Upper Tribunal for Scotland

2022UT11
Ref: UTS/AP/21/0034

DECISION OF LORD ERICHT

On an appeal in the case of

BARR ENVIRONMENTAL LIMITED

Appellant

and

REVENUE SCOTLAND

Respondent

FTT Case Reference FTS/TC/AP/18/0011

Appellant: Ghosh QC, Bremner QC, Ruxandu (of the English Bar) Brodies LLP
Respondent: Young QC, Ower Revenue Scotland

9 May 2022

Introduction

[1] Landfill sites are divided into individual cells by walls, known as Outer Cell Walls ("OCWs"). Once a cell is filled with waste the cell is capped and the land is restored by placing material on top of the cap and landscaping. A landfill operator processed waste in a recycling facility known as a Materials Recovery Facility ("MRF") and then used some of the processed material in the construction of OCWs and restoration at two of its sites. The operator also took the view that a substance called filter cake, which it received for disposal

from clients, was chargeable at the lower rate of Scottish Landfill Tax. Revenue Scotland took the view that the processed material used in the construction of cell walls and restoration was chargeable to Scottish Landfill Tax, as was material used in roads, and that filter cake was chargeable at the standard rate, and issued assessments and penalties. The First-tier Tribunal for Scotland refused the operator's appeal (other than in respect of certain matters which do not concern us here) ([2021] FTSTC3). The operator appealed to the Upper Tribunal for Scotland.

Summary of issues

[2] Two of the issues dealt with by the First-tier Tribunal were no longer before me.

[3] The first of these is that the respondent conceded the appeal in respect of roads. Parties entered into a joint minute in the following terms:

> "1. That in terms of section 47(1) of the Tribunals (Scotland) Act 2014…, the Tribunal should quash the decision of the First-tier Tribunal for Scotland Tax Chamber…. set out in its Decision Notice first released on 5 October 2021 and amended on 18 November 2021 insofar as it upholds, or directs further procedure in relation to, the decisions of the respondent set out in the Closure Notice dated 31 July 2018 and Notices of Assessment dated 31 July 2018 insofar as they relate to material used in the construction and maintenance of roads at the appellant's two landfill sites….
>
> 3. That the Tribunal should record that the value of the tax and penalties assessed in the aforementioned decisions of the respondent insofar as they relate to material used in the construction and maintenance of roads at the appellant's two landfill sites is £5,426,315 and that the sums sought by the respondent arising from its aforementioned Closure Notice and Notices of Assessment dated 31 July 2018 are accordingly reduced by that amount."

[4] I shall give effect to that Joint Minute.

[5] The second of these is that the appellant did not insist on its appeal in respect of the First-tier Tribunal's finding on whether a certain type of filter cake waste was taxable at the standard or lower rate of Scottish Landfill Tax.

[6] The remaining issues in this appeal can be summarised as follows.

The taxable disposals issue

[7] The First-tier Tribunal held that substantial quantities of material that the appellant used for the construction of outer cell walls and for restoration at its sites were "disposed of as waste" within the meanings of sections 3, 4 and 5 of the Landfill Tax (Scotland) Act 2014 and therefore taxable. The appellant submitted that the First-tier Tribunal did so on the basis of a serious misreading and mishandling of the relevant evidence and a misreading of the relevant authorities. The respondent's position was that the First-tier Tribunal's findings were well founded, supported by adequate reasoning, properly open to the Tribunal to make and properly made on the basis of the evidence before it.

The prescribed activities issue

[8] Even if there is no taxable disposal, material can be taxable if it falls within the definition of "prescribed activities" in section 6, 30 and 31 of the 2014 Act, article 3 of the Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014 and Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015. The First-tier Tribunal held that material used in the OCWs and for restoration was taxable under this head. The appellant's position was that site-won materials which would not otherwise have been subject to Scottish Land Tax could not become subject to Scottish Land Tax as a prescribed activity.

The assessments issue

[9] The respondent issued assessments which were upheld by the First-tier Tribunal. The appellant's position was that (1) for the reasons advanced under the taxable disposals

issue, there were no inaccuracies, (2) in the light of the professional advice taken and HMRC's previous acceptance of the treatment of the materials, any inaccuracies could not be said to be deliberate or reckless and (3) the First-tier Tribunal had made serious errors as to its fact finding exercise and the handling of the relevant evidence which undermined its conclusions. The respondent's position was that the First-tier Tribunal's findings were well founded, supported by adequate reasoning, properly open to the Tribunal to make and properly made on the basis of the evidence before it.

The penalties issue

[10] The respondent issued penalties on the ground that the appellant's Scottish Landfill Tax returns contained inaccuracies. The First-tier Tribunal upheld the penalties. The appellant's position was that (1) the appellant's position on the substantive issues was correct and so there was no "insufficiency of tax" to justify a penalty and (2) the respondent had taken careful, competent professional advice and no penalty could arise. The respondent's position was that the First-tier Tribunal's findings were well founded, supported by adequate reasoning, properly open to the Tribunal to make and properly made on the basis of the evidence before it.

Position of parties

[11] The appellant invited me to allow the appeal, set aside the First-tier Tribunal's decision and re-make it, concluding that:

(a) the material used in the construction of the OCWs and restoration works was not discarded as waste and therefore was not chargeable to Scottish Landfill Tax; and

(b) the appellant did not act deliberately in bringing about a loss of tax, and the appellant's Scottish Landfill Tax returns did not contain deliberate inaccuracies.

