Trinity Term
[2024] UKSC 25
On appeal from: [2022] EWCA Civ 1520

JUDGMENT

Centrica Overseas Holdings Ltd (Appellant) *v* Commissioners for His Majesty's Revenue and Customs (Respondent)

before

Lord Hodge, Deputy President
Lord Stephens
Lady Rose
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
16 July 2024

Heard on 19 March 2024

Appellant
James Rivett KC
Ronan Magee
(Instructed by Pinsent Masons LLP (London))

Respondent
David Ewart KC
James Henderson
Barbara Belgrano
(Instructed by HMRC Solicitors Office & Legal Services (Stratford))

LADY SIMLER (with whom Lord Hodge, Lord Stephens, Lady Rose and Lord Richards agree):

1. Introduction

1. This appeal raises the question whether professional advisory fees can be deducted by a holding company with investment business when calculating its profits for the purposes of determining its liability to corporation tax in the circumstances described below. The deduction of "expenses of management" is provided for by section 1219 of the Corporation Tax Act 2009 ("the 2009 Act"). Like trading companies which can deduct revenue expenses (albeit in their case, only when incurred wholly and exclusively for the purposes of their trade), investment companies cannot deduct expenses of management if they constitute capital expenditure because there is an express carve out in section 1219(3)(a) for expenses of management "of a capital nature". The question on this appeal, accordingly, is whether the professional advisory fees, though now accepted as expenses of management, were revenue or capital expenditure for deduction purposes.

2. The question arises in the context of an investment holding company within a corporate group. That context is important. An investment holding company is different from an investment dealing company or trading business. The principal activity of an investment holding company, whether the "topco" of a group or an intermediate holding company, is to hold investments. Its investments are capital investments held in its subsidiaries for the purposes of long-term investment, from which it derives value. Its investment business is the holding of shares and the arrangement of the affairs of its subsidiaries which that holding enables, including the disposal and acquisition of companies, the general control of the subsidiaries to ensure their value is maintained, and the bringing in of income in the form of dividends from those subsidiaries. In other words, its business is to manage its capital assets, not to trade with them.

3. The appellant is Centrica Overseas Holdings Limited ("COHL"), an intermediate holding company in the Centrica Plc group. In July 2005, COHL acquired the share capital of Oxxio BV ("Oxxio"), a Dutch holding company with four subsidiaries. Centrica Plc resolved to sell Oxxio in June or July 2009. In March 2011, following a lengthy process, the assets of two of the Oxxio subsidiaries and the shares in a third subsidiary were sold by COHL to the Eneco Group NV ("Eneco"). Between July 2009 and March 2011, COHL paid professional fees in connection with that transaction for services ranging from considering how best to realise value from the Oxxio business to advice on structuring and preparing the details of the final transaction. The services were provided by Deutsche Bank AG London ("Deutsche Bank"), PricewaterhouseCoopers ("PwC") and De Brauw Blackstone Westbroek ("De Brauw").

4. The fees disbursed by COHL for those services up to 22 February 2011 totalled £2,529,697. The fees were claimed by COHL as a deduction for revenue expenses of management of its investment business under section 1219 of the 2009 Act in its company tax return for the accounting period ending 31 December 2011. I shall refer to these fees, as they have been referred to below, as "the Disputed Expenditure".

5. COHL's claim for relief was disallowed in its entirety by the Commissioners for His Majesty's Revenue and Customs ("HMRC") on the basis that the Disputed Expenditure was not deductible under section 1219 because it was not an expense of management and even if it was, it was capital in any event and so excluded by section 1219(3)(a) of the 2009 Act. COHL appealed that decision.

6. Although COHL's appeal to the First-tier Tribunal (Judge Marilyn McKeever, "the FTT") was dismissed on a basis that is no longer relevant, in a detailed and careful decision dated 23 April 2020 [2020] UKFTT 197 (TC), the FTT analysed the professional and advisory services provided to COHL and concluded that most of the fees paid to Deutsche Bank (including a contingent fee) and PwC, and possibly some to De Brauw, were properly viewed as expenses of management. On appeal the Upper Tribunal (Fancourt J and Judge Jonathan Cannan, "the UT") was satisfied that the FTT had applied the correct legal test and was entitled to reach the conclusion that expenditure on the fees of Deutsche Bank and PwC was expenses of management. There was less clarity about the findings related to the De Brauw fees and this issue was remitted to the FTT for further determination: [2021] UKUT 200 (TCC), [2021] STC 1842.

7. So far as the capital expenditure question is concerned:

(i) The FTT noted that the disposal of the Oxxio business was a capital transaction. Fees for services of Deutsche Bank and PwC incurred up to the offer made by Eneco in January 2011 were nonetheless revenue expenses of management and deductible; those incurred afterwards were incidental to the transaction and capital in nature. The UT agreed, stating that, in a case like this, expenses of management are likely to be revenue expenses because the test is similar; the expenditure was not one-off in nature because COHL had many capital investments apart from Oxxio which might involve management from time to time including appraising an acquisition, disposal or restructuring; and because the Oxxio business would not necessarily be sold.

(ii) However, the FTT found that the De Brauw fees were in a different category. Their work was all, or mostly, to do with a potential or actual transaction, its effect being to bring about the disposal of the Oxxio business. The FTT held that the De Brauw fees were therefore capital in nature. The UT

disagreed: to the extent that the De Brauw fees were expenses of management because they informed decision-making about the disposal of the Oxxio business, the UT held they were revenue in nature and the FTT was wrong to hold otherwise. The correct treatment of the De Brauw fees was remitted to the FTT.

8. In the Court of Appeal, Singh LJ (with whom Newey LJ and Sir Launcelot Henderson agreed) held that the FTT was entitled to conclude that the Disputed Expenditure constituted expenses of management within section 1219(1) of the 2009 Act. There is no appeal from that decision. On the separate question whether the fees were capital in nature, the Court of Appeal held that the applicable test in this context is different from the test for whether expenditure is an expense of management. The FTT had conflated the two in error of law and the error was not corrected by the UT. The test is the same as that for capital expenditure for an ordinary trading business. Whether an item of expenditure is revenue or capital in nature is a question of law and accordingly, the Court of Appeal was required to resolve this question applying the findings of fact made by the FTT. It held that the Disputed Expenditure was capital in nature and not deductible as an expense of management accordingly: [2022] EWCA Civ 1520, [2023] 1 WLR 316.

9. COHL now appeals to the Supreme Court on the capital expenditure question only. There are two grounds of appeal:

(1) Ground 1 contends that the Court of Appeal erred in finding that, in the context of section 1219 of the 2009 Act, the scope of "expenses of management" of an investment business which are of "a capital nature" and therefore excluded by section 1219(3)(a) is to be identified on the basis of the principles which apply for the identification of expenditure which constitutes "items of a capital nature" incurred by a trading company and excluded by section 53(1) of the 2009 Act.

(2) Ground 2 contends that the Court of Appeal failed in any event to identify that, based on the unchallenged findings of primary fact made by the FTT, the Disputed Expenditure did not constitute expenses "of a capital nature" for the purposes of section 1219(3)(a) even if the applicable principles are those that apply in the context of section 53(1) of the 2009 Act.

