HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 54

on appeal from: [2007]EWCA Civ 545

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Maco Door and Window Hardware (UK) Limited (Respondents) *v* Her Majesty's Revenue and Customs (Appellants)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:
Timothy Brennan QC
Akash Nawbatt

(Instructed by HM Revenue & Customs Solicitors Office)

Respondents:
Giles Goodfellow QC
James Rivett

(Instructed by Gregory Rowcliffe Milners)

Hearing date:
22 MAY 2008

ON
WEDNESDAY 30 JULY 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Maco Door and Window Hardware (UK) Limited (Respondents) *v* Her Majesty's Revenue and Customs (Appellants)

[2008] UKHL 54

LORD HOFFMANN

My Lords,

1. For the reasons given by Patten J and Collins LJ, as well as those of my noble and learned friends Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury, I would allow this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

2. This appeal raises a very short point of construction of section 18(2) of the Capital Allowances Act 1990. Since my opinion on the point differs from that of a majority of your Lordships it will suffice for me to explain the reasons for my dissent quite shortly. I am enabled to do so because I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury, who, with my noble and learned friend Lord Hoffmann, constitute the majority, and can gratefully adopt their description of the facts and relevant statutory background.

3. The issue is whether the warehouse in which the respondent, Maco, stores the stock that it purchases from its Austrian parent, Mayer, is an "industrial building or structure" as defined in section 18 of the 1990 Act. Section 18(1) says that an "industrial building or structure" means "a building or structure in use - " for one or other of the purposes specified in the ten following paragraphs, lettered (a) to (j). Only paragraph (f) is of any use to Maco. Paragraph (f) has four sub-paragraphs, numbered (i) to (iv), of which only sub-paragraph (i) is of any use to Maco. Paragraph (f)(i) specifies

> "… the purposes of a trade which consists in the storage –
>
> (i) of goods or materials which are to be used in the manufacture of other goods or materials"

4. It is common ground that the goods which Maco purchases from Mayer and stores in its warehouse are "goods … which are to be used in the manufacture of other goods or materials". So far, so good. But it is also common ground that Maco does not carry on a "trade which consists in the storage" of goods. Maco's trade consists in the buying of goods and selling them on at a profit. Storage of the goods over the period between purchase and sale is an essential part of that trade but is not a trade on its own account.

5. This is where section 18(2) comes into play. The subsection says that

> "The provisions of subsection (1) above shall apply in relation to a part of a trade or undertaking as they apply in relation to a trade or undertaking except that where part only of a trade or undertaking complies with the conditions set out in subsection (1), a building or structure shall not by virtue of this subsection be an industrial building or structure unless it is in use for the purposes of that part of that trade or undertaking".

Since storage is "a part of" Maco's trade, subsection (2) requires the provisions of subsection (1)(f)(i) to be applied to that part of Maco's trade. The disagreement between the majority and the minority on this appeal is a disagreement as to how that is to be done. I, and I believe my noble and learned friend Lord Mance, take the view that subsection (2) requires that paragraph (f)(i) of subsection (1) must be applied to the

relevant part of Maco's trade, i.e. the storage part, as if that part were a trade. The words in subsection (2) : "shall apply in relation to a part of a trade … *as they apply in relation to a trade* …" seem to me to point clearly to that construction. It is, I think, accepted that if that is the right construction of subsection (2), this appeal must be dismissed.

6. The majority view, however, is that subsection (2) requires that paragraph (f)(i) be applied to Maco's storage activity without any qualification. If that is right then, since Maco does not have " a trade which consists in the storage" of goods, paragraph (f) cannot apply. If that is right, then of course this appeal must be allowed.

7. Which construction is to be preferred? I have already referred to the words in subsection (2) which seem to me to point to the construction I favour. The consequence of the majority view is that subsection (2) can only apply where the taxpayer is carrying on composite trades one of which is a "trade which consists in … storage". If it had been the intention of the legislature to limit the scope of subsection (2) to composite trades, it seems to me very odd that the reference in the subsection was to "a part of *a* trade", language which indicates to my mind an activity which is part of a trade but is not itself a trade.

8. Authority for both constructions can be found. In *Saxone Lilley & Skinner Ltd v IRC* (1967) 44 TC 122 this House had to consider the meaning of "a part of a trade" in a statutory predecessor of section 18(2). Lord Reid said that the phrase should be given its meaning as a matter of ordinary language and that there was

> "… nothing in the context here to justify giving any other interpretation to 'a part of a trade'" (p.139)

and that

> "If a trader stores or sells or otherwise deals with two kinds of goods, A and B, I think that it is the ordinary use of language to say that dealing with A is one part of his trade and dealing with B is another part" (p.139)

These remarks seem to me inconsistent with the notion that section 18(2) is confined to cases where a taxpayer is carrying on composite trades.

9. An even stronger authority in favour of the construction I favour is *Kilmarnock Equitable Co-operative Society Ltd v IRC* (1966) 42 TC 675. The taxpayer sold coal in 1 cwt bags and in bulk and decided to sell the coal also in 28 lb packets. It constructed a special building to pre-pack the coal in these packets and claimed allowances on the footing that the building was being used "for the purposes of a trade which consists in …… the subjection of goods or materials to any process" (see s.18(1)(e)). The taxpayer contended successfully that, in pre-packing its coal in the 28 lb packets, its coal was being subjected to a "process" for section 18(1)(e) purposes. The Court of Session upheld the claim for capital allowances, rejecting the Revenue's argument that the building was not used for the purpose of a trade part of which consisted of subjecting goods to a process. It was not part of the Revenue's case that the subjecting of the coal to a process had to constitute a trade on its own account. If the opinion of the majority in the present case had been presented and accepted the case would have been otherwise decided. The taxpayer would have lost.

