TC02767

Appeal number: TC/2011/5772

CORPORATION TAX – relief for remediation of contaminated land – capital expenditure on various items of sea defences in course of construction of a marina – whether land in a contaminated state by reason of seawater on foreshore – yes – breakwater constructed on seabed – not expenditure on land – sea defences constructed on foreshore – qualifying land remediation expenditure – works carried out on land above high water mark – not qualifying land remediation expenditure – paras 1, 2, 3, 4, and 7 Schedule 22 Finance Act 2001 – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEAN & REDDYHOFF LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
HELEN MYERSCOUGH ACA

Sitting in public at Bedford Square on 14 and 15 March 2013

Jan Matthews and Laura Poots, both of counsel, instructed by BDO LLP, for the Appellant

Jane Hodge, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Dean & Reddyhoff Limited "(the Appellant") appeals against amendments made by The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") to the Appellant's corporation tax returns for its three accounting periods ended respectively 30 September 2007, 30 September 2008 and 30 September 2009.

2. In the course of those latter two accounting periods the Appellant incurred expenditure on the construction of a marina (including quayside buildings and facilities) at Portland, Dorset. The expenditure was incurred in the course of the Appellant's trade of constructing and operating marinas. In particular, the Appellant incurred capital expenditure on works comprising the construction of a sea wall on the seabed largely surrounding the marina; the construction of a sea wall, or revetment, on the foreshore to protect land reclaimed from the foreshore and seabed; the construction of a plinth on the dry land part of the site on which buildings were constructed; and the construction of floodwater drainage systems on the site.

3. The Appellant claimed relief for that expenditure under the provisions of Schedule 22, Finance Act 2001 on the grounds that the expenditure comprised qualifying land remediation expenditure, that is, expenditure on works for the purpose of preventing the harm by reason of which land is in a contaminated state. The basis of the Appellant's claim for such relief is that seawater on the foreshore gives rise to the possibility of harm to the land part of the marina site by reason of wave, tidal surge and flood damage, and that the expenditure on the construction works in question has the purpose of preventing or minimising such harm.

4. The expenditure for which relief has been claimed by the Appellant totalled £8,046,632 for its accounting period ended 30 September 2008 and £750,750 for its accounting period ended 30 September 2009. To give effect to the relief claimed the Appellant carried back part of the expenditure to its accounting period ended 30 September 2007.

5. The Commissioners deny that the relief claimed is available to the Appellant, on the grounds that the land in respect of which the expenditure was incurred was not in a contaminated state within the terms of the relief. Accordingly the Commissioners amended the Appellant's corporation tax returns.

6. The parties have agreed the detail of the figures, and the way they relate to each accounting period. They require the tribunal to determine in principle whether or not land remediation relief is available to the Appellant for its expenditure on the construction works in question. It is sufficient to note that the amounts in dispute comprise £629,396 of corporation tax; £923,184 of land remediation tax credit; and tax losses of £750,750.

7. The issue we therefore have to decide is whether the Appellant is entitled to relief for remediation of contaminated land as provided for in Schedule 22, Finance Act 2001 in respect of its expenditure on the construction works in question.

8. We should mention that the law in relation to land remediation relief was amended in 2009 to the effect that land is now in a contaminated state only if the contaminating substance is present as a result of industrial activity, and not by reason of natural processes. The relief in its current (and more restricted) form is to be found in Part 14 of Corporation Tax Act 2009. The Appellant clearly would have no basis for a claim for relief had it incurred the expenditure in question on or after 1 April 2009, since its claim is based on seawater being the contaminant of land.

9. Our decision is that the Appellant's appeal is dismissed in relation to expenditure on the construction of a breakwater on the seabed, and in relation to expenditure on works carried out on land above the tidal high water mark, but is allowed in relation to the expenditure for which the Appellant has claimed land remediation relief for work carried out on the foreshore.

The legislation

10. Schedule 22, Finance Act 2001 ("Schedule 22", and references below to paragraphs are references to paragraphs of Schedule 22) sets out the relief which a company may claim where it acquires land for the purposes of its trade, where the land is in a contaminated state when it is so acquired, and where it incurs qualifying expenditure on preventing or minimising the harm by reason of which the land is in a contaminated state. The legislation was introduced as one of several government measures designed to regenerate derelict land by encouraging the cleaning up and development of what are commonly known as "brownfield sites".

11. The relief for qualifying expenditure is generous. Expenditure which is capital in nature is allowed as a deduction in computing trading profits. Further, the amount of qualifying expenditure (whether it is capital or revenue in nature) for which relief is given is 150% of the expenditure incurred. If the claiming of such relief results in the company which has made the expenditure incurring a loss, it can claim a tax credit of 16% of the amount of such loss. If the expenditure qualifies for capital allowances it does not qualify for land remediation relief (none of the expenditure for which the Appellant is claiming relief is eligible for capital allowances). If the claimant, or a person connected with the claimant, has caused the land to be contaminated, he is not entitled to relief for expenditure on mitigating the harm caused by such contamination.

12. The issue in the present case is whether the Appellant's expenditure meets the various qualifying conditions of the relief, and the following are the provisions of Schedule 22 material for considering that issue.

13. Para. 1 provides for the deduction for capital expenditure, setting out the conditions which must be met:

1(1) This paragraph applies if –

(a) land in the United Kingdom is, or has been, acquired by a company for the purposes of a trade carried on by the company,

(b) at the time of acquisition all or part of the land is or was in a contaminated state (see paragraph 3), and

(c) the company incurs capital expenditure which is qualifying land remediation expenditure in respect of the land (see paragraph 2).

1(2) For the purposes of corporation tax such capital expenditure as is qualifying land remediation expenditure shall (if the company so elects) be allowed as a deduction in computing the profits of the trade for the accounting period in which that expenditure is incurred.

....

1(5) A company is not entitled to a deduction under this paragraph in respect of expenditure on land all or part of which is in a contaminated state, if the land is in that state wholly or partly as a result of any thing done or omitted to be done at any time by the company or a person with a relevant connection to the company.

.... .