10. COHL's case in essentials is that the exclusion for expenditure of a capital nature in section 1219(3)(a) of the 2009 Act is different to that in section 53(1) and has very limited effect. It serves only to ensure that there is no deduction for the acquisition costs of investments made by an investment business, together with a limited category of items of fixed capital (such as the acquisition costs of a building from which the investment business is conducted). The exception was enacted simply to make plain that

a taxpayer with investment business cannot deduct this narrow category of expenditure which might constitute expenses of management (given the width of that concept as interpreted by the courts). It serves no wider purpose. On this basis, the Court of Appeal was not entitled to interfere with the evaluation of the specialist tribunals that the Disputed Expenditure was not capital expenses of management and not therefore excluded by the provisions of section 1219(3)(a).

11. COHL's alternative case, if its primary argument is rejected, is that existing case law in relation to section 53(1) of the 2009 Act itself emphasises that the capital/revenue analysis turns in large part upon the nature of the business in question, and investment businesses present a very different context to the business of trading companies. Applying that approach, the circumstances are such that expenditure relating to the core function of an investment management business is not excluded as capital expenditure. Whatever the scope of the concept of capital expenditure in this context, COHL also contends that the unchallenged findings made by the FTT demonstrate that the Disputed Expenditure was incurred to procure advice to enable decisions to be made about how to realise value from the Oxxio business. Such expenditure is not capable of being properly characterised as capital expenditure.

12. For reasons I shall develop below, I respectfully agree with the Court of Appeal's judgment and do not accept COHL's arguments. In summary, there is a clear distinction between the question whether something is an expense of management and the separate question whether that expense is capital in nature and the FTT and UT wrongly conflated the two. The phrase "expenses of a capital nature" in section 1219(3)(a) of the 2009 Act has the same meaning as "items of a capital nature" in section 53(1) of the same Act, and the well-established principles applicable to distinguishing between capital and revenue expenditure in the context of trading companies apply equally in this context. Further, the question whether expenditure is capital or revenue in nature is a question of law. The primary findings of fact made by the FTT (which are not open to challenge on this appeal) lead to the conclusion that the Disputed Expenditure, while constituting expenses of management of COHL's business, was of a capital nature. A commercial decision was taken to sell the Oxxio business, an identifiable capital asset. The object and purpose (in an objective sense) of the Disputed Expenditure was to obtain advice and services to achieve that disposal. That different options were considered and there was a possibility of the transaction not going through, does not alter the commercial reality that a decision had been taken to dispose of Oxxio. The Disputed Expenditure was one-off in nature. The fact that COHL has many capital investments apart from Oxxio which might involve management from time to time including in appraising an acquisition, disposal or restructuring does not alter that. Nor does this conclusion prevent expenses of an investment company from being deductible as revenue expenses of management. Its day-to-day costs of staff dealing with the business of management, rents, administration costs and repairs are all deductible revenue expenses of management, and not capital in nature. Like the Court of Appeal, I consider that all the Disputed Expenditure was capital in nature and falls within the

exception in section 1219(3)(a) of the 2009 Act. Accordingly, I would dismiss this appeal.

2. The relevant legislation

13. Part 16 of the 2009 Act is concerned with companies with investment business. A company with investment business is defined by section 1218(1) of the 2009 Act as a company whose business consists wholly or partly of making investments (section 1218 was renumbered as section 1218B with effect from 1 April 2014, but is otherwise identical). It includes holding companies and intermediate holding companies, which acquire investments with a view to holding them. It is common ground that COHL was a "company with investment business" for these purposes.

14. COHL is therefore liable to corporation tax on its "profits" derived from its investments, which are defined by section 2(2) of the 2009 Act to mean "income and chargeable gains" except where the context otherwise requires. Its profits in the form of income (computed in accordance with income tax principles) and its profits in the form of chargeable gains (computed in accordance with capital gains tax principles under section 2D(1) of the Taxation of Chargeable Gains Act 1992 (the "TCGA")) are aggregated for the relevant accounting period to arrive at the "total profits": see section 4 of the Corporation Tax Act 2010. At this stage any amounts which can be relieved against the company's total profits of the period are deducted from the aggregate amount (see section 4 of the Corporation Tax Act 2010) and this is where section 1219 of the 2009 Act comes into play.

15. The relief in section 1219 (as amended by section 1177 and schedule 1 para 683 of the Corporation Tax Act 2010 for accounting periods ending on or after 1 April 2010) is provided for, so far as material, in the following terms:

> "**1219 Expenses of management of a company's investment business**
>
> (1) In calculating the corporation tax to which a company with investment business is liable for an accounting period, expenses of management of the company's investment business which are referable to that period are allowed as a deduction from the company's total profits.
>
> …

> (2) For the purposes of this section expenses of management are expenses of management of a company's investment business so far as –
>
> (a) they are in respect of so much of the company's investment business as consists of making investments, and
>
> (b) the investments concerned are not held for an unallowable purpose during the accounting period to which the expenses are referable.
>
> (3) But –
>
> (a) no deduction is allowed under this section for expenses of a capital nature, …"

16. There are special rules whereby certain items are treated as expenses of management (see section 1221 and Chapter 3 of Part 16) and rules restricting certain specified deductions are contained in Chapter 4 of Part 16. None of these special rules is relevant in this case.

17. The relief now contained in section 1219(1) of the 2009 Act was originally introduced by section 14 of the Finance Act 1915, later replaced by section 33 of the Income Tax Act 1918 and then by section 75 of the Income and Corporation Taxes Act 1988 ("the Taxes Act 1988"). The relief was introduced to counter the unfairness suffered by some investment companies which were taxed by deduction on the income from their investments and could not bring the management expenses of earning such income into account in the same way as an ordinary trading company could do as part of the calculation of the profits on which they were taxable (see the explanation of Lord Wright to this effect in *Simpson v Grange Trust Ltd* [1935] AC 422, 425). It was also available to life assurance companies when taxed on their investment income rather than on their profits under Case I of Schedule D.

18. The capital exclusion in section 1219(3) of the 2009 Act was first introduced by section 38 of the Finance Act 2004 which substituted a new version of section 75 of the Taxes Act 1988 for the existing one, for accounting periods beginning on or after 1 April 2004. Section 75(3) as substituted provided that expenses of a capital nature are not expenses of management. This was subject to two exceptions, neither of which is relevant in this case.

19. The analogous rule relating to the exclusion of expenses of a capital nature in the calculation of profits for ordinary trading companies is now to be found in Chapter 4 of Part 3 of the 2009 Act which deals with "Trade profits: rules restricting deductions". The relevant rule is in section 53(1) which provides:

> "In calculating the profits of a trade, no deduction is allowed for items of a capital nature."

3. The meaning of "expenses of management" as discussed in *Sun Life* and *Camas*

20. The courts have had to consider the scope of the relief for expenses of management within the meaning of section 1219 of the 2009 Act and its predecessor sections in several cases. Although there is no longer any dispute that section 1219(1) applies to the Disputed Expenditure, two of these cases are relevant to the arguments advanced by COHL about the proper interpretation of the exclusion for capital expenditure. They are *Sun Life Assurance Society v Davidson (Inspector of Taxes)* [1958] AC 184 ("*Sun Life*") and *Camas plc v Atkinson* [2003] EWHC 1600 (Ch), [2003] STC 968 affd [2004] EWCA Civ 541, [2004] 1 WLR 2392 ("*Camas"*).