10. It should not be a matter of surprise that the Revenue did not in the *Kilmarnock Co-op* case take the composite trade point. Consistently from the enactment of section 8 of the Income Taxes Act 1948, which was in materially the same terms as section 18, until the decision of Lightman J in *Bestway (Holdings) Ltd v Luff* (1998) 70 TC 512 in 1998 the Revenue appear to have accepted that a "part of a trade" in section 18(2) could consist of an activity that was not a trade in itself. The suggestion that great complications and uncertainties would follow if your Lordships were to uphold the Court of Appeal's decision in the present case and confirm the Revenue's pre-*Bestway* practice is, in my opinion, shown to be mistaken by the history. There has not been a spate of cases where uncertainty as to the nature of the activity that could constitute a "part of a trade" for section 18(2) purposes has caused problems. Successive chancellors of the Exchequer, from 1945 onwards, have not thought it necessary to introduce amending legislation to confine the scope of subsection (2) to composite trades.

11. My noble and learned friend Lord Neuberger of Abbotsbury has, in his opinion on this appeal (para.60), suggested that it would be surprising if section 18(2) served only to expand but not to limit the ambit of section 18(1). I must respectfully say that in my opinion that

would not be in the least surprising. The apparent intention of section 18(2) was to expand the ambit of section 18(1). Not only can use of a building for the purposes of one of the specified trades attract capital allowances, but use of a building for the purposes of a part of a specified trade can do so. The expansive intention is clear. Why should that be a surprise?

12. My Lords for these reasons I would uphold the majority decision of the Court of Appeal and dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

The Facts

13. This is a corporation tax appeal concerned with capital allowances for industrial buildings. The respondent Maco Door and Window Hardware (UK) Ltd ("Maco") has claimed a writing-down allowance under section 3 of the Capital Allowances Act 1990 ("CAA 1990") for its accounting periods ending on 31 December 1999 and 31 December 2000, but the Revenue amended Maco's self-assessments so as to disallow the claims. The issue turns on the definition of "industrial building or structure" in section 18 of CAA 1990, and in particular on the meaning of the expression "a part of a trade" in section 18(2).

14. This question has been given different answers in the course of the appeal process. The Special Commissioner (Dr John Avery Jones CBE) allowed Maco's appeal. In the Chancery Division Patten J allowed the Revenue's appeal : [2007] STC 721. In the Court of Appeal the majority (Carnwath and Hallett LJJ) allowed Maco's appeal and restored its claims, but Lawrence Collins LJ dissented: [2007] ST 1442. The Revenue now appeals to your Lordships' House.

15. The building in question is a large warehouse and distribution centre at the Eurolink Business Centre, Sittingbourne, Kent. It also contains offices, a lecture theatre, and other facilities, but as these

represent less than one-quarter of the building (by capital cost, not area) they can be disregarded under section 18(7) of CAA.

16. Maco trades as an importer and distributor of products manufactured by its Austrian parent company, Mayer & Co Beschlage GmbH ("Mayer"). The products are hardware (such as locks, handles and hinges) to be fitted to a wide range of pvc doors and windows produced by other manufacturers. Designs of the hardware change frequently to keep up with changes in the designs of doors and windows. Maco purchases its stock from Mayer and sells it (either to wholesale distributors or direct to manufacturers of doors and windows) as a principal, not as an agent.

17. The Special Commissioner made some detailed findings about Maco's business and the use to which it puts the building. He recorded that because designs change frequently, because products made by Mayer for the United Kingdom market differ from those which it makes for the rest of the market (and require re-tooling), and because Maco sells the products with a ten-year guarantee, Maco has to hold large and varied stocks (amounting to about 2,300 different lines in all). There is specialised computerised equipment for locating and moving stock, much of which is on pallets. It is unnecessary to go into further detail here. It is common ground that the building is a state-of-the-art warehouse and distribution centre. But Maco is storing and selling goods which are its own property. Its trade is not storage. It is that of a merchant, buying goods and selling them on at a profit.

The legislation

18. Capital allowances have a long and complex history. They are a relief afforded by Parliament partly as compensation for the non-allowance of depreciation as a deduction in computing trading profits for tax purposes, and partly as a policy of providing differential tax incentives in order to encourage particular forms of economic activity. Parliament's perception of the need for incentives changes from time to time and there is not therefore any very regular or coherent pattern in the way that capital allowances have been granted over the years. Allowances for industrial buildings were first introduced by the Income Tax Act 1945. The legislation was consolidated, as amended, by the Capital Allowances Act 1968, and reconsolidated, with further amendments, by CAA 1990, which (with a few further amendments) was in force in 1999 and 2000. Since then Parliament has enacted the

Capital Allowances Act 2001 ("An Act to restate, with minor changes, certain enactments relating to capital allowances") as part of the tax law re-write programme.

19. Despite repeated amendment and consolidation the provisions enacted in 1945 remain essentially intact. They reflect a general legislative policy, formed in the very difficult economic conditions at the end of the second world war but still continuing half a century later, to encourage industrial activity by according to industrial buildings advantages not accorded to shops and offices. But the precise extent of the advantages depends on the correct construction of the legislation, and in particular the terms of section 18 of CAA 1990 (definition of "industrial building or structure").