14. Para. 2 sets out the conditions which expenditure must satisfy if it is to comprise "qualifying land remediation expenditure" – in essence, it must be expenditure on contaminated land, being expenditure which restores the land from its contaminated state or prevents or mitigates the harm caused by that contaminated state:

2(1) For the purposes of this Schedule "qualifying land remediation expenditure" of a company means expenditure of the company that meets the conditions in sub-paragraphs (2) to (6).

2(2) The first condition is that it is expenditure on land all or part of which is in a contaminated state (see paragraph 3).

2(3) The second condition is that the expenditure is expenditure on relevant land remediation directly undertaken by the company or on its behalf (see paragraph 4).

2(4) The third condition is that the expenditure is incurred –

(a) on employee costs (see paragraph 5), or

(b) on materials (see paragraph 6),

or is qualifying expenditure on sub-contracted land remediation (see paragraphs 9 to 11).

2(5) The fourth condition is that the expenditure would not have been incurred had the land not been in a contaminated state (see paragraph 7).

2(6) The fifth condition is that the expenditure is not subsidised.

In the Appellant's case it is common ground that the third and fifth conditions are met.

15. Para. 3 defines when land is to be regarded as being in a "contaminated state":

> *3(1) For the purposes of this Schedule land is in a contaminated state if, and only if, it is in such condition, by reason of substances in, on or under the land, that –*
>
> *(a) harm is being caused or there is a possibility of harm being caused; or*
>
> *(b) pollution of controlled waters is being, or is likely to be, caused.*
>
> *... .*

16. Para. 4 sets out the types of works which comprise "relevant land remediation":

> *4(1) For the purposes of this Schedule "relevant land remediation", in relation to land acquired by a company, means –*
>
> *(a) activities falling within sub-paragraph (2), and*
>
> *(b) ... .*
>
> *4(2) The activities referred to in sub-paragraph (1)(a) are the doing of any works, the carrying out of any operation or the taking of any steps in relation to –*
>
> *(a) the land in question,*
>
> *(b) any controlled waters affected by that land, or*
>
> *(c) any land adjoining or adjacent to that land,*
>
> *for the purpose described in sub-paragraph (3).*
>
> *4(3) The purpose referred to in sub-paragraph (2) is that of –*
>
> *(a) preventing or minimising, or remedying or mitigating the effects of, any harm, or any pollution of controlled waters, by reason of which the land is in a contaminated state; or*
>
> *(b) restoring the land or waters to their former state.*
>
> *... .*

17. Expenditure qualifies for relief only if that expenditure would not have been incurred had the land not been in a contaminated state. Para. 7 makes provision for this condition:

> *7(1) Without prejudice to the generality of paragraph 2(5), this paragraph has effect for the purpose of determining whether expenditure would or would not have been incurred had not all or part of the land been in a contaminated state.*
>
> *7(2) If expenditure on the land is increased by reason only that the land is in a contaminated state, the amount by which such expenditure*

is increased shall be considered to be expenditure satisfying the condition in paragraph 2(5).

7(3) If any works are done, operations are carried out or steps are taken mainly for the purpose described in paragraph 4(3), expenditure on such works, operation or steps shall be taken to satisfy the condition in paragraph 2(5).

18. Finally, it is necessary to note certain relevant definitions, which are found in para. 31(1):

"harm" means –

(a) harm to the health of living organisms,

(b) interference with the ecological systems of which any living organisms form part,

(c) offence to the senses of human beings, or

(d) damage to property;

"land" means any estate, interest or rights in or over land;

"substance" means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour.

The evidence and the findings of fact

The agreed statement of facts

19. The parties had agreed a statement of facts not in dispute between them. It is in the following terms.

(a) Background

1. The Appellant was incorporated on 10 September 1992 and its principal activity is that of marina operators.

2. The Appellant has made claims, in respect of the accounting periods ended 30 September 2008 and 2009, that qualifying land remediation expenditure is treated as if it were an amount equal to 150% of the actual amount.

2.1. The Corporation Tax computations include a claim for enhanced qualifying land remediation relief totalling £8,046,632 for 2008 and £750,750 for 2009. These comprise:

	2008	2009
Capitalised qualifying land remediation expenditure	£5,290,525	£500,500

Staff costs of for time spent on the Portland development (deducted in the profit and loss account)	£73,896	
	£5,364,421	£500,500
Additional 50% of qualifying expenditure	£2,682,211	£250,250
	£8,046,632	£750,750

3. Losses of £1,144,421 in respect of the land remediation relief claim for the accounting period ended 30 September 2008 have been carried back to the accounting period ended 30 September 2007.

(b) Portland Marina

4. The Appellant entered into an Agreement for Leases on 13 July 2007. The Agreement for Leases provided for, amongst other things, the Appellant to be granted:

   4.1. A lease by the Crown Estate over the foreshore and seabed at Portland Harbour ("the Crown Estate Lease"); and

   4.2. A lease by the South West of England Regional Development Authority ("SWRDA") over the land at Osprey Quay, Portland ("the SWRDA Lease").

5. The Appellant was granted 125 year terms under the Crown Estate Lease and SWRDA Lease. Both leases commenced on 25 March 2009 and were granted on 12 June 2009.

6. Following the Agreement for Leases, the Appellant commenced work on a new marina in October 2007. The marina opened in 2009.

   6.1. Appendices 1 to 3 [of the agreed statement of facts] contain photographs and a site plan showing the marina development. [Those Appendices are not included in this Decision]

   6.2. The site of the proposed marina was tidal and within the Environment Agency's Flood Zone 3a (High Probability).

7. The work carried out to construct the marina included:

   7.1. Reclaiming two acres of foreshore and seabed to form land on which the marina quayside facilities could be constructed. Without the work to reclaim land, those facilities could not have been built on that part of the site.

   7.2. Construction of an 875 metre dropped-stone sea wall ("the Dropped Stone Sea Wall") on the seabed surrounding the marina. This was constructed to prevent wave, surge and flood damage to buildings, land, boats and other

property in the marina (including on the quayside). Without the Dropped Stone Sea Wall it would not have been possible to build the marina because of the risk of this damage. The Dropped Stone Sea Wall has two access points, so sea water flows freely into and out of the marina by natural tidal action.

7.3. Construction of a sea wall around the border of the reclaimed land ("the Additional Sea Wall"). This was constructed to protect the reclaimed land and property upon that land from the erosive effects of the sea, wave damage and flooding.

