respondent submits, and does not mean that such sums ought to qualify for capital allowances.

140. It was further submitted that, following on from its analysis of ***Ben-Odeco***, the Appellant argued for a purposive interpretation of section 284 of TCA1997 that is, according to the Appellant, an interpretation which is informed by the desire of the Oireachtas "*…to allow taxpayers capital allowance relief for expenditure on obtaining and establishing plant and machinery to an operational level* ." It was submitted that what the Appellant was contending for amounted to a broadening of the statutory test provided for by the words used in section 284 to accommodate the Appellant. It was submitted that this was impermissible, as held by the Court of Appeal in ***Stokes***.

141. It was further submitted that also relevant on this point was the judgment of the Supreme Court in ***Revenue Commissioners –v- O'Flynn Construction*** **[2013] 3 IR 533** where, in the context of a provision which

enjoined a tax inspector to have regard to, *inter alia*, the purpose of particular transactions in deciding whether they involved a "*misuse ...or ...abuse*" of taxation provisions, O'Donnell J considered the established canons of statutory interpretation. He held, *inter alia,* that:

> "*The idea that any particular scheme can produce a result that the Oireachtas did not intend is much more easily expressed than applied in practise. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction that are available in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated all the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected or an intended scheme that was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme.*"

142. It was submitted that the intention of the Oireachtas, while no doubt relevant to a construction of a taxation statute, is to be found in the words of the statute.

143. Counsel for the Respondent then addressed the Appellant's assertion that the plant to which the connection fees relate belonged to it, because it had been paid for by the Appellant, was constructed by the Appellant and was dedicated to the Appellant's power plant. It was submitted that this ignored the fact that, as regards each of the constructions to which the connection fees

related the Appellant had agreed that ownership of, and responsibility for, those structures was to rest with ESB and BGE respectively. It was submitted that the mere fact of payment or benefit does not and cannot equate to ownership. This was particularly so where ownership was the subject of specific agreements. The contract with BGE was signed and dated on [redacted] stating that "*at all times Bord Gais will own and operate the Works*". Therefore, the Respondent submitted that it was irrelevant whether the official transfer had taken place or not. Furthermore, it was submitted that it was clear from the contract that the use of the connection was not limited to the Appellant and each provider reserved the right to allow others access. The Appellant could not object as it had no control.

144. Counsel then turned to the Appellant's argument that, in line with generally accepted accounting principles, the accounting treatment of an item of expenditure will not automatically convert revenue expenditure into capital expenditure, or vice versa, for tax purposes. He submitted that the fact that expenditure is charged to fixed assets may lend support to an argument that the expenditure is capital expenditure for tax purposes. However, it in no way suggested that, should a capital item not be capable of obtaining capital allowances, then it automatically becomes a revenue expense. The tax treatment must follow the accounting treatment. The expense was capital in nature and, as such, the accounting treatment was appropriate. The fact that capital allowances are not available does not alter the treatment of the item.

145. In relation to the question of allowances and expenditure, Counsel referred me to the case of ***Bridge House (Reigate Hill) Ltd –v- Hinder (HM Inspector of Taxes)*** **(1968-1972) 47 TC 182** which concerned a restaurant

which paid a contribution towards the cost of connecting its premises to the mains sewage system. Denning MR stated therein:-

> "*The statutory provisions on the point are very complicated, but I will try to summarise them. An initial allowance and annual allowances are made "where a person carrying on a trade incurs capital expenditure on the provision of plant or machinery for the purposes of the trade"… Those sections apply only to the person who himself provides the plant or machinery. They do not apply where one person provides it and another person makes a contribution towards the expenditure."*

146. It was submitted on behalf of the Respondent that the within appeal and the Appellant's position was in precisely the same space as the position of the Appellant in ***Bridge House***. It was submitted that the expenditure incurred by the Appellant in the instant appeal was a payment for access to the ESB system and that there can be no credible suggestion that the Appellant was providing plant and machinery itself.

H. <u>Analysis and findings</u>

147. As with any appeal to the Tax Appeals Commission, the onus of proof lies on the Appellant.

148. As is clear from the grounds of appeal, the evidence given and the submissions made, there are three distinct questions which must be addressed in the within appeal and I will address each one in turn.

Section 955

149. The Appellant contends that the amended Notices of Assessment raised by the Respondent are out of time. The basis for this argument is that the Appellant contends that because the losses which the Respondent attempts to claw back in the amended Notices of Assessment were incurred in the periods ending on the 31st of March [redacted] and on the 31st of March [redacted], it follows that the Respondent is out of time to claw back the claimed losses in the appealed Notices of Assessment.