20. The essential provisions are in subsections (1) to (4), which I will set out in full (I have already noted the generous *de minimis* provision in subsection (7), and I add that under subsection (9) "undertaking" means an undertaking carried on by way of trade). The text below includes minor amendments made by the Finance Acts 1991 and 1995.

> "(1) Subject to the provisions of this section, in this Part 'industrial building or structure' means a building or structure in use –
>
> (a) for the purposes of a trade carried on in a mill, factory or similar premises; or
>
> (b) for the purposes of a transport, dock, inland navigation, water, sewerage, electricity or hydraulic power undertaking; or
>
> (c) subject to subsection (11) below, for the purposes of a tunnel undertaking; or
>
> (d) subject to subsection (12) below, for the purposes of a bridge undertaking; or
>
> (da) for the purposes of a highway undertaking; or
>
> (e) for the purposes of a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process; or
>
> (f) for the purposes of a trade which consists in the storage—
>
> > (i) of goods or materials which are to be used in the manufacture of other goods or materials; or

(ii) of goods or materials which are to be subjected, in course of a trade, to any process; or

(iii) of goods or materials which, having been manufactured or produced or subjected, in the course of a trade, to any process, have not yet been delivered to any purchaser; or

(iv) of goods or materials on their arrival in any part of the United Kingdom from a place outside the United Kingdom; or

(g) for the purposes of a trade which consists in the working of any mine, oil well or other source of mineral deposits, or of a foreign plantation; or

(h) for the purposes of a trade consisting in all or any of the following activities, that is to say, ploughing or cultivating land (other than land in the occupation of the person carrying on the trade) or doing any other agricultural operation on such land, or threshing the crops of another person; or

(j) for the purposes of a trade which consists in the catching or taking of fish or shellfish;

and, in particular, the expression 'industrial building or structure' includes any building or structure provided by the person carrying on such a trade or undertaking for the welfare of workers employed in that trade or undertaking and in use for that purpose.

(2) The provisions of subsection (1) above shall apply in relation to a part of a trade or undertaking as they apply in relation to a trade or undertaking except that where part only of a trade or undertaking complies with the conditions set out in subsection (1), a building or structure shall not by virtue of this subsection be an industrial building or structure unless it is in use for the purposes of that part of the trade or undertaking.

(3) The reference in paragraph (e) of subsection (1) above to the subjection of goods or materials to any process shall include a reference to the maintaining or repairing of any goods or materials but, notwithstanding subsection (2) above, paragraph (e) shall not apply to the maintenance or repair by any person of any goods or materials employed by that person in any trade or undertaking unless that trade

or undertaking itself falls within any of the paragraphs of subsection (1) (including paragraph (e)).

(4) Notwithstanding anything in subsections (1) to (3) above, but subject to subsections (5) and (7) below, 'industrial building or structure' does not include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office".

Maco's case, which was successful before the Special Commissioner and in the Court of Appeal, is that part of its trade is storage of goods falling within section 18(1)(f)(i). The Revenue's case is that the goods fall within the description in section 18(1)(f)(i), but that no part of Maco's trade is storage.

21. It is apparent that throughout section 18(1) the emphasis is on use of a building for the purposes of a trade, or an undertaking carried on by way of trade. The trader using the building need not be its owner (although in this case Maco is, we were told, the owner) but the trade for which the building is used must fall within one or more of the ten categories listed in subsection (1). These categories cannot be mutually exclusive, since section 18(1)(a) appears to be largely a subset of section 18(1)(e). But apart from that there are few if any obvious overlaps. Subsection (4) overrides the previous provisions, excluding particular premises even if they would otherwise come within subsection (1). So if a company which is a shoe manufacturer sells 90% of its products by wholesale, but has its own retail shop in a separate building near the factory, the shop will not be within section 18, even though the company's trade is within section 18(1)(e) (if on the other hand the shop was in a corner of the factory itself, section 18(7) would probably apply). The same approach would be taken if the entirety of the company's products were sold through its own retail outlets. Its factories and warehouses would still be within section 18, as its trade was manufacture, but its retail shops, showrooms and offices would not be (unless and except so far as section 18(7) applied to any particular building).

"A part of a trade"

22. These examples prompt some general points about the scheme and effect of section 18. Whether the requirements of the section are met may depend both on the way in which an enterprise divides its activities between different buildings, and on the way in which those activities are arranged within its corporate structure. It is common ground that in this case the conditions would have been satisfied if Maco had traded simply as a storage company, with its stock remaining the property of Mayer until sooner or later it was sold to customers. The Special Commissioner observed that it made little sense to restrict the relief to the case of a warehousing subsidiary. But it would also have been available, under section 18(1)(e), if the warehouse had belonged to Mayer, trading through a United Kingdom branch (rather than a subsidiary). In any case it is a commonplace of tax law that different corporate structures often produce different fiscal consequences, even if the economic results are the same from the consumer's point of view.