7.4. Construction of a 1.2m high plinth under the land upon which buildings were constructed. This was built in order to comply with local flood risk assessments. The plinth was necessary to prevent damage to the proposed quayside buildings and property from wave, surge and flooding damage.

7.5. Construction of suitable drainage systems, including storm drains and culverts to ensure sufficient protection for the quayside buildings and property from damage due to the possibility of flooding or storm surges, should there be flooding arising on the Appellant's and/ or adjoining properties.

8. The Appellant's claim to land remediation relief is in respect of:

8.1. Construction of the Dropped Stone Sea Wall around the marina.

8.2. Construction of the Additional Sea Wall along the edge of the reclaimed land.

8.3. Raising the land bordering the sea (including the reclaimed land) above ground height by about 1.2 metres.

8.4. Construction of suitable drainage systems, including storm drains and culverts.

8.5. Staff costs relating to the above.

9. The costs of reclaiming land (formerly seabed and foreshore) as set out above do not form part of the Appellant's claim to land remediation relief.

Returns, assessments and appeals

10. The Appellant submitted its tax returns for the accounting periods ended 30 September 2008 and 30 September 2009 and HMRC made enquiries as shown in the table below.

APE	**Date return submitted to HMRC**	**Date HMRC opened enquiry**	**Date HMRC issued closure notice**	**Date of appeal**
30 Sep 08	29 Sep 09	17 Sep 10	15 Jul 11	27 Jul 11

30 Sep 09	27 Sep 10	23 Sep 11	3 Nov 11	8 Nov 11

11. On 15 July 2011 HMRC issued a consequential amendment for the accounting period ended 30 September 2007. The Appellant appealed against this on 31 August 2011.

(c) Tax

12. The Appellant's self assessment for the accounting period ended 30 September 2008 shows no Corporation Tax to be due and losses of £6,914,325, of which £1,144,421 have been carried back to the accounting period ended 30 September 2007, and £5,769,904 have been surrendered for a land remediation tax credit.

    12.1. HMRC's closure notice shows Corporation Tax of £306,939.20 to be due. This failed to take into account small companies relief and relief for charges on income. When these reliefs are taken into account, the amount of Corporation Tax due if the land remediation relief claim fails will be £296,764.86.

13. The only issue in dispute for the period ending 30 September 2007 is the claim for a loss to be carried back from 2008. The loss in 2008 is dependent upon the Appellant's land remediation relief claim being valid.

    13.1. If the 2008 loss cannot be carried back, Corporation Tax of £332,631.16 will be due for the period ending 30 September 2007.

14. The Appellant's self assessment for the accounting period ended 30 September 2009 shows no Corporation Tax to be due and trading losses of £1,619,482.

    14.1. If HMRC is successful at the hearing no Corporation Tax will be due and there will be trading losses of £868,732.

    14.2. This loss figure would be offset against property income for the same accounting period of £159,823 to give a loss carried forward of £708,909.

The evidence

20. We had in evidence before us a bundle of documents comprising the following: the Appellant's corporation tax returns for the relevant years and its claim for land remediation relief; correspondence between the Appellant and the Commissioners relating to that claim; the amendments made by the Commissioners to the corporation tax returns denying the relief; a development plan and design framework prepared by SWRDA for the development of the Osprey Quay site at Portland; an information memorandum dated January 2004 entitled "Marina Opportunity" prepared by agents of the Regional Development Agency seeking offers for the development of a marina at Portland; the Flood Risk Assessment dated March 2007 prepared by the specialist environmental consultants and engineers Atkins for the Appellant setting out the flood risk from tidal surges and wave overtopping to the site proposed for the marina, and the mitigation options available to defend the site from flooding; site plans and photographs of Portland Harbour, the marina site before development and after

completion of development, the reclaimed land, and the seawalls and revetments constructed to protect the marina and the land-side buildings and facilities; and the agreements for lease (and subsequent leases) whereby the Appellant acquired a 125 year lease of the land part of the site (from the Regional Development Agency) and of the foreshore and bed of the sea required for the marina (from the Crown Estate Commissioners).

21. The Appellant had one witness, Richard Reddyhoff, a director of and shareholder in the Appellant. Mr Reddyhoff's particular responsibilities in the Appellant's business are the project management of the Appellant's developments and the management as operations director of the Appellant's marina sites. Mr Reddyhoff produced two witness statements and gave oral evidence. He was cross-examined by Mrs Hodge for the Commissioners.

22. Mr Reddyhoff's evidence related to the following matters: his experience as project manager of major waterside development projects; the development of the Appellant's business and the extent of its marina holdings; the history of the Osprey Quay site and its use up to its sale to the Appellant; Portland Harbour and its sea wall; the extent of the land, foreshore, and seabed acquired by the Appellant for the purposes of developing the site as a marina; the development of the marina, including the land-side buildings and facilities and the boat mooring facilities; the recommendations made by Atkins for defending the site to the standard of a 1 in 200 years risk of flooding by seawater; the nature and extent of the sea defences and raised platforms constructed by the Appellant; and the different nature and extent of such defences had the Appellant been concerned to protect the land only (and not the marina moorings and the boats moored there).

23. Mr Reddyhoff was an entirely credible witness, and we accept his evidence in its entirety.

24. The Commissioners produced no witnesses.

25. From the evidence before us we find the following further facts in paragraphs 26 to 40 below.

26. The land at Osprey Quay, Portland has an area of 80 acres and comprises part of the narrow strip of land (the southern end of Chesil Beach), bounded by the sea on both sides, which links the Isle of Portland to the "mainland" at Weymouth. The sea boundary to the east comprises Portland Harbour, which is protected by sea walls constructed more than 100 years ago providing 2,400 acres of sheltered water.

27. Osprey Quay was until 1999 a Royal Naval Air Station, HMS Osprey. SWRDA acquired the site with the objective of regenerating the site in the light of the closure of HMS Osprey, and in pursuit of that objective produced in December 2001 a Development Plan. That Development Plan set out a number of proposed developments for different uses, including residential use, leisure and tourism use, community and recreational use, and marina leisure use to maximise the potential of the harbour frontage.

28. The Development Plan also identified flood risks to the site from the sea and the need for flood protection to protect the site from flooding for a 1 in 200 year event.