150. Section 955 of TCA1997 was the statutory provision which governed the time limit in being at the time of the Respondent raising the amended Notices of Assessment. This provided for a four-year time limit, commencing at the end of the relevant chargeable period, on the Respondent raising an amended Notice of Assessment on the Appellant.

151. In considering the principles of statutory interpretation and construction relevant to a tax appeal, the starting point is generally accepted as being the judgment of Kennedy CJ in ***Doorley –v- Revenue Commissioners*** **[1933] IR 750**, who held at page 765:-

> *"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms... for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is... as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament."*

152. In ***Kiernan v Revenue Commissioners*** **[1981] IR 117**, the Supreme Court held that there are three basic rules of interpretation:-

> *"First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning... Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language… Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use."*

153. The Supreme Court in ***McGrath –v- McDermott*** **[1988] IR 258** set out the principles of statutory interpretation as they apply to tax cases as follows:

> *"The function of the courts in interpreting a statute of the Oireachtas is, however strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to*

achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective."

154. More recently in ***Gaffney v The Revenue Commissioners*** **[2013] IEHC 651**, the High Court noted that the Revenue Commissioners agreed that the principles applicable to the construction of tax statutes are those set out in ***Doorley*** and in ***Kiernan*****.**

155. The Supreme Court in ***O'Flynn Construction Limited*** considered the decision in McGrath as follows:-

"The ratio decideendi [sic] of that decision was merely that it was not open to the Court by a process of development of the common law to develop a doctrine of fiscal nullity which would for example remove from a tax payer relief which was otherwise applicable on a strict reading of the enactment."

156. Subsequent to the hearing of this appeal, the Supreme Court has delivered itself of two significant judgments concerning the proper interpretation of tax legislation, namely ***Dunnes Stores –v- The Revenue Commissioners*** **[2019] IESC 50** and ***Bookfinders Ltd -v- The Revenue Commissioners*** [**2020**] **IESC 60**.

157. While both of these decisions contain thorough, detailed and helpful analyses of the previous caselaw and relevant principles, and while I have carefully considered and applied those analyses in their entirety in reaching the conclusions I have set forth hereunder, I believe a useful summary or overview is

that given by McKechnie J in ***Dunnes Stores***, wherein he stated as follows in paragraphs 63 to 65:-

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "*The words themselves alone do in such cases best declare the intention of the lawmaker*" (*Craies on Statutory Interpretation, *7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "*… it is natural to enquire what is the subject matter with respect to which they are used and the object in view" – Direct United States Cable Company –v- Anglo-American Telegraph Company *[1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question* – McCann Limited –v- O'Culachain (Inspector of Taxes) *[1986] 1 I.R. 196, per McCarthy J at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*
>
> *Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case, one particular rule rather than another has been applied, and why in a similar case the opposite is also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as*

that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

158. I note that the foregoing passage was cited with approval by O'Donnell J giving the Supreme Court's decision in ***Bookfinders*** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54 as follows:-

"However, the rest of the extract from the judgement [of McKechnie J] *is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

159. Having considered all of the above, I now direct myself to the wording of section 955 of TCA1997. Applying the ordinary meaning of the words therein, I am satisfied that it is not open to me to look behind or further than the time limits as set out in the section. I believe that it would be contrary to, or at a minimum would do violence to, the wording of the section were I to go beyond that and consider the time origin of the losses included in the relevant returns when deciding whether or not the amended Notices of Assessment are out of time.

160. The Respondent correctly submits that in assessing an appeal pursuant to section 955, I must first look to whether the amended Notices of Assessment were raised outside of the relevant four-year time limit. The amended Notices of Assessment in this appeal were raised on the 3rd of January 2013 in respect of the period ending on the 31st of March 2008 and on the 1st of February 2013 in respect of the periods ending on the 31st of March 2009 and the 31st of March 2010. Accordingly, I am satisfied that the amended Assessments were issue within the time permitted by the legislation.

161. There is no provision in section 955 for me to enquire further into the question of the four-year time limit once I find that the amended Notices of Assessment were issued within the four-year time limit.

162. I believe that the Appellant is incorrect in its submission that I must look further than the statutory time limits and consider the date of origin of the losses included in the relevant returns when establishing whether the amended Notices of Assessment are out of time.