21. *Sun Life* concerned a life assurance business which claimed relief for brokerage fees and stamp duty paid on the purchase of certain investments. The deduction was claimed as an expense of management within the meaning of section 33 of the Income Tax Act 1918. Since section 33 contained no express exclusion for capital expenditure (like that now provided by section 1219(3)) the question of whether the expenditure was capital or revenue simply did not arise. Without reference to any revenue/capital distinction, all members of the House of Lords regarded the right to deduct as depending on the sums having been disbursed as expenses of management and not as anything else; the words "expenses of management" in section 33 were ordinary words with no technical or special meaning; and their application in any particular case was a question of broad evaluative judgement to determine on which side of the line they fell.

22. In his leading speech in the House of Lords, Viscount Simonds referred to the concession made by counsel for Sun Life that the price paid to purchase the investments themselves could not be expenses of management. COHL contend that Viscount Simonds' speech demonstrates his view that the concession was wrongly made. However, a careful analysis of what Viscount Simonds said shows that this is not correct.

23. Sun Life carried on a trade (life assurance) and as part of the everyday conduct of that trade it bought and sold investments, which were revenue assets or circulating capital. Because the Revenue had elected to tax Sun Life on its investment income, and not as a trader on its trading profits under Schedule D Case I, it could not claim its

trading or general expenses as a deduction. Viscount Simonds recognised that the words "expenses of management" were words of qualification and applied to some only of the trading or general expenses deductible under Schedule D Case I. However, Sun Life submitted that "expenses of management" included everything that would fall within trading or general expenses with the sole exception of the cost of purchase of investments. It is clear (from the passage at p 198) that Viscount Simonds did not agree with this submission. His reference to the illogicality in Sun Life's submission is that, if expenses of management are said to be the same as trading or general expenses, it is illogical to exclude the costs of revenue assets. In other words, given the premise of Sun Life's submission, the exclusion is illogical, for "the acquisition of the necessary stock in trade would appear to be a first expense of carrying on a business". But significantly, as he made clear, Viscount Simonds did not accept the premise. Hence, in a case to which the expenses of management regime applies, he did not think that the concession was wrong. He went on to say:

> "The concession is nevertheless of value, for, if the expense of purchasing an investment is not an expense of management, I can see no valid ground of distinction between the price of the stock which is purchased and the stamp duty paid upon contract or transfer and the brokerage paid to the broker. Each item is an integral part of the cost of acquisition or, as the commissioners put it, a part of the expenses of the particular purchase not of the expenses of management." (p 198).

In other words, since it was conceded that the acquisition cost of the investments was not an expense of management, the question became one of which costs in addition to the actual purchase price comprised acquisition costs and so were not expenses of management and which costs were not to be treated as an "integral part" of the costs of acquisition and so could be deducted.

24. This distinction between expenses of management and expenses of acquisition is reflected in all the speeches. Thus, the brokerage and stamp duty costs were described as "so closely linked with the transaction of purchase that they may naturally be considered as items in the total cost of a purchase which has already been resolved upon by the management of the company, and not as expenses of management" (per Lord Morton of Henryton at p 202). Although Lord Reid took a different view of the deductibility of the brokerage fees, his suggested approach was similar:

> "It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition, on the one hand, or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management." (p 206)

25. The acceptance that the cost of acquisition of an investment itself, together with any costs that cannot be severed from it, is not an expense of management has prevailed since *Sun Life*. It has not been doubted in any case to which we have been referred.

26. *Camas* is entirely consistent with and applied that approach. The taxpayer company (also an investment company) identified a group of companies as a possible target for a merger or acquisition. Various activities were undertaken as part of a project to acquire the targets (although ultimately the transaction never took place). Services rather like the services obtained by COHL were obtained from financial, legal and other advisers about the possible bid, and there were printing costs associated with the offer documentation as well. Camas sought to deduct the advisory and printing fees incurred as an expense of management within the meaning of what had become section 75 of the Taxes Act 1988, the immediate predecessor provision to section 1219. Importantly, section 75 in its original form (like section 33 before it) contained no express exclusion of capital expenditure. Section 75 (1) provided:

> "(1) In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the United Kingdom there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing profits apart from this section."

27. The Revenue advanced two main arguments against the fees for those services being allowable as expenses of management. The first, in line with *Sun Life*, was that whatever the phrase "expenses of management" might mean, it did not extend to expenses which were wholly attributable to the acquisition of a particular investment and therefore an inseparable part of the costs of that acquisition. The Revenue accepted that if the expenses were not part of the acquisition costs, then they were expenses of management, as defined. There was no third category to consider, and the judge simply had to decide on which side of the line the expenditure fell. Patten J held that the expenditure fell on the right side of the line for the taxpayer. It was "rendered to enable Camas to reach a decision as to whether or not to make an acquisition, and was therefore necessary and payable regardless of whether the purchase took place" (para 43) and so was an expense of management and not part of the cost of acquisition. So far so similar to the position in this appeal. Neither the Revenue's argument nor the decision cast doubt on the distinction drawn in *Sun Life* between management expenses and expenses properly regarded as inseparable from the costs of acquisition of an investment. To the contrary, both were entirely consistent with it.

28. Significantly, the Revenue's second main argument in *Camas* was that section 75 of the Taxes Act 1988 simply did not permit the deduction of expenditure of a capital nature. This argument built in part (see para 25 of Patten J's judgment for the Revenue's

other arguments on this) on the introduction of capital gains tax by the Finance Act 1965 and the range of allowances for capital expenditure available under that regime (now contained in sections 38 and 39 of the TCGA). The Revenue contended that this established a comprehensive code for allowances in respect of capital expenditure so that there was no reason for section 75 of the Taxes Act 1988 to be interpreted as extending to cover capital expenditure as an expense of management.

29. Patten J rejected the second argument too: the terms of section 75(1) made clear that deduction for sums disbursed as expenses of management was subject to an exception in the case of expenses which are deductible in computing profits under either some other provision of the Taxes Act 1988 or under the TCGA. That showed that the possibility of overlap between the provisions of section 75 of the Taxes Act 1988 and those of sections 38 and 39 of the TCGA was contemplated and confirmed that capital expenditure was deductible, insofar as not accounted for as part of the computation of chargeable gains. Patten J continued:

> "It would have been possible to exclude capital expenditure associated with the acquisition of an asset from the computation of corporation tax on total profits in the accounting period in which the acquisition took place, and left it to TCGA section 38 to provide relief at the time of disposal. But this would require clear words, when the combined provisions of ICTA section 75 and TCGA section 39(1) in fact point in the opposite direction by disallowing as expenses of a disposal expenditure which is allowable for the purpose of computing corporation tax." (para 30)

30. On appeal to the Court of Appeal, Carnwath LJ (with whom Sir Andrew Morritt V-C and Chadwick LJ agreed) upheld Patten J's decision: [2004] EWCA Civ 541, [2004] 1 WLR 2392. In relation to the argument that capital expenses were excluded from the concept of expenses of management, Carnwath LJ saw no reason to read words into a statute that were not there and refused to do so (see para 44). He adopted a submission recorded as having been made by the Attorney-General on behalf of the Revenue in *Sun Life* (at p. 190) to the effect that:

> "If the expression 'expenses of management' is given its natural meaning, it is unnecessary to consider whether any particular expense is capital or not. The words must have their ordinary natural meaning without a gloss."