23. The other essential point to note is that section 18(1)(e) is concerned with "a trade which consists in the manufacture of goods [etc]". A trade must by definition be conducted with a view to profit. A do-it-yourself enthusiast is not a trader. Making goods out of raw materials is an activity which becomes a trade only if the goods are to be turned to account – normally by sale, occasionally by hire. Mr Goodfellow QC (for Maco) rightly pointed out that some manufacturers, for instance in the tailoring trade, work on goods which they do not own, and charge for their time and skill without any sale of goods. But that does not affect the general principle. A trading manufacturer who does own the finished goods is in the ordinary course of things going to sell them either by wholesale or by retail. If a manufacturing company has a chain of retail shops, it may decide to set up a retailing subsidiary, and in that case there would be two traders and two trades, with a wholesale transaction between them (as in this case, between Mayer and Maco). But if only a single company is involved, it would not be a correct legal analysis to describe it as carrying on two trades (rather than two vertically integrated activities). To do so would involve positing a fictitious sale in which the same company was both seller and buyer. Occasionally an appropriation similar to a fictitious sale is required for some particular tax purpose (see for instance *Watson Brothers v Hornby* (1942) 24 TC 506, approved by this House in *Sharkey v Wernher* [1956] AC 58) but there is no warrant for it here. The Court of Appeal were rightly unanimous in the view that capital allowances should not be over-complicated.

24. There is therefore a clear and important distinction, in my opinion, between a trade and an activity undertaken in the course of a trade. The expression "a part of a trade" is a simple phrase which is no doubt capable of bearing different meanings according to the context. The second half of section 18(2), which refers to the case where "part only of a trade or undertaking complies with the conditions set out in subsection (1)" suggests that the "part" must be something that has the same sort of characteristics as the trade as a whole – what Patten J ([2007] STC 721, para 40) called an activity in the nature of a trade. That was also the approach adopted by Lightman J in *Bestway (Holdings) Ltd v Luff* (1998) 70 TC 512, 543, citing Rowlatt J in *Graham v Green* [1925] 2 KB 37, 40;

> "a conception of a trade ... differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from odd sticks. You may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts."

25. In my opinion that approach is the right one. To come within section 18(2) "a part of a trade" must be, not simply one of the activities carried out in the course of a trade, but a viable section of a composite trade which would still be recognisable as a trade if separated from the composite whole: for instance, a garage business that sells cars from its showroom and services and repairs cars in its workshop, the example given in argument by Mr Brennan QC in *Bestway*. If the proprietor were to close the showroom, or alternatively were to close the workshop, he would still have part of his original trade.

26. It is not enough, in my view, to be able to isolate (by horizontal division as it were) some activity carried on in the course of a vertically-integrated trade, even if that activity is (in the words of Lightman J in *Bestway*) "significant, separate and identifiable". I consider that *Bestway* was rightly decided, but I see force in Mr Goodfellow's criticism of the test that I have just referred to. Storage was not a part of the wholesale cash and carry trade considered in that case, not so much because it was insignificant as because you cannot trade by storing your own goods.

27. Mr Goodfellow argued that the construction which I prefer is inconsistent with section 18(3), the second part of which would be

unnecessary, he said, unless section 18(2) had the wide meaning he contends for. Section 18(3) was originally introduced by the Finance Act 1982 so as to reverse the decision of the Court of Appeal in *Vibroplant Ltd v Holland* (1981) 54 TC 658, to the effect that for a plant hire company to service and repair its plant was not subjecting it to a process. The Court of Appeal did not comment on the dictum of Dillon J (at first instance) that servicing and repairing the plant was part of the company's trade (as, in some sense, it obviously was).

28. The effect of the second part of section 18(3) is that a building used by a trader to service and repair his own trade equipment cannot qualify for relief unless his trade qualifies under one or more of the ten categories in section 18(1). A company trading as a transport undertaking (section 18(1)(b)) can get relief for the building where its lorries are serviced and repaired; so can a shoe manufacturer (section 18(1)(e)) for its delivery vehicles. But a supermarket chain cannot get relief for a building used to service and repair its distribution vehicles, because its trade is outside every category in section 18(1). The second part of section 18(3) does not apply at all to the servicing and repair of other people's (that is, customers') vehicles.

29. Mr Goodfellow is right, I think, to argue that as a matter of strict logic the second part of section 18(3) is unnecessary, on the Revenue's construction, since you can no more trade by repairing your own vehicles than you can trade by storing your own goods. But I do not regard this as a strong argument against the Revenue's construction. Especially in view of what Dillon J said in *Vibroplant*, it is understandable that Parliament chose to put this point beyond argument.

30. Mr Goodfellow also argued that the Revenue's construction would lead to all sorts of complications. The notion of a composite trade is no doubt rather imprecise, and there may be some borderline cases (to be decided as a question of fact and degree) as to whether a trade can be vertically divided in this way. But those difficulties seem relatively trivial compared with the prospect of any business that owns a van or lorry claiming to have a transport undertaking (section 18(1)(b)) which is a part of its trade. The balance of any argument on complication seems to me to come out decisively in favour of the Revenue.

The authorities

31. Apart from those already mentioned, the most important authorities to be considered are the decision of this House in *Saxone Lilley & Skinner (Holdings) Ltd v Commissioners of Inland Revenue* (1967) 44 TC 122 and that of the Inner House of the Court of Session in *Kilmarnock Equitable Co-operative Society Limited v Commissioners of Inland Revenue* (1966) 42 TC 675.