29. In January 2004 SWRDA produced a marketing brochure seeking expressions of interest for the development and operation of a marina on 4.5 acres of the Osprey Quay site fronting onto Portland Harbour and providing up to 600 berths for motor and sailing craft. At that time the proposed marina site (landside) was undeveloped with a hard surface of concrete or tarmacadam. The site was offered on a new 125 year lease, and it was recognised that the area of foreshore and seabed to be occupied by the marina would need to be leased from the Crown. The marketing brochure specifies that planning consents will be required for the use of the landside element of the marina, and also that it will be necessary to apply to the Portland Harbour Authority and other authorities for marine development below the existing High Water Mark.

30. The marketing brochure also specifies that Portland Harbour meets high environmental standards, having been identified as a "Sensitive Marine Area" and designated a voluntary "Marine Conservation Area". It also specifies that Environment Agency data for the year 2000 shows water quality ranging from "Good" to "Excellent".

31. In March 2007 the engineering and project management firm Atkins (which has a division specialising in the planning and management of coastal and marine environments) produced for the Appellant a Flood Risk Assessment undertaken for the development of the marina then proposed by the Appellant on the Osprey Quay site and on land which the Appellant planned to reclaim from the foreshore and seabed. The Flood Risk Assessment identified the following flood risks to the proposed marina site:

(1) It identified that the primary risk of flooding to the site was from an extreme tidal surge and easterly offshore waves entering Portland Harbour, notwithstanding that the sea walls of Portland Harbour moderate the wave climate within Portland Harbour and provide protection from offshore easterly waves. The level of risk is identified as 3a High Probability in the Environment Agency's flood zone categorisations, that is, with an annual probability of flooding, in percentage terms, of more than 0.5% (a risk level of more than 1 in 200 years);

(2) It identified a possible risk to the site from surface water flooding;

(3) As at March 2007 the land part of the site was protected from flood risk from Portland Harbour along its north-eastern boundary by flood defences along the frontage consisting of a rock revetment and a small concrete sea wall with an elevation of 2.51m above ordnance datum ("AOD" – effectively, above mean sea level). That defence level would be sufficient to defend against the then current predicted 1 in 200 year risk, but that standard of protection would deteriorate with rising sea levels, and flooding over these defences was seen as feasible within the 60 year lifetime of the proposed marina development – by that time the 1:200 year flood protection risk would decrease to a 1:10 year risk;

(4) As at March 2007 the north-western boundary of the site had no formal flood defence structures, leaving the site vulnerable to flooding at a level of 2.0m AOD. In consequence the site was at that time at risk of flooding when water levels in Portland Harbour rose above 2.0m AOD;

(5) The Environment Agency considers that a breach in the Portland Harbour breakwaters and sea walls is likely within the 60 year lifetime of the proposed marina development. Were that to happen, some of the sheltering effect of those defences would be lost, subjecting the Portland Harbour area to increased exposure to offshore waves. In consequence there is a residual risk of flooding of the marina site should there be a breach in the Portland Harbour defences.

32. The Flood Risk Assessment proposed the following measures to mitigate the identified flood risk to the proposed marina site and the development on that site and to meet the requirements in that regard stipulated by the Environment Agency:

(1) A new breakwater (the structure which became the 875m-long Dropped Stone Sea Wall) constructed offshore in Portland Harbour designed to dissipate wave action and to control wave overtopping of the shoreline defences of the marina site;

(2) A new revetment (the structure which became the Additional Sea Wall) around the sea-facing border of the land reclaimed from the seabed to protect that reclaimed land, constructed to a level of 2.5m AOD, and an extension of the existing seawall so as to protect the reclaimed land (as well as the existing land site protected by that seawall);

(3) Raised plinths with ground levels set to 3.4m AOD behind the Additional Sea Wall on which all new buildings would be constructed;

(4) A surface water drainage network to mitigate surface flooding in the event of a 1 in 30 year storm.

All of these recommended measures were subsequently carried out by the Appellant in the course of the development of the marina site.

33. On 13 July 2007 SWRDA, the Appellant, The Crown Estate Commissioners, and certain other parties entered into an Agreement for Leases in relation to the marina at Osprey Quay. The Appellant paid a capital sum in instalments as consideration for a licence to enter onto the site to carry out the development of the marina following which it was entitled to the grant of a lease (for a term of 125 years) from SWRDA in respect of the land, and a corresponding lease from The Crown Estate Commissioners in respect of the foreshore and bed of the sea at Portland Harbour, together comprising the landside and waterside area of the marina.

34. The Agreement for Leases required the Appellant to seek planning permission for the development of the marina site, and, following grant of planning permission, to carry out the development works to an agreed specification. That specification included the installation of a breakwater structure, the reclamation of a new parcel of land over the existing foreshore and seabed to a height of more than 2.1m AOD and the construction on that reclaimed land of finished levels and building plinths, the

construction of a flood protection up-stand kerb to the boundary of part of the site, and the installation of services and drainage infrastructure on the site.

35. SWRDA granted its lease to the Appellant on 12 June 2009. The Crown Estate Commissioners granted their lease to the Appellant also on 12 June 2009. In the Crown Estate Commissioners lease the demised premises are defined as "All that piece of land being part of the foreshore and bed of the sea at Portland Harbour in the County of Dorset shown coloured red, red hatched black, pin, pale blue and brown on the Plan and references to 'the Premises' include any part of them". The Plan shows that the foreshore and bed of the sea demised extends to the part of the seabed on which the breakwater (that is, the Dropped Stone Sea Wall) is constructed, and also the part of the foreshore and seabed which is reclaimed as land.

36. The Dropped Stone Sea Wall controls the wave environment in the marina area, protecting the marina site from predicted 1.5m wave action, and reducing the risk of flooding at extreme high tides or in storm surges. Within this breakwater are the floating pontoons for yacht moorings. The breakwater encircles much of the sea area of the marina site, but with two access points to allow craft easy passage from Portland Harbour into the marina, and allowing seawater and waves to flow freely into the marina by tidal and other natural action. Its purpose is to provide a defence against damage to the pontoons, yachts moored at the pontoon, and the landside site of the marina (including the reclaimed land) and the buildings and facilities constructed on the landside site.