163. For the sake of completeness, I would observe that I have not found any ambiguity or doubt in the wording of section 955 in so far as that provision is relevant to the instant appeal. Even had I reached a contrary view, it is clear from the ***Bookfinders*** decision that it would be impermissible for me to have regard to the Interpretation Act, as submitted by the Appellant.

164. Accordingly, I reject this ground of appeal as advanced by the Appellant.

Legitimate Expectation

165. Notwithstanding that the concession made by Counsel for the Appellant at the outset of this hearing makes this issue moot for the purposes of the instant appeal, I believe it appropriate to record that, having considered the matter and the submissions made on behalf of both the Appellant and the Respondent, I agree entirely with the position taken by the Respondent in this regard.

166. The Tax Appeals Commission is a creature of statute and the powers conferred on Appeal Commissioners were at the time of the judgment in ***Menolly*** to be found in section 934 of TCA1997 and are now set out in section 949(K) of TCA1997 (as inserted by the Finance (Tax Appeals) Act, 2015), subsection (2) of which provides that:

> "*If, on an appeal against an assessment that—*
> *(a) assesses an amount that is chargeable to tax, and*
> *(b) charges tax on the amount assessed,*

the Appeal Commissioners consider that the appellant is overcharged or, as the case may be, undercharged by the assessment, they may, unless the circumstances of the case otherwise require, give as their determination in the matter a determination solely to the effect that the amount chargeable to tax be reduced or increased."

167. The position as set out by Charleton J in his decision in ***Menolly*** is relevant in this regard. He stated at page 11 that "*Revenue law has no equity…*" and went on to state that:

"*How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure on that appeal and the remedies available to the appellate body.*"

168. The decision of Charleton J was more recently considered in ***Lee –v- Revenue Commissioners*** **(Court of Appeal, unreported decision of 28**

January 2021) where Murray J, giving the decision of the Court of Appeal, held that:-

> *"Whatever about fitting an inquiry into whether an Inspector of Taxes has acted reasonably or in good faith in issuing an assessment within the statutory framework, if a taxpayer can agitate before the Appeal Commissioners whether a liability has been settled, it is not at all apparent to me that there is any rational basis on which it can be said that he should be prevented from contending that the Inspector should be precluded from proceeding to issue an assessment by either a legitimate expectation, or an estoppel. The proposition that legitimate expectation is an exclusively 'public law remedy' does not in my view provide a convincing explanation. I struggle to see how categorising a remedy as one derived from 'public law' advances the debate. A claim in contract is one in 'private law' and a claim of estoppel may be one in 'equity'. None of these labels actually addresses the inquiry as to why a claim falling within one or other such description is not within the Commissioner's remit. The real point is that none of these forms of action has been entrusted to the jurisdiction of the Appeal Commissioners not because of their general legal categorisation, but because that jurisdiction is directed to the assessment and statutory charge alone. Arguments as to contract, legitimate expectation, estoppel or other theories which might, through one or more aspects of the general law operate to prevent Revenue from issuing, acting on or (as the case may) enforcing that assessment do not come within the jurisdiction so defined."*

169. Having regard to the foregoing decisions, I believe it is appropriate to record that it is now well-settled that the Tax Appeals Commission does not

have the jurisdiction to consider or determine arguments founded in the doctrine of legitimate expectation.

Ancillary or Revenue expenditure

170. Finally, I must determine the issue of whether the connection fees the subject matter of the instant appeal should be relievable as ancillary expenditure on the provision of plant and machinery or whether, alternatively, the expenditure should be treated as revenue expenditure and therefore be deemed deductible.

171. In considering this question I have carefully considered the evidence given on behalf of the Appellant which was highly detailed and technical in nature, and which has been summarised *supra*.

172. I am satisfied on the evidence before me that a company that wishes to enter into the business of power generation in Ireland is bound by a detailed regulatory system, the purpose of which is to protect the integrity of the national electricity grid and the supply of electricity to both households and business users.

173. Section 34 of the 1999 Act states that:

> *"(1) Subject to subsection (4), where an application is made to the Board by any person, the Board shall offer to enter into an agreement for connection to or use of the transmission or distribution system, subject to terms and conditions specified*

in accordance with directions given to the Board by the Commission under this section from time to time.

(1A) An offer under subsection (1) may, on request of the applicant, be on the basis that the applicant constructs, or that either or both the applicant and the transmission system operator arranges to have constructed, the connection to the transmission system, and any such connection constructed or arranged to be constructed by the applicant shall be the property of the person with whom the agreement is made, and shall, for the purposes of section 37, be deemed to be a direct line."