32. The essential point about the *Saxone* case is that the warehouse where the shoes were stored was run by a subsidiary company, Jacksons Limited, whose only trade was storage. The only issue in the case was whether storage of shoes manufactured within the Saxone group, and not yet sold (shoes, that is, falling within what is now section 18(1)(f)(ii)) could be treated as "a part of a trade", the other part being the storage of shoes which did not fall within any limb of section 18(1)(f). It was, therefore, a case of what I have called vertical division, although there was no physical segregation of the types of shoe within the warehouse, and it gives no support to the "separate" element of the "significant, separate and identifiable" test.

33. The case which does cause some difficulty is *Kilmarnock*, and it calls for closer consideration. The Kilmarnock Co-op traded as a general merchant, selling a variety of goods by retail and some by wholesale. As part of a plan to expand wholesaling in coal, it installed (in a separate building at its premises) specialised machinery for screening coal and packing it in 28-lb paper bags. The issue was whether this building was an industrial building. Before the General Commissioners there seem to have been only two issues: whether the building was used to subject coal to a process, and whether it was used for a purpose "ancillary to the purposes of ... a retail shop". The General Commissioners decided both these points against the Co-op. They seem to have made no finding about whether the screening and bagging of coal was a part of its trade.

34. On appeal to the Court of Session the Co-op succeeded on both the points argued below. The Court of Session also addressed the point which seems not to have been taken below, that is whether the screening and bagging of coal was a part of the Co-op's trade for the purposes of what is now section 18(2).

35. What the Court said on this point is not easy to disentangle from its reasoning on the "ancillary purpose" issue. But Lord Clyde said at pp 679-680:

> "The Crown further argued that in any event the building in question was not in use for a trade or part of a trade which consisted in subjecting of the goods to a process within the meaning of [section 18(2)].
>
> It was therefore disqualified from being an industrial building or structure, so the argument runs, within the meaning of the subsection. This contention by the Crown is also not specifically dealt with by the Commissioners, if it was presented to them. The argument was that if the Society's only trade was screening and packing of coal in paper bags then the situation might have been different, but this Society operated a trade of general merchants, and only a small part of their total operations involved paper packaging of screened coal. But the relative proportions of the Society's various activities appear to me to be quite irrelevant. The building in question houses a definitely identifiable part of their industrial operations and a quite separate activity, and that separate activity alone. This is in my view enough to satisfy the requirements of subsection (2)."

Lord Guthrie said at p 681:

> "But in my opinion the separation of the dross from the coal is its subjection to a process, the process of selection from the mass of coal of lumps which are suitable for packing in bags. There is no doubt that at the building the Appellants carry on a trade, a business conducted with a view to profit, which consists of the subjection of the coal to this process."

36. Both Patten J and Lawrence Collins LJ cited these passages (the latter citing Lord Clyde rather more briefly). Patten J commented (para 37) :

> "Mr Goodfellow submits that applying Lightman J's test of what constitutes storage, the packaging of the coal was

> not an end in itself and was simply a step towards making the coal more attractive for sale to potential customers at the society's retail stores. But that was not the way in which the Court of Session approached the matter. Both Lord Clyde and Lord Guthrie regarded the process as a separate commercial operation in its own right. Lord Clyde's words can, I think, be read as a response to the Crown's contention that the packaging operation was not the society's "only" trade. Not that it was not an operation in the nature of trade at all."

37. Similarly Lawrence Collins LJ said (paras 74 and 77):

> "Lord Clyde was meeting the point that that trade was only a small part of the operations of the Society. He was not dealing with a point that there was no separate trade ... The gist of the decision in *Kilmarnock* is that the relevant trade for the purposes of section 18(1) was assumed to be processing and packing, and that the effect of section 18(2) was to make that part of Kilmarnock's overall trade a qualifying trade for the purposes of section 18(1)(e). I do not consider that it is authority for Maco's case that it is not necessary for part of the trade under section 18(2) to be a qualifying trade under section 18(1)."

38. I am in full agreement with these comments by Patten J and Lawrence Collins LJ. A part of the Co-op's composite trade as general merchants consisted of the trade of manufacturer (of screened and bagged coal, to be sold either wholesale or retail). That brought it within what is now section 18(2). The fact that most of it might be sold in the Co-op's retail shops did not take it out again under section 18(4). The case does not therefore assist Maco because its trade is neither manufacture nor storage.

39. I am indeed in full and respectful agreement with the whole of the judgment of Lawrence Collins LJ. I would happily have adopted it as mine, but in view of the differences of opinion on this matter, both below and in this House, I have thought it right to set out my opinion in my own words. I would therefore allow this appeal and restore the decision of Patten J.

LORD MANCE

My Lords,

40. I have had the benefit of reading in draft the speeches of my noble and learned friends Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. I gratefully adopt their account of the background and issues.

41. I have found the issues quite evenly balanced. However, in my opinion, the better view is that taken by the majority in the Court of Appeal and by my noble and learned friend Lord Scott. I would supplement the reasons Lord Scott gives by only a few of my own, as follows.

42. First, I consider the natural meaning of the language in s.18(2) to be that "a part of a trade or undertaking" is an element, not itself a trade or undertaking. It seems to me improbable that s.18(2) was included simply to make clear that a "composite trade" (i.e. a business involving two or more distinct trades) should be treated severally, so that an industrial building or structure in use for any one of such trades would be eligible for writing-down allowance. That would anyway be obvious from the language of s.18(1) and as a matter of common sense. S.18(1) requires nothing more than an identifiable building or structure in use for the purposes specified expressly as purposes of, in most cases, a trade. It could not have been thought that its benefit would be lost if the business also had other buildings or structures in which it carried on some other trade.