31. To support COHL's argument on the proper interpretation of section 1219(3)(a) of the 2009 Act, Mr Rivett KC relied on the pre-enactment history of that provision. I

shall return to this below. However, I make clear at this stage that I find no support in *Camas* for Mr Rivett's argument that the terms in which Patten J rejected the Revenue's second argument should be read as casting doubt on the concession made in *Sun Life* that the costs of acquisition of an investment could not be expenses of management. To the contrary, both parties and the judge accepted this premise, and the question was where to draw the dividing line between the expenses of deciding to acquire an investment (deductible as expenses of management) and the expenses necessarily incurred in implementing that decision (not so deductible). I therefore reject the submission that following Patten J's decision in *Camas* there was nothing on the face of the statutory regime then in force to prevent the costs of investments themselves (together with the sort of inseparable expenditure that was in issue in *Sun Life,* and other expenditure such as the costs of acquisition or construction of fixed capital assets forming part of the framework of the investment business itself), from being deductible under the provisions of section 75 of the Taxes Act 1988 as originally enacted.

4. Summary of the facts as found by the FTT

32. By way of preliminary comment before coming to the facts, I should note that COHL's claim for relief did not extend to cover its expenditure on fees for professional services in the period post-dating 22 February 2011 (the date of the Board meeting approving the sale price) because it accepted that those fees were expenses of implementation of the disposal transaction and could not be severed from the disposal. They were therefore costs of the disposal and not expenses of management. That has remained COHL's position throughout the proceedings. It is also worth recording that COHL has not at any stage sought to draw any distinction between the different fees for different professional services encompassed by the total sum claimed. The total sum of £2,529,697 claimed under section 1219 therefore stands or falls together.

33. Since, as I have already indicated, there is no challenge to the conclusion that the Disputed Expenditure constitutes expenses of management within section 1219(1) of the 2009 Act, it is not necessary to summarise in full the detailed findings of fact made by the FTT. The following summary is sufficient for my purposes and should be understood on that basis.

34. As a substantial intermediate holding company in the Centrica Plc group, COHL holds the Centrica group's investments outside the United States, with investments of shares in and loans to companies based here, in Canada, India and Europe, including the Netherlands and Norway.

35. The Oxxio acquisition in July 2005 proved unsuccessful. From the time of its acquisition, the Oxxio business generated significant losses every year and COHL provided ongoing financial support to Oxxio throughout the period to 2011, including

debt financing through an inter-group revolving loan facility. As at 31 December 2009, the balance outstanding on the loans (which were interest bearing) was €91,000,000. In addition, COHL provided an equity injection in 2009 of €190,000,000. By the end of June 2010, the existing facility had expired. On 1 July 2010, COHL's directors approved a new facility with a limit of €250,000,000 expiring on 31 December 2011.

36. In June 2009, Centrica Plc's annual report and accounts for 2009 stated that management had "approved and initiated a plan to sell [the Oxxio business] in the Netherlands." The report continued by stating that the sale of the Oxxio business would complete by 30 June 2010.

37. The disposal of Oxxio was discussed at a meeting on 10 July 2009. This was described as a "kick-off meeting". The "transaction objective" (as it was referred to) was to achieve a "going concern sale" and the project was codenamed "Project Erasmus". Representatives of Deutsche Bank, PwC and De Brauw attended the meeting although they had not yet been formally engaged at that time.

38. A Centrica Plc board minute dated 28 July 2009 recorded that Oxxio and two other European businesses "would be treated as discontinued businesses held for sale". As the FTT noted, "held for sale" is an accounting term defined by IFRS5 (in other words, International Financial Reporting Standard 5 which deals with non-current assets held for sale and discontinued operations). According to that standard, a disposal group is a group of assets that can be classified as "held for sale" if its value is to be recovered principally through a single sale transaction. The disposal group must be "available for immediate sale in its current condition" and a sale must be "highly probable, within 12 months of classification as held for sale (subject to limited exceptions)" (see IFRS 5 paras 4, 6-8). The FTT said at para 23:

> "For this to apply, management must be committed to a plan to sell the asset and must have initiated an active programme to locate a buyer and complete the plan. It must be actively marketed for sale at a price which is reasonable in relation to its current fair value. It should be expected that the sale will complete within a year."

The decisions taken in June and July 2009 by the Centrica Plc board were consistent with a decision to sell the Oxxio business within the following year, and it had clearly initiated active steps to achieve that in July 2009.

39. However, the sale process proved difficult and lengthy and as already indicated, the transaction did not complete until March 2011. Although the initial and ongoing intention was to sell the shares in Oxxio, other alternatives for realising the value in the

Oxxio business were considered along the way. Options considered included selling the assets of the business, rectifying the problems in the business with a view to a future share sale and not selling the business at all but winding it down. Whilst Centrica had taken a strategic decision to exit the Dutch market, the aim was to realise as much value as possible from the investment in a commercial way and disposal of the business was not something to be done at any price.

40. The eventual disposal in March 2011 was not the straightforward sale of shares in Oxxio which had initially been hoped for. The scale of the loss suffered through the Oxxio business in 2008 had been unexpectedly large. Prospective purchasers did not necessarily want to buy all the businesses together. There were, in addition, problems with management practices and financial controls which made a share purchase unattractive from a buyer's perspective and meant that an asset sale might be more attractive to a buyer. This led to a period in mid-2010 when the sale process for Oxxio was effectively put on hold to allow management to complete certain statutory audits and attempt to address some of these problems.

41. Eneco first made an indicative offer in September 2010, which was rejected. There may have been another offer, which was also rejected in December 2010. In January 2011 Eneco made a final offer, which formed the basis of subsequent negotiations and the eventual sale. At that stage many parts of the deal remained to be negotiated and there was still a high risk that the deal would fail. There was a Centrica plc board meeting on 22 February 2011 at which the board approved in principle the specific proposed transaction with Eneco and delegated authority to negotiate the detailed terms of the deal to certain board members including the CEO, CFO and General Counsel.

42. As I have said, COHL accepted that expenditure incurred after this date was not expenses of management but were expenses of implementing the decision to sell the Oxxio businesses. There followed a period of due diligence and intense negotiations and there remained a risk the deal might fail. Centrica continued to explore other possibilities if the sale to Eneco did not go ahead.

43. In the event, it was not possible to sell the whole Oxxio group and the eventual transaction involved an asset sale involving partial de-mergers. Effectively two of the Oxxio subsidiaries were demerged and purchased by Eneco. Eneco also acquired the entire shareholding in a third subsidiary, Oxxio Metering. COHL continued to own and provide financial support to the fourth subsidiary (Oxxio Tolling) which remained part of the Centrica Group. The final agreement was signed on 24 March 2011, effectively marking the end of the transaction process. COHL received value from the transaction by way of repayment of its loans from the proceeds of sale.

5. The services provided by Deutsche Bank, PwC and De Brauw

44. The FTT described the nature of the services provided by Deutsche Bank, PwC and De Brauw at paragraphs 50 to 118, addressing the engagement and the services provided by each organisation separately, from the kick-off meeting in July 2009 until completion. Each firm was engaged by Centrica plc to provide the services and the costs were borne by COHL as the main beneficiary of them. They were all involved throughout the process.

45. The fees paid by COHL were as follows:

(i) PwC was paid £172,423 pursuant to an invoice dated 28 January 2011. COHL's claim for deduction was on a time-apportioned basis.

(ii) De Brauw issued invoices dated 23 February 2011 and 3 August 2011 for €162,578.62 and €603,750 respectively. Again, COHL sought a time-apportioned deduction in respect of the total €766,328.

(iii) The Deutsche Bank fee of €3,550,515.32 pursuant to an invoice dated 22 September 2011 consisted of two elements: a fixed fee of €2.5m payable "in the event the Oxxio Transaction [a defined term] is completed"; and an additional incentivisation fee (a fee structure described by a witness for COHL as typical in a sale transaction and intended to incentivise the investment bank to get the best deal they could for the client and to get it over the line). COHL's claim in respect of the former was on a time-apportioned basis. The latter was paid but COHL did not seek any deduction for the incentivisation fee.