37. If the breakwater had been constructed to function solely as a defence to flooding of the landside marina site it would have been constructed closer to the shoreline and would have been shorter in length.

38. The Additional Sea Wall comprises a perimeter revetment (of stone, concrete units or slabs, etc) separating the reclaimed land (and part of the existing land) from the sea within the area protected by the Dropped Stone Sea Wall. It is constructed on the foreshore (or what became foreshore on reclamation of the land), or partly on the foreshore and partly on dry land. It protects the land, and the buildings and facilities constructed on the land, from wave action and storm surge.

39. The raised plinth is constructed on the existing and reclaimed land to provide a ground level for buildings constructed on the plinth of 3.4m AOD. This provides a level above the 1:200 year predicted flood water level.

40. The new and refurbished surface water drainage system controls the run-off of surface water (whether from rainfall or from high seawater levels in Portland Harbour) from buildings on the marina site and open site areas sufficient to cope with a 1:30 year flood event.

The submissions

The Appellant's submissions

41. Mr Matthews appeared on behalf of the Appellant and made the following submissions at the hearing of the appeal.

42. The basis of the Appellant's claim for relief for expenditure on land remediation under Schedule 22 is that part of the land which it held as lessee (namely the foreshore) is in a contaminated state because it is in such condition, by reason of a substance on the land (namely, seawater), that there is a possibility of harm being caused (by tidal surges and waves), and it has incurred the expenditure in question on the land or adjoining land to mitigate the effect of that harm. The statutory language setting out the terms on which the relief is available is clear, and expresses the purpose of the legislation. The Appellant's expenditure, and the circumstances which gave rise to that expenditure, fall within the terms of the statutory provisions.

43. The Appellant argues that the foreshore is land, citing the authorities of *The Lord Advocate v Wemyss and Another* [1900] AC 48; *Mellor v Malmesley* [1905] Ch 164; and *Argyll & Bute D.C. v Secretary of State for Scotland*1976 S C 248. The seabed, however, may not be land, on the authority of the *Argyll & Bute* case.

44. The works on which expenditure was incurred and for which land remediation relief is sought by the Appellant were carried out to prevent wave, surge and flood damage to the land, buildings, boats and other property in the marina site. The works were essential in that the marina could not have been constructed had they not been carried out. They are works which the Appellant was required to carry out under the terms of the Agreement for Leases.

45. When the Appellant acquired the marina site (under the Agreement for Leases), part of the site (which was land, being the foreshore which it acquired from The Crown Estate Commissioners) was in a contaminated state as defined by paragraph 3(1), that is, by reason of a substance (seawater) on that land that resulted in the possibility of harm being caused (harm being damage to property, as defined in paragraph 31(1)). The possibility of harm being caused to property by reason of the seawater arises because of the risks of wave action, storm surges and flooding, as identified in the Flood Risk Assessment.

46. The expenditure has to meet the conditions of paragraph 2 in order to qualify for relief. This is so in the Appellant's case: the expenditure is on land (the foreshore) all or part of which is in a contaminated state; the expenditure was incurred on the carrying out of operations on the land (foreshore) or adjoining land (the marina landside); the expenditure was on employee costs or on materials; the expenditure would not have been incurred had the foreshore not been in a contaminated state; and the expenditure was not subsidised.

47. Further, the Appellant is not within the restriction on relief comprised in paragraph 1(5) (the so-called "polluter pays" restriction): the foreshore leased to the Appellant were not contaminated by reason of the possibility that seawater would

cause harm to property "wholly or partly as a result of any thing done or omitted to be done at any time by" the Appellant. The Appellant acquired its interest in this land at a time when the seawater covered the foreshore (as it did at high tide), and although the works carried out by the Appellant (such as the construction of the Dropped Stone Sea Wall) failed to eliminate the harm which the seawater might do, that did not mean that the foreshore was in a contaminated state as a result of the Appellant's actions. Failure to remove the seawater does not mean that the Appellant caused the contamination.

48. The Appellant argues that the context and basic objectives of the provisions of Schedule 22 can be discerned from the documents prepared by HM Treasury prior to the introduction of the legislation (in the Pre-Budget Report 2000 and the Budget Report 2001) and in the Explanatory Notes accompanying the Finance Bill 2001. That context is to achieve, by means of tax incentives, the Government's aim of regenerating towns and cities by bringing back into use urban land which is under-used and bringing contaminated land back into productive use by making development of such land more viable (see Budget Report 2001 at pages 625 and 633). The circumstances of the Appellant, and the work it carried out in protecting from harm the land at Osprey Quay site so that it could be developed as a marina, were within those aims. Therefore the Commissioners cannot, even at the broadest level of policy, contend that the Appellant's circumstances are not within the purpose or scope of the provisions for tax relief for expenditure on land remediation.

The Commissioners' submissions

49. Mrs Hodge appeared at the hearing to present the Commissioners' case. She argued that land remediation relief was introduced to provide incentives for "brownfield" land sites to be brought back into use and developed in circumstances where the cost of cleaning up contaminated land was otherwise prohibitive. If the provisions of Schedule 22 are construed to give effect to that purpose, the Appellant's circumstances fall outside the scope of the relief. The land acquired by the Appellant (Osprey Quay) was not a disused brownfield site, nor had it been contaminated as a result of any industrial activity. The Appellant was not cleaning up contaminated land, but merely constructing seawalls which provided the normal protection for a marina (both waterside and landside).

50. The Appellant's claim for relief is based on the contention that the foreshore is "land" for the purposes of the land remediation relief provisions – it is a primary condition of the relief that land in a contaminated state was acquired by the claimant. Land is defined to mean "any estate, interest or rights in or over land" – a definition which excludes the expression "land covered with water", which is found in the definition of "land" in the Interpretation Act. Thus not only the seabed, but also the foreshore (which at any time is partially or totally covered by seawater) is excluded from "land" for the purposes of the relief. The only "land" acquired by the Appellant is the Osprey Quay site itself, acquired by lease from SWRDA, and that was not in a contaminated state at the time it was acquired.