43. In his dissenting judgment in the Court of Appeal Lawrence Collins LJ nonetheless read s.18(1)(f) and s.18(2) together in such a way that s.18(2) would only apply if Maco could establish, first, that it had a trade which "consists in the storage" of the goods and, secondly, that the relevant building was in use for the purposes of part of that trade. In short, Maco would in this case need to establish that it was carrying on a trade or undertaking, part of which was the trade of storage in the relevant building. But that is not what s.18(2) says. It is the part of the trade which has to be storage, not the trade itself. And to require both the part and the trade of which it is part to be trades when carried on by the taxpayer seems a most unlikely construction of the statutory wording.

44. In my view, the statutory language is clear enough. Reading ss.18(1) and (2) together, the word "trade" in s.18(1)(f) becomes "part of a trade", and the word "part" (not the word "trade") then qualifies the ensuing clause "which consists in the storage". A part of a trade thus complies with the conditions set out in subsection 1(f), if the part "consists in the storage" etc. The remaining words of s.18(2) (providing that "a building or structure shall not … be an industrial building or structure unless it is in use for the purposes of that part of that trade or undertaking") complete the information as to how subsection (2) aligns and operates in conjunction with the opening words of subsection (1) ("'industrial building or structure' means a building or structure in use …..(f) for the purposes of a trade …."). Again, they show that "trade" in s.18(1) is in this context to be read as "part of a trade". The result is that a building or structure will only count under s.18(2) if it is in use for the purposes of whatever part of the trade or undertaking is identified under that subsection as consisting of storage within s.18(1)(f). Again, that confirms that all that matters is that there should be a part of a trade or undertaking, for the purposes of which part the relevant building or structure is in use.

45. Like my noble and learned friend Lord Scott I see no difficulty in treating s.18(2) as a one-way provision, in the taxpayer's favour. It expands and does not restrict the allowance. This can be claimed either on the basis of and in respect of the trade or undertaking as a whole or, if that does not fall within s.18(1), then on the basis of but in respect only of a building or structure which is in use for a part of a trade or undertaking which part must (in the present case) consist in storage of goods or materials within one of clauses (i) to (iv) of s.18(1)(f). If, on the other hand, the trade or undertaking as a whole qualifies, then no question arises of looking at any part of it under s.18(2).

46. Like the Commissioners, I find strange the idea that it should have been intended that a building or structure should benefit by incentives in a corporate structure set up where the building owner trades separately as a storage supplier, whereas the same building or structure attracts no such incentive in a set up like the present, where Maco was also buying and selling the contents which the building was used to store. As Lord Scott notes, the Commissioners do not appear to have experienced any difficulty over the forty or so years when they were ready to accept the correctness of Maco's interpretation. Bearing in mind that both s.18(1) and s.18(2) only operate where there is an identifiable building or structure in use for the relevant purposes, it does not seem to me

surprising that Maco's interpretation gave rise to no difficulty and no move by the Commissioners to amend the law.

47. Instead, in 1982, the wording of s.18(3) was introduced into the Capital Allowances Act 1968 (the predecessor statute to the 1990 Act) by amendment made by the Finance Act 1982. S.18(3) provides that the subjection of goods or materials to a process should include maintaining or repairing them. When this provision was introduced in 1982, it was clearly contemplated that the position, apart from the further provision of s.18(3) commencing "notwithstanding subsection (2) above", would be that a person engaged in the maintenance or repair of goods or materials employed by that person in a trade or undertaking could claim an allowance even though the trade or undertaking itself did not fall within any head of s.18(2). This is only consistent with the view that I take of s.18(2) which is the view also taken by the Revenue at the time (as well as by Dillon J at first instance in *Vibroplant Ltd. v. Holland* (1981) 54 TC 658, 666). The further provision commencing "notwithstanding subsection (2) above" was deliberately confined to the context of maintenance and repair of goods and materials brought by s.18(3) within s.18(1)(e). Nothing equivalent exists or can have been thought in 1982 to exist in relation to the other paragraphs of s.18(1) including paragraph (f). The 1990 statute - the consolidating statute which we have to interpret: see *R v. Secretary of State for the Environment, Transport and the Regions Ex p. Spath Holme Ltd.* [2001] 2 AC 349 - was passed on the view of the law which Maco advances and which must be taken to reflect Parliament's intention regarding the effect of s.18(2).

48. I would therefore uphold the Court of Appeal's decision and dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

49. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Walker of Gestingthorpe, and I agree with him that this appeal should be allowed. The issue at stake has been subject to an unusual degree of disagreement, in that: the experienced Special Commissioner's decision was reversed by Patten J, whose decision was

in turn reversed by the Court of Appeal by a majority of two to one, and there is a bare majority of three to two the other way in this House. Not least for that reason, I propose to express my reasons in my own words.

50. The facts and relevant statutory background are fully set out in Lord Walker's opinion. The issue ultimately turns on the meaning of "a part of a trade" in section 18(2) of the 1990 Act. Maco contends that it refers to any activity which forms a component of the taxpayer's trade, such as an activity which is ancillary to, or inherent in, that trade. The Commissioners argue that it only applies to any activity which is itself a trade, although carried on as part of a taxpayer's composite trade.