46. The FTT's detailed findings about the nature and extent of the services provided were helpfully summarised by the UT as follows:

> "36. Deutsche Bank's role was to advise, provide information and make recommendations in relation to the disposal of the Oxxio businesses. This included wide-ranging advice and assistance in relation to strategic alternatives for the various businesses, for example the possibilities of share or asset sales and asset swaps, structuring, negotiating, planning and managing the disposal process and identifying and evaluating potential purchasers. […]

37. By June 2010, Eneco had been identified as a potential purchaser and by October 2010 a virtual data room had been set up, co-ordinated by Deutsche Bank to provide information to Eneco. Eneco made an initial offer in September 2010 which was rejected, and it was not until 24 March 2011 that the transaction with Eneco completed. Deutsche Bank continued to be involved with the transaction until that time, advising in relation to other options for the disposal in case the deal with Eneco fell through.

38. PwC's role was principally in the preparation of a Vendor Due Diligence Report ('the VDD Report') to be made available to potential purchasers. VDD Reports are generally obtained where there are difficulties in the business being sold. PwC were given full access to Oxxio's management and financial records. The VDD Report was available to Centrica but was primarily intended for the preferred bidder on the basis that PwC would assume a duty of care to the preferred bidder in relation to the report. In fact, the VDD Report helped Centrica understand what was going on in the Oxxio business and how best to proceed with the transaction.

39. In July 2010 PwC produced what was described as a 'deep dive' report ('the Deep Dive'). The purpose of the Deep Dive was to enable Centrica to understand the extent of the problems in Oxxio and inform Centrica as to the options available, including whether the problems were so bad that the business was unsaleable. In its half-year accounts to 30 June 2010 Centrica stated that it intended to dispose of Oxxio as soon as practicable and continued to report it within discontinued operations. However, there had been discussions about whether the sale process should be put on hold whilst the problems were resolved or abandoned altogether in light of the issues.

40. PwC submitted their final VDD Report on 28 January 2011, which marked the completion of their work.

41. De Brauw acted as legal advisers, advising Centrica on matters of Dutch law including employment law, competition law, tax, material contracts, the preparation of draft and final sale and purchase agreements. This included advice on the structure of the sale and generally in relation to completion of

the transaction. They were involved in preparation of the virtual data room. A draft sale and purchase agreement had been prepared as early as November 2009. The FTT describes some of this work as general advice on legal issues in evaluating potential structures for the sale and some of it as '"nitty gritty" transaction specific work'.

42. In November 2010, De Brauw prepared a document setting out a detailed explanation of the steps to be taken to achieve a demerger of the Oxxio businesses, although the transaction eventually took a slightly different form. At the same time, De Brauw provided advice on competition law issues."

47. At paragraphs 426 to 429 and 436 to 437 the FTT drew the following conclusions from the findings it had made:

"426. In the case of Deutsche Bank and PwC at least, the payments were made for services, that is, advice and the advice was to be used to enable COHL to make decisions about its investment in Oxxio. In the case of Deutsche Bank, that was strategic advice on the options for disposing of this difficult asset and assistance in finding a purchaser who would be prepared to make an adequate offer for at least some aspects of the Oxxio business. In my view, the costs of such advice and assistance were part of the ongoing management expenses of COHL as it enabled the company to make decisions about how it might realise value from its investments in Oxxio.

427. The PwC VDD report and, in particular, the Deep Dive was advice which gave the management of COHL an insight into the nature and extent of the problems in the Oxxio business and informed the decisions about how to deal with its investment.

428. The Deutsche Bank and PwC advice was used by COHL in conducting its investment business and was, in my view, of a revenue nature.

429. The De Brauw advice and other work was different in nature in that it was directed, not to enabling the company to

> conduct its business of managing investments, but to preparing to carry out a transaction, once the nature of the transaction had been determined, and once a decision had been made, carrying out the transaction.
>
> […]
>
> 436. The work done by De Brauw is in a different category. Their work was all, or mostly, to do with a potential, or the actual, transaction. I did not see any evidence that they had provided general advice to inform the decision making process. Their engagement letter did provide that they were to provide employment law, competition law and tax law advice, but it was not clear to what extent, if at all, they provided generic advice to help with the decision making process. […]
>
> 437. It is difficult to see that the De Brauw fees were revenue expenses of management for work done in assisting COHL in considering how to deal with its Oxxio investment, in the same way that the fees of Deutsche Bank and PwC were, at least up to the point where an 'in principle' transaction was being pursued. Except to the extent it may have provided generic legal advice, the *effect* of De Brauw's work was to bring about a disposal of the Oxxio business. […]"

6. Ground 1: the correct test to be applied to the question whether an expense of management is of a capital nature within section 1219(3)(a) of the 2009 Act

48. The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: see *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 (per Lord Bingham of Cornhill at para 8) and, more recently, *R (O and Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 (*"R(O)"*) at paras 28 and 29, where Lord Hodge DPSC went on to explain at para 29:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression

> of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

49. As Lord Bingham explained in *Quintavalle,* legislation is usually enacted to make some change, or address some problem, and the court's task, within the permissible bounds of interpretation, is to give effect to that purpose (see para 8). He also approved as authoritative that part of the dissenting speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822, where Lord Wilberforce said:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."

50. As for the relevance of external aids to interpretation, at para 30 in *R(O)* Lord Hodge explained:

> "External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

51. The words of section 1219(3)(a) are clear and straightforward, as is their statutory context. For the reasons that follow, the words "expenses of a capital nature" in s1219(3) of the 2009 Act and "items of a capital nature" in section 53(1) of the same Act must mean the same thing. They were both plainly intended to carve out those

expenses which are capital in nature by reference to the well-established principles developed by the courts on that distinct legal question.

52. First, when the capital expenditure exclusion was first introduced in 2004 (by section 38 of the Finance Act 2004, see para 18 above), the concept of expenditure of a capital nature was already well-established in the tax code. It had a long history and had been the subject of authoritative judicial interpretation in the case law. I shall return to some of that case law below. The principle established in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 and re-affirmed in *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259 applies, and as Lord Hodge JSC explained at para 53:

> "… where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established …"

53. Parliament can be taken to have been aware of the established capital/revenue case law in 2004 and in these circumstances, it would be surprising if the exclusion for expenditure of a capital nature introduced by section 38 of the Finance Act 2004 was intended to have a special narrower meaning without anything to signal that this was so. While it is true that the code for taxation of trading companies is different to the regime that applies to companies with investment business, the words used, first in new section 75(3) and subsequently re-enacted in almost identical terms in section 1219(3)(a) simply do not admit of the construction proposed by COHL. Rather, it can readily be inferred that in using the phrase "expenses of a capital nature" the legislative intention was that this phrase should be interpreted in accordance with the meaning established by case law relating to the materially similar phrase used in other parts of the tax code.

54. That the legislative purpose of aligning the capital expenditure position for investment companies with those for trading companies is readily inferred from the fact that the capital exclusion was re-enacted in section 1219(3)(a) of the 2009 Act using the same words "of a capital nature" as those found in section 53(1) of the 2009 Act without any limit or qualification signalling a contrary intention, is also reinforced by the Explanatory Notes to the Corporation Tax Bill (which became the 2009 Act). These are admissible to identify the mischief or purpose of this re-enactment. They demonstrate an intention to align the trading company and investment company rules in relation to capital expenditure, stating that clause 1219(3) was intended to exclude capital expenditure "in terms that follow closely the trading income rule": see para 3089 of the Explanatory Notes. The Explanatory Notes to the 2009 Act were expressed in identical terms: see para 3091.