51. Even if the foreshore were "land" for these purposes, that land was not in a contaminated state within the terms of paragraph 3: the land may be contaminated by reason of a substance such as water on the land, but it is a requirement that the condition of the land (that is, as contaminated) must cause the harm or the possibility of harm to property – in the Appellant's case it is the seawater (the contaminant) not the land which is the cause of possible harm. It follows that the Appellant did not acquire land which at the time of its acquisition was in a contaminated state, and the condition within paragraph 1(1)(b) is not satisfied.

52. Further, the Commissioners argue, neither the foreshore nor the landside part of the marina were in a contaminated state when acquired by the Appellant, because there was at that time no harm, or possibility of harm, being caused: harm is defined to mean (in the Appellant's circumstances) harm to property, but the property which the Appellant claims is at risk of harm from wave action or storm surge is the buildings it built on the landside of the marina (in particular the "recreational" buildings, such as a restaurant) and the boats and pontoons on the waterside of the marina, none of which existed when the Appellant acquired the foreshore. Had the marina not been constructed there would have been no reason to build the various flood defences – existing sea defences were adequate to protect the land at Osprey Quay as it was (and as it was used) when the Appellant acquired the foreshore.

53. The Commissioners' final submission is that, even if the foreshore is land, and that land was in a contaminated state when it was acquired by the Appellant, the provisions of paragraphs 1(5), 2(5) and 7 apply to the effect that no relief is available for the expenditure incurred on the sea and flood defences. Paragraph 1(5) is the "polluter pays" provision: if the land is in a contaminated state wholly or partly as a result of the Appellant's actions, no relief can be claimed. This is the case since there was no risk of harm to property until the Appellant carried out the commercial development of the marina. Further, the Appellant needed to construct the Dropped Stone Sea Wall as a breakwater to provide calmer water for the craft moored alongside the pontoons, as was apparent from the shape and extent of that breakwater, and paragraph 2(5) (taken with paragraph 7) stipulates that the claimant must show that the expenditure would not have been incurred had the land not been in a contaminated state. The Appellant cannot show that it has increased its expenditure by constructing the Dropped Stone Sea Wall because the land is in a contaminated state in circumstances where it would have constructed that breakwater in any event.

Discussion

54. The issue we have to decide is whether the Appellant's capital expenditure on certain works and structures is qualifying land remediation expenditure for the purposes of Schedule 22. If so, the Appellant is entitled, for its corporation tax purposes, to the generous reliefs for which Schedule 22 provides in respect of such expenditure. There is no dispute between the parties as to the quantum of the claim, and we are asked to give our decision on the principle of whether the agreed amount of expenditure meets the conditions which qualify it for the relief.

55. It is necessary, however, to set out the different works or structures on which the Appellant incurred the expenditure in the course of constructing a marina in Portland Harbour and on part of the Osprey Quay site at Portland, and to identify certain key characteristics. It is also necessary in our view to consider whether the expenditure on the different works or structures viewed individually meets the conditions required to qualify as land remediation expenditure. The works taken together comprise a system of sea defences, but they are identified in the Flood Risk Assessment, and in the case made by the Appellant, as separate and distinct works or structures.

56. The most substantial structure is the Dropped Stone Sea Wall, constructed entirely on the seabed (presumably by the process of dropping stones individually or in wire mesh containers until they are piled up to the agreed height above sea level), and providing a breakwater around much of the perimeter of the marina. No part of this structure rests on the foreshore or on dry land (the foreshore is the area between mean low water and mean high water, and is in the ownership of the Crown). A principal function of this structure is to provide calmer water (that is, reduced wave action) within the waterside part of the marina – as Mr Reddyhoff expressed it, to provide more comfortable moorings for the craft moored to the floating pontoons which are an important feature of the marina. This structure acting as a breakwater also provides some protection from exceptional wave, tide or storm conditions for the dry land area of the marina including the buildings and other facilities constructed in that area – that protection is not absolute, because the breakwater provides points of access to Portland Harbour from the marina (waterside) site, but, in conjunction with the Additional Sea Wall revetment, is to a standard which the relevant authorities consider provides an acceptable risk after taking account of anticipated changes in sea level over time. If this structure were intended only to protect the dry land area of the marina it would be constructed closer to the shore, and would not be as long as the 875m it comprises.

57. The next most substantial structure is the Additional Sea Wall, that is, a sea wall or revetment which borders the dry land area of the marina (and in particular, that part which has been reclaimed from Portland Harbour). It is constructed on the foreshore (including an area which became foreshore on the land reclamation), or partly on the foreshore and partly on the dry land adjoining the foreshore. Its sole function is to protect the dry land area of the marina (including the buildings and facilities constructed in that area) from flooding from exceptional wave action or storm or tidal surge, again to a specified acceptable risk standard. It provides a second line of defence should the Dropped Stone Sea Wall prove inadequate for that task (and bearing in mind that the Dropped Stone Sea Wall is not, as mentioned, a complete defence – by reason of the access points it provides to the marina there remains some direct exposure to the conditions in Portland Harbour).

58. The third structure is a 1.2m high plinth constructed on the dry land area of the marina (including that part reclaimed from Portland Harbour) on which various buildings used by those working at the marina and those using and visiting the marina's facilities are constructed. This is intended to protect those buildings from flooding risk to an acceptable risk standard.

59. The final structure is a system of storm drains and culverts comprising a surface water drainage network constructed on the dry land and draining onto the foreshore designed to divert floodwater away from buildings on the marina site and ensure it is drained from the site as quickly and efficiently as conditions permit.

60. We deal first with the Commissioners' argument that the Schedule 22 provisions should be construed to give effect to Parliament's intention and purpose, which is to be found from the context of the papers and reports which introduced those provisions. That intention and purpose is, the Commissioners' contend, to provide an incentive to bring "brownfield land" in urban areas back into productive use by giving relief for the costs of cleaning up land contaminated by industrial activity. The works carried out by the Appellant in building a marina are beyond the scope of the intention and purpose of the relief.

61. We consider that the correct approach is to discern the intention of Parliament from the language of the statute as read in the context of the legislation of which it forms part. That principle is set out in *R v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349 and in particular in the speech of Lord Nicholls of Birkenhead. Non-statutory, or extraneous, material may be a useful tool in identifying the purpose of legislation, but the fundamental principle of legal certainty requires that the language of the legislation itself should be regarded as the means by which Parliament has accurately expressed its intentions. Should that language be ambiguous or obscure, or should it give rise to an absurdity, then external material such as ministerial statements may assist in setting the legislative background against which the words of the legislation can be understood.