51. The difference between the two positions can be illustrated by an example of a trader who manufactures motor vehicle components, some of which he sells through retail outlets to the public, and some of which he supplies to motor vehicle manufacturers. There could be said three separate "part[s]" of the business, namely (a) the manufacture of components, (b) the supply of components to the motor manufacturing industry, and (c) the retail sale of components. Both parties accept that, as a result of applying section 18(2), insofar as a building was used by the trader for purpose (a), e.g. a factory, it would fall within section 18(1)(e), but, if a building was used by the trader for purpose (c), e.g. a shop, section 18(1) would not apply, as retail use is not within section 18(1).

52. If the components were stored in a separate building by the trader so that, in connection with purpose (b), they could be supplied to motor vehicle manufacturers as and when they were needed, on Maco's case the building would satisfy section 18(1)(f)((i), as the components would be in "storage", an aspect (and hence under section 18(2) "a part") of the trader's business, and they would be intended to "be used in the manufacture of other goods", namely motor vehicles. However, as the storage of the components in preparation for providing them to motor vehicle manufacturers could not sensibly be characterised as a separate trade of the trader, on the Commissioners' case the use of the building would not fall within the ambit of section 18(2), and hence could not benefit from section 18(1)(f) – at least unless it could be said to be used for the purposes of the component manufacturing business.

53. While Maco's interpretation is generally more generous to taxpayers, there will be cases where, on the Commissioners' case, a building would fall within section 18(1), but on Maco's approach it

would not do so. If a building was used by the trader in my example for research into the design or efficiency of motor vehicle components, Maco would presumably accept that the building was used for research, which is not within any of the categories of section 18(1). However, the Commissioners would, I think, accept that it fell within section 18(1)(e), at least provided that the research was devoted to improving the quality of the components manufactured by the trader: in such a case, the building would be used "for the purposes of" the trader's manufacturing trade.

54. In my judgment, the Commissioners' interpretation is to be preferred. First, I think it is more in accordance with the language and structure of section 18. Secondly, it seems to me to make better sense so far as the purpose of section 18 is concerned. Thirdly, I believe that it is the more practical interpretation.

55. I accept that either interpretation is possible if one merely looks at the way in which section 18(2) is expressed. However, I agree with what Lawrence Collins LJ said in the Court of Appeal at para 48, namely that "the language of section 18(2) and its place within section 18 show that it is concerned with part of a trade which is a qualifying trade under section 18(1)". Applying section 18(2) to, for instance, section 18(1)(e) or (f), the section extends to a building "in use… for the purposes of part of a trade which consists in [X]". On the Commissioners' argument, this is perfectly simple: one simply asks whether the trader in question carries on a business, part of which is trade X.

56. This appears to me to fit in well with the structure and wording of the two subsections. Section 18(2) is simply clarifying or extending section 18(1) so far as composite trades are concerned. To put the point another way, both linguistically and in the light of the way in which the two sub-sections are structured, the "part of a trade" envisaged by section 18(2) has the same characteristics as the "trade" envisaged by section 18(1): as Patten J put it, [2007] STC 721 at para 40, it has to be "an activity in the nature of a trade".

57. On Maco's approach, one asks whether part of the trader's trade consists of activity X. On this approach, through the medium of section 18(2), it seems to me that section 18(1) ceases to be a provision concerned with types of trade, which is what it appears clearly to be directed to, and becomes concerned with types of activity within a trade.

Further, if Maco's interpretation is correct, the structure of sections 18(1) and (2) is both unnecessarily cumbersome and a little surprising. All that would have been needed would have been to replace the word "which" in the opening part of paragraphs (e) and (f) of section 18(1) with "insofar as it" (and to make similar amendments in the other paragraphs), and to omit section 18(2) altogether. Further, on this approach, the ambit of section 18(2) becomes more wide-ranging than that of section 18(1), which is not what one would expect.

58. As to the purpose of section 18, it is to encourage certain types of business, through the indirect means of benefitting property owners fiscally. The origins of section 18 go back to section 8 of the Income Taxes Act 1945, subsequently re-enacted as section 8 of the Capital Allowances Act 1968. In this connection, the 1945 Act was prompted by the need to regenerate the United Kingdom's economy after the Second World War. The use of land for certain types of business was encouraged through the means of capital allowances, and that has persisted to the present day in the Capital Allowances Act 2001, whose sections 274 and 276 have replaced section 18 of the 1990 Act (in terms which now clearly reflect the Commissioners' interpretation of section 18).

59. If, as is suggested by the wording of section 18 of the 1990 Act, and is clear from the underlying legislative policy, the purpose is to encourage certain types of business, then that also appears to me to favour the Commissioners' contention. In that connection, I would refer to a building put to a use subsidiary to a trade falling within section 18(1) but not itself falling within the subsection (such as research for improving motor vehicle components manufactured by a trader, the example given above). It seems to me likely that the policy of the 1990 Act was intended to be that such a building should be within the ambit of section 18. On the Commissioners' case, it would be.

60. On Maco's case, however, such a building would not be within section 18(1), unless section 18(2) only applies one way. It would be a little surprising if such a building was not within section 18(1), as it would involve attributing a rather unrealistic view to the legislature and an artificially restricted scope to the legislation. On the other hand, it would be more than surprising if, on Maco's case, section 18(2) only served to expand, but not to limit, the ambit of section 18(1). The logic of Maco's case appears to me (and I understood it to be accepted by Maco) to involve dividing up individual businesses into component parts, and then assessing which of those parts satisfy section 18(1).