55. Finally, the legislative history and timing of the introduction of the capital exclusion in the Finance Act 2004 also reinforce the conclusion that an express capital bar (in conventional terms) was intended to be introduced. COHL contended that, as a matter of statutory construction, the words "expenses of a capital nature" in section 1219(3)(a) of the 2009 Act have a more limited meaning intended to exclude the acquisition costs of investments themselves (together with expenditure not separable from such costs) and a limited category of fixed capital costs such as buildings. Although this proposed interpretation would largely exclude expenditure which was, on the basis of *Sun Life*, outside the scope of the relief as not being management expenditure at all, Mr Rivett's contention was that the Revenue's concern in introducing the capital bar was somehow to address a doubt that had been expressed about the correctness of a concession made almost 50 years earlier in *Sun Life* but not raised again since, about expenses that were or were not to be regarded as expenses of management (a different question). However, as I have explained at para 23 above, I do not consider that Viscount Simonds thought that the concession was wrong. Moreover, there is no support for Mr Rivett's interpretation in *Camas* or in any extrinsic material.

56. As discussed above, the Revenue's first argument in *Camas* adopted the *Sun Life* distinction between acquisition and associated expenses on the one hand and expenses of management on the other. The soundness of that distinction was neither raised nor challenged in *Camas* and this distinction was applied by Patten J and the Court of Appeal without criticism. The Revenue's second argument in *Camas* was that capital expenditure was inherently excluded from the concept of expenses of management in section 75 of the Taxes Act 1988 (as originally enacted). In rejecting this argument, Patten J made clear that it would have been possible with clear words, to exclude capital expenditure associated with the acquisition of an asset from the deduction permitted for expenses of management in section 75 as it then stood, but that no such clear words had been used. Likewise, the comments made by Carnwath LJ in the Court of Appeal were made in the context of determining whether there was a capital bar in the pre-2004 legislation which contained no express capital bar. The Court of Appeal did not need to (and did not) address the question whether the expenditure was or was not capital. An express capital bar was introduced by clause 38 of the Finance Bill 2004 (which became section 38 of the Finance Act 2004) as a direct response to the rejection of the Revenue's second argument in *Camas*.

57. Any doubt about that is resolved by the Explanatory Notes to the Finance Bill 2004. These state that the new clause 75(3) provides that expenses of a capital nature are not expenses of management and explain, at para 11, that:

> "The Inland Revenue has always argued that capital expenditure is inadmissible as an expense of managing investments under the current rules but the High Court has recently found against the Inland Revenue on the point (in Camas v Atkinson …). The Inland Revenue is taking its

appeal against this decision to the Court of Appeal but the hearing has not yet taken place."

58. The conclusion that "expenses of a capital nature" in section 1219(3)(a) of the 2009 Act has the same meaning as "items of a capital nature" in section 53(1) of the 2009 Act does not subvert or undermine the long-standing purpose of the investment management expenses relief available as Mr Rivett sought to suggest. I do not accept Mr Rivett's submission that at one level of abstraction all expenditure incurred by an investment business has a connection to a capital transaction because (by definition) the activity of an investment business is the making and holding of investments. A holding company, in its role as the ultimate controlling shareholder of a group of companies, is constantly concerned with the management of its investments, taking decisions in relation to the group, none of which is directed to buying or selling companies or assets held by companies within the group. All that is the revenue activity of an investment holding company. From time to time, it might buy or sell a subsidiary, but it is wrong to suggest that that is all or the bulk of what it does. That is precisely COHL's position here.

59. Nor does it follow that adopting the well-established case law that applies to section 53(1) to ascertain whether an expense of management constitutes a capital expense would render little or no scope for relief to be granted by section 1219(1). Nothing in my conclusion prevents the ongoing management expenses of an investment company from being deductible as revenue expenses of management. For example, the revenue expenses of management of an investment company's investments, its day-to-day staff costs, rent, administration costs and repairs are deductible expenses of management, and not capital in nature.

60. Nor is there anything in the argument advanced by COHL that where Parliament wants to incorporate a body of case law it does so expressly (giving the example of section 210(1) of the 2009 Act expressly providing that "the profits of a property business are calculated in the same way as the profits of a trade" and incorporating section 53 of the 2009 Act in this regard). It is true that Parliament chose to calculate the profits of a property business in the same way as the profits of a trade and therefore incorporated a series of trading provisions by reference in section 210(2). However, that was not done for investment businesses and a different approach was adopted. It simply does not follow that the principles from the revenue/capital case law were not intended to be imported in the clear words used in section 1219(3)(a).

61. My conclusion means that ground 1 fails. The exclusion of expenditure of a capital nature in section 1219(3)(a) is to be interpreted as requiring the application of well-established principles to distinguish between capital and revenue expenditure. It is therefore necessary to identify the principles that apply to the distinction between

capital and revenue expenditure, and I therefore turn to these principles before addressing COHL's arguments on ground 2.

7. The established principles to be applied in determining whether expenditure is capital or revenue in nature

62. It is well-established that the question whether expenditure is capital or revenue in nature is a question of law: see *Beauchamp (Inspector of Taxes) v F W Woolworth plc* [1990] 1 AC 478, 491-492.

63. The many decided cases that deal with the problem of differentiating between revenue and capital expenditure reflect the fact that items of expenditure on the borderline can be difficult to assign between these two broad categories. They make clear that there is no single test or criterion which will be decisive in all factual circumstances.

64. Nonetheless the body of capital/revenue case law is useful in providing illustrations of the approach adopted in a particular set of circumstances, and of the kind of indicia or factors regarded as relevant in those circumstances. There are also certain principles that have been derived from the cases, albeit recognising that they were decided in relation to widely differing businesses and circumstances. As Lord Wilberforce explained in *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1966] AC 295, 348, the principles to be derived from the cases are useful provided it is recognised that they cannot automatically be applied to a case involving a different business and different circumstances.

65. A good starting point in identifying the distinction between the two types of expenditure is the opinion of Viscount Cave LC in *Atherton v British Insulated and Helsby Cables* [1926] AC 205, 213-214, where he said:

> "[W]hen an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

66. In *Strick* (at p 348), Lord Wilberforce identified three questions, which he said were generally relevant to this question:

> "What is the nature of the payment, and for what was the payment made? These, together with a third question, namely, how that, for which the payment was made, was to be used, were stated by Dixon J in his classic judgment in *Sun Newspapers Ltd v Federal Commissioner of Taxation* [(1938) 61 CLR 337, 363]. There are, he said:
>
> > 'three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.'
>
> I may add to this another statement by the same learned judge in the later case of *Hallstroms Pty Ltd v Federal Commissioner of Taxation* [(1946) 72 CLR 634, 648]:
>
> > 'What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process.'"

In other words, what matters is the true nature of the payment, for what it was made, and the object or effect of the expenditure, together with the factors set out by Dixon J in the quotation from *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337, 363, that might be relevant on the particular facts of the case.