62. We see no reason to look beyond the words of Schedule 22 to discern the purpose of the land remediation relief provisions. In particular, we cannot accept the Commissioners' view that the language of the statute should be read to confine it in some way to cases of sites contaminated by industrial activity. Parliament chose to enact the legislation in wide terms, defining land which is in a contaminated state by reference to the harm, or the possibility of harm, caused by any natural or artificial substance (solid, liquid, or gas) in, on or under the land, and providing relief for expenditure which prevents or minimises that harm or remedies or mitigates the effects of it. Whilst the language of the legislation is a little complex, it is not in our view obscure or ambiguous, nor does it give rise to any absurdity. We therefore see no basis on which the language of that legislation is required to be read in the more restricted sense which the Commissioners argue is specified by the terms of the Budget Reports and Explanatory Notes to which they referred us. Parliament later concluded (in 2009) that it wished to narrow the terms of the relief specifically to contamination of land resulting from industrial activity, and it expressed that narrower purpose by using different language.

63. Turning, then, to the language of Schedule 22, it is necessary to identify what is "land" for the purposes of the land remediation relief provisions, and how that relates to the different structures for the expenditure on which the Appellant is claiming relief.

64. Land, for Schedule 22 purposes, is defined at paragraph 31(1) to mean "any estate interest in or rights in or over land". That definition does not expressly include "land covered with water", which is to be found in the definition of land in the Interpretation Act 1978. The Appellant's submission is that, at common law, "land" includes the foreshore (which, of course, is entirely uncovered by water briefly at the lowest of neap tides, but, correspondingly, is completely covered by water briefly at the highest of spring tides), and that accordingly the Appellant's leasehold interest in the foreshore which is held under the lease granted by The Crown Estate Commissioners is "land" for Schedule 22 purposes. The Appellant does not seek to argue that the seabed is "land". The Commissioners argue that the foreshore, although it might be land at common law, is not "land" for Schedule 22 purposes since the definition for those purposes does not include "land covered with water".

65. We agree with the Appellant on this point: the foreshore is "land", notwithstanding that at times it is covered with seawater. That appears to be the case at common law from the authorities cited to us (see paragraph 43 above), and in itself is an unexceptional proposition. It is not "land covered with water" since at times it is not so covered, and therefore the issue of whether or not that expression is to be treated as implicitly included or excluded from the definition of "land" for Schedule 22 purposes is irrelevant.

66. Neither party advanced the proposition that the seabed (that is, the area at all times covered in seawater, being below tidal low water mark) is land, either at common law or for Schedule 22 purposes and accordingly our decision proceeds on the basis that it is not land for such purposes.

67. The clear emphasis on the legislation is upon "land": paragraph 1(1) speaks of land acquired by a company, of that land being in a contaminated state, and of the land remediation expenditure being in respect of that land. The first of the conditions in paragraph 2 which expenditure must meet if it is to qualify as land remediation expenditure is that it is expenditure on land, at least part of which is in a contaminated state.

68. We cannot see that the Appellant's expenditure on the Dropped Stone Sea Wall qualifies for relief. All that expenditure is expenditure on works on the seabed or in the sea itself. The parties agree that the seabed is not land. If it is not land it cannot be land in a contaminated state, and that expenditure cannot meet the first condition of paragraph 2.

69. Mr Matthews argued that the expenditure should be viewed as part of the expenditure on the entirety of the marina project, and that taking the project as a whole land in a contaminated state (the foreshore) was acquired and expenditure was incurred "in relation to" that land to mitigate the effects of the harm by reason of which the land was contaminated, as provided in paragraph 4(2) and (3).

70. That, in our view, is too broad a canvas in relation to this particular project. We see no basis on which, where there are distinct items of works carried out, it is required for the purposes of this legislation to regard them, and the expenditure

incurred to carry them out, as part of a single activity or item of land remediation expenditure. The correct approach is to examine the individual works carried out, and to determine whether the expenditure on those particular works meets the qualifying conditions. If that approach is applied to the expenditure on the Dropped Stone Sea Wall it is clear that it is not expenditure on land, all or part of which is in a contaminated state.

71. That this approach is the correct approach in the circumstances of the Appellant is underlined by the fact that the Dropped Stone Sea Wall is constructed where it is, and with the dimensions it has, at least in part to carry out a function unrelated to protecting damage to property. The evidence of Mr Reddyhoff was that if the breakwater had been constructed to ensure that the marina land site development was protected to the required standard from wave action and tidal surge, it would have been constructed closer to the shore line and consequently at a shorter length (and, it can be assumed, at a lesser cost). It functions as a breakwater to define the marina waterside and, by reducing wave action, to provide a more comfortable mooring for the craft moored at the floating pontoons. Whilst we agree with the Appellant that duality of purpose does not disqualify expenditure from land remediation relief, nor is there any provision to apportion expenditure according to purpose or function, it is in these circumstances correct to examine whether the expenditure, viewed separately, meets the qualifying conditions for relief.

72. We therefore conclude that the Appellant is not entitled to land remediation relief for its expenditure on the works comprising the Dropped Stone Sea Wall.

73. By contrast, the works comprising the Additional Sea Wall are constructed on land (in part the foreshore and in part land above mean high water). The expenditure is therefore on land. The issue is whether that land was at the time of the expenditure in a contaminated state (and if so, was in such a state when it was acquired by the Appellant under the Agreements for Lease); and if it was, whether the expenditure in question was on "relevant land remediation".

74. In relation to expenditure on the Additional Sea Wall we agree with the Appellant's case. There is seawater on the foreshore, and by reason of that seawater there is the possibility of harm being caused in terms of damage to property. That possibility is confirmed by the expert Flood Risk Assessment. Therefore the land (or part of the land – the foreshore part – on which the expenditure on the Additional Sea Wall was incurred) was in a contaminated state as defined by paragraph 3(1), and the first condition of paragraph 2 is met. It is not material that the property at risk of damage is not located on the land in a contaminated state. The land was in its contaminated state at the time it was acquired by the Appellant.