61. Thirdly, it seems to me that Maco's interpretation could lead to practical difficulties. It would often be a matter of opinion how far one went in dividing up aspects of a particular trade. Take an area in a factory, or a separate structure adjoining the factory, given over to storage of the finished goods ready for immediate collection, or to keeping trucks used to transport the goods around, or out of, the factory. On the Commissioners' interpretation, the treatment of such areas or structures would present no problem. They would fall within section 18(1)(e), and section 18(2) would not apply. On Maco's case, the areas or structures could be said to be outside the ambit of section 18(1)(e), because of section 18(2). Not only would that seem rather inconsistent with the purpose of the capital allowances scheme as already discussed, but it would also appear somewhat unrealistic, and it could also obviously lead to arguments and subjective judgements as to when and how to divide up businesses into component parts.

62. I readily concede that none of the arguments so far discussed would, if considered individually, be determinative of the point at issue. However, I consider that, when taken together, they make out a conclusive case in support of the Commissioners' interpretation of section 18(2), unless there is a compelling reason, which I have not so far considered, for rejecting that interpretation. I turn, then, to consider the arguments raised on Maco's behalf (insofar as I have not already dealt with them)

63. First, it is said that there are previous decisions which favour Maco's approach. Only one, *Saxone Lilley & Skinner (Holdings) Ltd v IRC* (1967) 44 TC 122, is a decision of your Lordships' House, and it does not, in my view, have any relevance to the point at issue here. The decision of the Inner House in *Kilmarnock Equitable Co-operative Society v IRC* (1966) 42 TC 675 is more in point on the facts, and there is a strong case for saying that the outcome is hard to reconcile with the Commissioners' approach in this case.. However, quite apart from the fact that the decision is not binding on this House, it does not appear to me that the Commissioners raised the point that they are relying on here. In *Vibroplant Ltd v Holland (HMIT)* (1981) 54 TC 658, a view was expressed at first instance by Dillon J (whose decision was upheld on appeal), which was supportive of Maco's case, but it was both tentative and *obiter*. Maco also relied on the decision of His Honour Judge Finlay QC, sitting in the High Court, in *Crusabridge Investments Ltd v Casings International Ltd* (1979) 54 TC 246, where the point now raised by the Commissioners would very probably have produced a different outcome, but it does not seem to me to have been raised.

64. Accordingly, I do not consider that the reasoning in the earlier cases relied on by Maco provides much assistance to its case. I should also mention that more recently in *Bestway (Holdings) Ltd v Luff (HMIT)* (1998) 70 TC 512, the point presently at issue was addressed in detail by Lightman J, who resolved it in favour of the Commissioners' interpretation.

65. Secondly, Maco argues that the Commissioners appear to have accepted, at least until they took their present stance in, or shortly before, *Bestway*, that Maco's interpretation was correct. To my mind, the only value in that point is to weaken any reliance that might be placed on the alleged impracticality of Maco's interpretation. It is true that there is no evidence either way as to the practicality of Maco's interpretation, but I consider that there is something (but not a great deal) in the argument that the Commissioners might have been expected to produce evidence of difficulties, especially if they had been frequently encountered.

66. Apart from this rather limited sort of factor (and ignoring cases where legitimate expectation or the like could be relied on), the fact that, for a substantial period, the Commissioners interpreted a particular provision in a taxing statute in a certain way is normally of limited assistance as to the provision's meaning. The interpretation of legislation is, of course, ultimately a matter for the judiciary, not the executive. Quite apart from this, the Commissioners' change of stance in this case would, as mentioned, work to the advantage of some taxpayers. It cannot conceivably be argued that such a taxpayer could not invoke what is now the Commissioners' interpretation, and, if such an argument succeeded, the Commissioners would be bound to give effect to that interpretation in other cases, including those where it worked against a taxpayer.

67. Thirdly, it is said that the effect of the Commissioners' interpretation can be avoided through the means of the relevant part of the business being carried on through a subsidiary company. Thus, in the present case, if Maco had set up a subsidiary which had carried on the storage aspect as its own business, the building in which the storage was carried on would have fallen within section 18(1)(f). That is true, but the outcomes of disputes in revenue law (and indeed in many other areas of law) often turn on the corporate structure which parties such as taxpayers, or those controlling taxpayers, choose to adopt.

68. Finally, reliance is placed on the proviso to section 18(3), which, it is said, is only consistent with Maco's interpretation. I think there are two points to be made about that argument. The first is that section 18(3) reproduces a sub-section introduced into section 7 of the 1968 Act, with the purpose of reversing the effect of the decision in *Vibroplant*. Given that (as already mentioned) Dillon J expressed the *obiter* views that he did in that case, it is not surprising that the proviso was included. Secondly, the proviso to section 18(3) is not so much inconsistent with the Commissioners' interpretation of section 18(2) as unnecessary if that interpretation is correct. It would be surprising if repair was treated in the way the Commissioners argue because of the proviso to section 18(3), but other operations were not, but that would be the effect of Maco's interpretation.

69. Combining these two points, I conclude that the proviso to section 18(3) does not assist Maco's case. The proviso to section 18(3) is consistent with the Commissioners' interpretation of section 18(2), and was included in relation to repair because of the *obiter* view expressed in the very case which section 18(3) (or, to be more accurate, its statutory predecessor) was introduced to reverse.

70. Accordingly for the reasons given by Lord Walker, as supplemented by the points mentioned in this opinion, I would allow the Commissioners' appeal and restore the order of Patten J.