67. These are all questions of objective analysis (not to be determined according to the subjective motive or purpose of the taxpayer), as was made clear by the House of Lords in *Lawson (Inspector of Taxes) v Johnson Matthey plc* [1992] 2 AC 324. Mr Rivett placed considerable reliance on this case, but its facts are highly unusual and readily distinguishable from the facts of this case.

68. One of the issues that arose in *Johnson Matthey plc* was whether an injection of £50m by the taxpayer parent company, Johnson Matthey plc ("JM plc"), into its wholly

owned subsidiary ("JMB") before a sale of that subsidiary (in a rescue operation by the Bank of England because of the perceived public interest in avoiding the collapse of the subsidiary) was a revenue or capital payment. Vinelott J [1990] 1 WLR 414 (who disagreed with the General Commissioners on this question) held that the payment was capital in nature: it was a payment to get rid of JMB, which was a capital asset. The Court of Appeal [1991] 1 WLR 558 agreed, holding that the nature of the rescue operation was a single agreement made by which the Bank of England acquired the shares in JMB for a nominal sum on terms that JM plc provided the £50m injection to its subsidiary. JM plc's purpose was to preserve its own trade, but that was not determinative of the capital/revenue issue. JM plc made the payment to enable it to get rid of a capital asset, the continued retention of which would have been harmful to JM plc. The House of Lords allowed JM plc's appeal. Although the payment was made in a context which included the disposal of an identifiable capital asset, the payment of £50m was made as a contribution towards the rescue operation by the Bank of England which preserved the whole of JM plc's business. JM plc made the payment to save its own platinum trade from collapse and to be able to continue in business. The payment was not made to persuade the Bank to take the worthless shares in JMB and could not be described as money paid by JM plc to divest itself of those shares.

69. However, in holding that the payment was a revenue payment in *Johnson Matthey plc*, nothing in any of the speeches in the House of Lords cast doubt on the proposition that (in general) money paid for the disposal of a capital asset is itself capital in nature. Thus, for example, Lord Goff of Chieveley (with whom Lord Keith of Kinkel and Lord Emslie agreed) made clear (at p 341):

> "The question is rather whether, on a true analysis of the transaction, the payment is to be *characterised* as a payment of a capital nature. That characterisation does not depend upon the motive or purpose of the taxpayer. Here it depends upon the question whether the sum was paid for the disposal of a capital asset." (emphasis in original).

See also *Wharf Properties Ltd v Comr of Inland Revenue* [1997] AC 505, where the Judicial Committee of the Privy Council emphasised the importance of the objective purpose for which money is spent when deciding whether it is of a revenue or capital nature.

70. There are many cases, particularly those involving trading companies, where difficulties can arise in determining on which side of the revenue/capital line the expenditure in question falls. In these cases a helpful starting point is to identify whether some form of asset has been obtained: see *Tucker (Inspector of Taxes) v Granada Motorway Services Ltd* [1979] 1 WLR 683, 686, where Lord Wilberforce recognised that this approach can produce arbitrary results but concluded that it

provides a basis for distinguishing between capital and revenue expenditure and should be maintained.

71. No such difficulties arise in the present appeal. Whereas the investments of an investment dealing company are revenue assets (or circulating capital) with which it trades, the investments of a holding company are capital assets (or fixed capital) and its business is to manage those assets. COHL's business is to act as a holding company and its investments are capital assets. Here, accordingly, the expenditure clearly relates to fixed or capital assets.

72. Mr Ewart relied on several cases to illustrate the proposition that money expended to achieve the disposal of an asset (tangible or intangible) is generally treated as capital in nature. It is sufficient to refer to two of them. First, in *Pendleton (Inspector of Taxes) v Mitchells & Butlers Ltd* [1969] 2 All ER 928, the taxpayer company (brewers and retailers of beer) was forced to move parts of its trade by acquiring new licensed premises, in some cases to increase, and in others to preserve, its existing but threatened trade. It deducted the legal costs incurred in obtaining the removal and transfer of the licences when computing its profits. The Special Commissioners drew a distinction between such costs where the intention was to increase the existing trade (viewed as capital expenditure) and those simply intended to maintain the level of existing trade (viewed as revenue expenditure). Cross J allowed the Crown's appeal. The company was forced to acquire new licensed premises and had both to build premises and provide them with a licence. There was no relevant distinction between the costs of the bricks and mortar and the costs of obtaining a licence. Equally, the fact that the company was forced to discontinue trade at the old premises and did not expect to do more than maintain the same volume of trade at the new premises was irrelevant.

73. Secondly, Mr Ewart relied on *ECC Quarries Ltd v Watkis (Inspector of Taxes)* [1977] 1 WLR 1386 as closely analogous with the present appeal. The case concerned legal and professional charges incurred on preparing and presenting applications for planning permission to enable the taxpayer company to exploit sand and gravel pits on land it acquired. As a matter of commercial accounting, this expenditure was properly treated as being chargeable against revenue, but the question was whether as a matter of law the expenditure was capital in nature.

74. The expenditure was incurred in connection with the making of the planning applications themselves as opposed to an earlier advice stage, and subsequently to persuade the local authority and the Minister to grant the permission sought. Applying the identifiable asset test, Brightman J held, at p 1397, that the expenditure was capital expenditure:

> "[…] the taxpayer company expended money for the purpose of securing a permanent alteration to the nature of the land it owned or occupied; that is to say, a change from land confined to its existing use and of little or no value to the taxpayer company for the purposes of its trade to land capable of being turned to account pursuant to the taxpayer company's subsequent trading activities. It was a lump sum for an enduring advantage static in nature in the sense that it was not the planning permission which would produce the profits but the subsequent operations of working and winning the minerals. […]
>
> On common sense principles, and with the benefit of judicial guidance in the reported authorities, it seems to me that the expenditure was of a capital and not of an income nature. To use the words of Lord Wilberforce in *Inland Revenue Commissioners v Carron Co* (1968) 45 TC 65, 75, the planning permission, if obtained, would in some sense have been an intangible asset of a capital nature. If that is right, money expended in seeking to acquire such an asset must equally be expenditure of a capital nature."

75. Drawing the threads together, although there is no single test to be applied in all circumstances, in most cases the objective purpose for which the payment is made is likely to be an important indicator. Where a capital asset (whether tangible or intangible) is obtained or can be identified, the starting point is to assume that money spent on the acquisition or disposal of the asset should be regarded as capital expenditure. There may be particular features of the payment or the circumstances (for example, as in *Johnson Matthey plc*) that displace that assumption. It may be helpful to consider the nature of what was obtained (the advantage) by the expenditure (including whether it is lasting or not), how it is used or viewed in the business and how the advantage was paid for (whether by a lump sum to acquire it or periodic payments for use for a particular period). Where money is spent on improving an asset, or making it more advantageous, that a payment is recurring may indicate that it is expenditure on maintenance or upkeep and therefore of a revenue nature, whereas a lump sum payment may indicate the opposite.

8. Ground 2: the application of these principles to the facts found by the FTT

76. Having set out the principles to be applied in identifying how the distinction between revenue and capital expenditure should be drawn, the next question is whether applying those principles to the findings made below about the Disputed Expenditure,

the Court of Appeal erred in concluding that the Disputed Expenditure was capital in nature.

77. Mr Rivett submits that applying such principles as can be drawn from the authorities makes plain that the Disputed Expenditure was not of a capital nature even on the basis of the case law which applies in the different context of section 53(1) of the 2009 Act. He submits that the findings of fact made by the FTT make plain that the expenditure was the type of core management expenditure incurred by an investment business of the type here in question, was likely to recur, and did not have the effect of creating, enhancing or disposing of a capital investment such as to bring the expenditure within the category of capital expenditure identified by the cases relating to section 53(1) and its predecessors.