75. The expenditure on the Additional Sea Wall was expenditure on relevant land remediation: the works on which the expenditure was incurred were works in relation to the foreshore or the adjacent land above high water mark, and they were for the purpose of mitigating the effect of the harm by reason of which the land was in a contaminated state – they were to reduce the risk of seawater flooding the marina site

in extreme conditions caused by wave action or tidal surge. Therefore the second condition of paragraph 2 is met.

76. There is no dispute that the expenditure was incurred on employee costs or on materials, and so the third condition of paragraph 2 is met. It is also agreed that the Appellant's expenditure was not subsidised, so the fifth condition of paragraph 2 is met.

77. There was dispute about the fourth condition of paragraph 2, that "the expenditure would not have been incurred had the land not been in a contaminated state". Paragraph 7(2) states that if expenditure is increased because the land is in a contaminated state, then the amount by which it is so increased is the amount which qualifies for relief. The Commissioners' submissions on these provisions also encompassed the "polluter pays" provision of paragraph 1(5) – expenditure does not qualify if the land was in its contaminated state wholly or partly as a result of the actions or failings of the person claiming relief.

78. The basis of the Commissioners' case in relation to these provisions is that whilst the Osprey Quay site was in its undeveloped state (including whilst it was used as a Royal Naval Air Station) it was not necessary to provide the further protection from flooding which the Appellant carried out – such protection was required only because the Appellant intended to develop the site as a marina with structures and buildings on the marina landside – in that respect there was no contamination (because no possibility of harm) until the Appellant, by its development, brought into being the situation where property could possibly be damaged (that is, the possibility of harm being caused by the seawater).

79. We do not accept such a case. Taking the wider policy point first, these provisions, even on the narrower "brownfield site" basis for which the Commissioners argued, must apply in circumstances where the damage to property or possibility of damage to property concerns property to be constructed on the land in the course of its regeneration – the whole purpose of the relief is to encourage new development and new uses for land where such development is prevented or inhibited because the latent condition of the land might cause damage to the potential development. The contaminated state of the land whilst it is used as, say, a factory may not cause harm or the possibility of harm whilst it is so used, or whilst the factory premises remain on the site, but that may cease to be the case if the factory is demolished and residential or other commercial development is carried out. It would be contrary to the purpose of the relief if the developer of the site was in those circumstances regarded as the person who had brought about the contaminated state of the land.

80. Nor does the language of Schedule 22 support the Commissioners' case. Land is in a contaminated state where by reason of the substance in, on or under the land damage to property is being caused or *there is a possibility of damage to property being caused*. That language encompasses what one may regard as the latent, or acceptable, condition of contamination, where some change to the state or use of the land causes, or may cause, what was latent or acceptable to become active or no longer acceptable. It does not specify that the possibility of damage is limited to

damage to property existing as at the time the land is acquired by the company claiming relief. Prior to the Appellant acquiring the land there was the possibility of damage to property from seawater flooding, but that was acceptable (presumably) whilst the land was used as an airfield. The development of the land for the purposes of a marina did not bring about the possibility of damage to property from seawater flooding, but it resulted in what was acceptable being no longer acceptable because of the nature of the property susceptible to such damage. It cannot be said, in the terms of paragraph 1(5), that the foreshore was in a contaminated state wholly or partly as a result of any action or failing on the Appellant's part.

81. We might add, although it is not strictly relevant, that there was nothing extraordinary – in terms of being particularly susceptible to seawater flooding, or in need of special protection from such flooding – in the property constructed by the Appellant on the marina site. Apart from the facilities for repairing and storing boats, the property comprised shops and a restaurant and similar facilities – thus the kind of commercial development to be expected in any regeneration of a site previously used for a specialised purpose.

82. We therefore conclude that the Appellant, in relation to its expenditure on the Additional Sea Wall, satisfied all the conditions set out in paragraph 2 for claiming land remediation relief, and is not precluded by paragraph 1(5) from claiming such relief. Its appeal in respect of that part of its expenditure is allowed.

83. We turn next to the two remaining items of expenditure for which the Appellant claims relief, namely the expenditure on the plinth on which buildings were constructed, and the surface water drainage network. We can deal with these two items together, as they share a characteristic which separately identifies them, in that the works on which the expenditure was incurred were carried out on dry land on the marina site, that is, not to any extent on the foreshore, but on land above the high water mark. The Appellant's case is that it acquired the foreshore, which was land in a contaminated state, and that it incurred this particular expenditure on relevant land remediation, in that, in the terms of paragraph 4, the works were carried out in relation to land adjoining or adjacent to the land in a contaminated state, and those works were for the purpose of minimising or mitigating the effects of the damage to property by reason of which the foreshore was in a contaminated state.

84. However, the first condition in paragraph 2 for expenditure to comprise qualifying land remediation expenditure is that it must be expenditure on "land all or part of which is in a contaminated state". The land on which this particular expenditure was incurred, being above mean high water (whether originally or following reclamation) was not, as to any part, land in a contaminated state. That is to say, it was not land in such a condition, by reason of seawater on the land, that there is a possibility of damage being caused to property. Put shortly, it is the foreshore that is the land in a contaminated state, not the land on which the plinth and drainage system have been constructed. The plinth and the drainage system were constructed because the foreshore was land in a contaminated state, and that posed a risk of damage to property on land which itself was not in a contaminated state. The terms of

the relief, which is available for expenditure on land all or part of which is in a contaminated state, do not extend to these circumstances.

85. Therefore the Appellant's expenditure on such works does not qualify for land remediation relief under Schedule 22, and the Appellant's appeal in respect of that part of its expenditure is dismissed.

Decision

86. The Appellant's appeal so far as it relates to its expenditure on the Dropped Stone Sea Wall is dismissed.

87. The Appellant's appeal so far as it relates to its expenditure on the Additional Sea Wall is allowed.

88. The Appellant's appeal so far as it relates to its expenditure on the plinth for buildings constructed on the dry land area of the marina site, and the surface water drainage network also constructed on the dry land area of the marina site, is dismissed.

89. This decision determines in principle the matters under appeal. The parties may apply to the tribunal to determine those matters conclusively if required.

Right to apply for permission to appeal

90. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 26 June 2013