174. I accept as correct the evidence given on behalf of the Appellant that in order to enter into the business of electricity generation, the Appellant was obliged to enter into an agreement for connection to or use of the transmission or distribution system, which said agreement was subject to terms and conditions specified in accordance with directions given to the Board by the Commission. I accept as correct that the Appellant paid the sum of €[redacted] for the construction of the connections to BGE and ESB during the construction of the power plant and that same was commissioned in [redacted] and [redacted]. I further accept as correct that the Appellant was obliged to transfer the ownership of the connections and the lands on which the connections were constructed to BGE and ESB (now EirGrid) pursuant to the terms and conditions set out in the said agreement, as provided for in section 34 of the 1999 Act.

175. Section 284 of TCA 1997 provides that:

"*Subject to the Tax Acts, where a person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as a "wear and tear allowance") shall be made to such person for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to such person and is in use for the purposes of the trade at the end of that chargeable period or its basis period and which, while used for the purposes of the trade, is wholly and exclusively so used.*"

176. On the one hand, the Respondent submits that the connections the subject matter of the within appeal do not and never have belonged to the Appellant and therefore the Appellant is not entitled to rely on the expenditure as a loss in its return to the Respondent.

177. On the other hand, the Appellant submits that the connections the subject matter of the within appeal are machinery and plant which are integral to the commissioning and continued operation of the Power Station. The machinery and plant are, on the Appellant's submission, in use for the purposes of Appellant's trade and are wholly and exclusively used for the purposes of the Appellant's trade.

178. The Appellant further submits that the connections could never have remained in its ownership as a necessary consequence of the statutory and regulatory regime which surrounds the production of electricity within the State, and in particular as a consequence of the Generator Connector Agreement which it was compelled to enter into as part of its licensing

procedure and which is governed by the provisions of section 34 of the 1999 Act.

179. Having carefully considered all of the evidence, submissions and case law I am satisfied and find as material facts that although the legal ownership of the connections rests with BGE and ESB, the said connections are in use for the Appellant's trade and are wholly and exclusively used for the purposes of the Appellant's trade. I am further satisfied and find that the Appellant pays for 100% of the maintenance and upkeep of the said connections. I am further satisfied and find as a material fact that the only reason for the transfer of ownership of the said connections is to ensure the integrity and security of the electricity system in the State and that, but for that statutory and regulatory requirement, the connections would have remained in the ownership of the Appellant.

180. Moreover, I am satisfied on the evidence before me that the electricity and gas connections the subject matter of this appeal are a necessary and integral part of the Appellant's Power Station. The connections were necessary to bring the plant and machinery which constitutes the Power Station into operation and they continue to be necessary to allow the Power Station to operate for the intended trade purpose of generating electricity. In reaching this conclusion, I believe that the decision in ***Cooke –v- Beach Station Caravans*** is apposite and of assistance. I believe that the Power Station and the connections the subject of this appeal cannot properly be said to be independent of one another; rather they should be considered as comprising a unit which operates as part of the business carried on by the Appellant.

181. I have also had careful regard to the decision of the House of Lords in ***Ben-Odeco*** but that case is, in my view, clearly distinguishable on its facts from those which pertain in the instant appeal. I therefore reject the Respondent's argument that the expenditure on the electricity and gas connections is too remote to come within the parameters of section 284.

182. Accordingly, I accept as correct the Appellant's argument that its expenditure on the connection fees paid to BGE and ESB constituted ancillary expenditure necessary for the provision of the machinery and plant used to generate electricity at the Power Station. That machinery and plant belongs to the Appellant. I therefore find that the monies expended by the Appellant on the construction of the gas and electricity connections constituted capital expenditure on the provision of machinery or plant for the purposes of the Appellant's trade within the meaning of section 284(1) and I will therefore allow the Appellant's appeal on this ground.

183. In light of the foregoing finding, it is not necessary for me to consider further the Appellant's subsidiary arguments that the gas and electricity connections "*belonged to*" the Appellant within the meaning of section 284, or whether the expenditure thereon could be said to constitute revenue expenditure.

I. Conclusion

184. For the reasons set out above, I consider that the Appellant has by reason of the Amended Notices of Assessment dated the 3rd of January 2013

and the 1st of February 2013 been overcharged to Corporation Tax for the accounting periods ending on the 31st of March 2008, the 31st of March 2009 and the 31st of March 2010, and I determine pursuant to section 949AK(1)(a) of the Taxes Consolidation Act, 1997 as amended that those Amended Assessments be reduced accordingly.

MARK O'MAHONY
APPEAL COMMISSIONER
7 May 2021