78. In support of those submissions, Mr Rivett emphasised findings made by the FTT about COHL's investment business which included capital contributions, acquisitions, subscriptions for shares, disposals and debt financing, and that its principal concern was to extinguish the ongoing financing costs of the Oxxio investments. The Disputed Expenditure was paid for professional services to enable COHL to make decisions about its investment in Oxxio, and he submitted that this was an on-going activity. The Disputed Expenditure was incurred at a time when there was no certainty that Oxxio would be sold. He relied on findings that possible options included "rectifying problems in the business with a view to a future share sale and not selling the business at all but winding it down" and exiting the Dutch market "was not something to be done at any price" (FTT decision, para 218). In other words, the expenditure was of a type that might be recurrent and "was not to bring about a disposal of the Oxxio businesses, but to inform the management decisions about how best to do so" (FTT decision, para 425). Finally, he submitted that there was no sale of any asset by COHL, which retained shares in Oxxio and the Oxxio Tolling business to which it continued to provide support.

79. While some of the facts emphasised by Mr Rivett may be relevant to the capital/revenue analysis, others are plainly not. More significantly, I do not accept that the FTT's findings, viewed fairly, lead to the conclusion he advocates. The primary findings of fact made by the FTT are not contradicted by the conclusion that the Disputed Expenditure was capital in nature. To the contrary, that conclusion follows from the FTT's findings and, like the Court of Appeal, I consider that the FTT fell into error by conflating the two separate statutory questions when it came to answering the capital expenditure question. In any event, since the question whether expenditure is of a capital nature is a question of law, the Court of Appeal (and indeed this court) can and should arrive at its own conclusion on the capital expenditure issue, applying the findings of fact made by the FTT.

80. The expenditure in this case was incurred on professional and advisory services and was expenses of management. Fees for such services are capable in principle of being revenue or capital in nature. The starting point is that such fees take the character of expenditure of a capital or revenue nature from the commercial or business transaction for which they are incurred.

81. Although the transaction that was ultimately concluded by COHL did not involve an outright sale of shares in Oxxio, the transaction with Eneco achieved in substance the disposal of this loss-making investment from the Centrica group, and consequently the repayment to COHL of substantial loans. The identifiable asset test can plainly be applied. Oxxio was an onerous capital asset. Having taken the decision to dispose of it, the Centrica board appointed Deutsche Bank, PwC and De Brauw. Representatives of those firms attended the so-called "kick-off" meeting on 10 July 2009 "to start the divestment process" (FTT decision, para 51) and, as the FTT held, "to initiate the sales process, to set out a timetable and identify the work streams which were needed" (para 293).

82. The three firms were engaged specifically for this process. There is no evidence that they were engaged more generally in advising COHL on its investment business, or on an ongoing basis after completion of the Oxxio transaction. There is no evidence that the Disputed Expenditure was recurring expenditure in that sense. Moreover, Mr Rivett's reliance on generalised statements made by the FTT that the effect of the professional advice which COHL obtained was not to bring about a disposal of the Oxxio business but to inform management decisions about how best to do so, does not take him very far in this case.

83. This is because as a matter of objective analysis, once a commercial decision was taken to dispose of the Oxxio business, the services of Deutsche Bank, PwC and De Brauw were obtained precisely to enable management to achieve that disposal. Thus, the terms of the Deutsche Bank engagement letter dated 23 July 2009 reflect employment as exclusive financial adviser in relation to the "strategic alternatives for the Oxxio … business that may lead to a possible transaction, through sale (whether by way of share or asset sale) … or otherwise …". PwC's letter of engagement, dated 23 November 2009, reflected its appointment in connection with "your proposed disposal of Oxxio". The letter said PwC would act as independent accountants providing due diligence for use by a purchaser with a view to buying the Oxxio business. The De Brauw engagement letter, dated 9 October 2009, said they were instructed "in regard to the envisaged divestment of the Oxxio group … as a whole or in parts". They expected to advise on matters of Dutch employment law, competition law, and tax matters relating to the potential structure of the disposal transaction. Thus, the Disputed Expenditure was both directed at and focused on bringing about a disposal of the Oxxio business.

84. Consistently with the terms of their engagement, Deutsche Bank evaluated the options available for disposing of the Oxxio business. Another significant part of Deutsche Bank's engagement was "to identify possible buyers and to evaluate the level of interest they might have in the different parts of Oxxio's business".

85. Likewise, the main service provided by PwC was the preparation of a "a report, the purpose of which is to assist a potential purchaser in its due diligence with a view to buying the Business", the Vendor Due Diligence report. True it is that as PwC began their work, the scale of the problems (relating to financial reporting and other issues) emerged and as a result, PwC visited the Oxxio headquarters in Holland on 8 July 2010, and produced a report for Centrica plc called the "Project Erasmus Deep Dive". However, that PwC's services included elements of advice on issues that arose in the course of seeking to achieve the disposal, does not alter the fundamental nature of the expenditure or its objective purpose, namely, to bring about a disposal of the Oxxio business.

86. In De Brauw's case, as the FTT held, their role "was, essentially, to provide legal advice on matters such as competition law and tax, which might affect how the Transaction was carried out and to produce and negotiate the documents needed to implement the Transaction".

87. Accordingly, the clear objective purpose of the Disputed Expenditure was to assist in bringing about the disposal of an identifiable capital asset, namely the Oxxio business, in whatever form that transaction ultimately took. Money expended to achieve a disposal of a capital asset is properly regarded as being of a capital nature. The nature of COHL's business does not affect that conclusion. If a trading company disposes of a capital asset the costs of bringing about that disposal (such as the fees of professionals involved in the sales process) will also be capital in nature. The same should be true of an investment company. The fact that there was no certainty that the Oxxio business would be sold does not make the expenditure revenue in nature. There is uncertainty in most transactions, but that does not prevent expenditure on professionals rendered to enable an investment company to reach a decision as to whether or not to make an acquisition or disposal and payable regardless of whether the transaction takes place (being an expense of management and not part of the acquisition or disposal cost itself) from being capital expenditure. Indeed, expenditure on an abortive capital disposal transaction is capital expenditure nonetheless and is the paradigm case of a situation in which there is uncertainty as to whether a transaction will go ahead (see for example *ECC Quarries Ltd* referred to at paras 73 and 74 above, where the abortive expenditure incurred on the unsuccessful planning application was held nonetheless to be capital expenditure). Nor is this question affected by the consideration, which will often be true, that a commercial business will not be prepared to dispose of its assets at any price. Neither means that the expenditure ceases to be capital.

88. Accordingly, the Disputed Expenditure was capital in nature and excluded by section 1219(3)(a) of the 2009 Act. The Court of Appeal made no error in reaching the same conclusion.

9. Conclusion

89. In conclusion, the introduction of the exclusion for management expenditure of a capital nature in 2004 was intended to align the position of trading companies and investment companies so far as capital expenditure is concerned. That exclusion in section 1219(3)(a) is to be interpreted in accordance with well-established capital/revenue principles. Applying those principles to the facts found by the FTT leads to the clear conclusion that the Disputed Expenditure in this case was capital in nature.

90. I would therefore dismiss this appeal and uphold HMRC's closure notice issued on 19 December 2016 amending COHL's company tax return on the basis that none of the Disputed Expenditure was deductible under section 1219 of the 2009 Act.