[12] The respondent invited me to quash and re-make the First-tier Tribunal's decision on the prescribed activities issue in its favour and to uphold the decision of the First-tier Tribunal and dismiss the appeal on the taxable disposals, assessments and penalties issues. The respondent agreed with the appellant that if I were to allow the appeal, it would be appropriate to re-make the decision rather than remit it back to the First-tier Tribunal.

Statutory provisions

Landfill Tax (Scotland) Act 2014: Scottish Landfill Tax

"3 Charge to tax

(1) Tax is to be charged on a taxable disposal made in Scotland.

(2) A disposal is a taxable disposal if –
(a) it is a disposal of material as waste (see section 4),
(b) it is made by way of landfill (see section 5), and
(c) it is made at a landfill (see section 12).
……

4 Disposal of material as waste

(1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding material.

(2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

……..

5 Disposal by way of landfill

(1) A disposal of material is a disposal of it by way of landfill if –
(a) it is deposited on the surface of land or on a structure set into the surface, or
(b) it is deposited under the surface of the land.

6 Prescribed landfill site activities to be treated as disposals

(1) The Scottish Ministers may, by order, prescribe a landfill site activity for the purposes of this section.

(2) A 'landfill site activity' means any of the following descriptions of activity, or an activity that falls within any of the following descriptions –
(a) using or otherwise dealing with material at a landfill site,
(b) storing or otherwise having material at a landfill site.

(3) If a prescribed landfill site activity is carried out at a landfill site, the activity is to be treated –
(a) as a disposal of the material involved in the activity as waste,
(b) as a disposal of that material made by way of landfill, and
(c) as a disposal at the landfill site of that material.

30 Information: material at landfill sites

(1) The Scottish Ministers may, by regulations, make provision about giving the Tax Authority information relating to material at a landfill site or part of a landfill site.

(2) The regulations may require a person to give information.

(3) The regulations may-
(a) require a person, or authorise [a designated officer] to require a person, to designate a part of a landfill site (a 'non-disposal area'), and
(b) require material, or descriptions of a material specified in the regulations, to be deposited in a non-disposal area.

31 Information: site restoration

(1) Before commencing restoration of all or part of a landfill site, the operator of the site must-
(a) notify the Tax Authority…that the restoration is to commence, and
(b) provide such other…information as the Tax Authority may require.

(2) In this section 'restoration' means work, other than capping waste, which is required by a relevant instrument to be carried out to restore a landfill site to use on completion of waste disposal operations.

(3) The following are relevant instruments-
(a) a planning permission
(b) an authorisation"

Scottish Landfill Tax (Administration) Regulations 2015 ("2015 Regulations)

"**12 Non-disposal areas**

(1) An officer of Revenue Scotland is authorised to require a person to designate a part of a landfill site (a 'non-disposal area'), and a person must designate a non-disposal area if so required.

(2) Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers, or one of its officers considers, there to be a risk to the collection of landfill tax-
(a) the material must be deposited in a non-disposal area; and
(b) a registrable person must give Revenue Scotland, or one of its officers, information and maintain a record in accordance with paragraph (4) below.

(3) A designation ceases to have effect if a notice in writing to that effect is given to a registrable person by Revenue Scotland.

(4) A registrable person must maintain a record in relation to the non-disposal area of the following information, and give this information to Revenue Scotland or to one of its officers if requested-
(a) the weight and description of all material deposited there;
(b) the intended destination or use of all such material and, where any material has been removed or used, the actual destination or use of that material;
(c) the weight and description of any such material sorted or removed."

Finance Act 1996: UK Landfill Tax

"**40 Charge to tax**

(1) Tax shall be charged on a taxable disposal.

(2) A disposal is a taxable disposal if-
(a) it is a disposal of material as waste,
(b) it is made by way of landfill,
(c) it is made at a landfill site, and
(d) it is made on or after 1st October 1996.

……

64 Disposal of material as waste

(1) A disposal of material is a disposal of it as waste if the person making the disposal does so within the intention of discarding the material.

(2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

…."

The taxable disposals issue

Decision of First-tier Tribunal

[13] The First-tier Tribunal found that the use of materials from the MRF in the construction of OCWs and in restoration were taxable disposals because the materials were disposed of with the intention to discard as waste by way of landfill at a landfill site (para [432]).

Findings in fact of the First-tier Tribunal accepted by the appellant

[14] In coming to that conclusion the First-tier Tribunal made various findings in fact which were not challenged on appeal and indeed were the foundation of the appellant's submission that the decision should be remade in its favour.

[15] These uncontroversial findings may be summarised as follows.

[16] The appellant is a private limited company forming part of a larger group which acquired the appellant in 2007 resulting in the introduction of new systems. Its principal activity is waste management. The appeal concerned landfill sites at Auchencarroch and Garlaff. The systems at each site are similar. A landfill site is a carefully managed location in which the design, construction and operation of the site play a part in reducing the environmental impact. Landfill sites are complex environments with infrastructure and engineering requirements.

[17] In 2010, the Scottish Government's Zero Waste Plan was published setting out plans for legislation to reduce the amount of waste going to landfill. The appellant decided to invest in MRFs at its Auchencarroch and Garlaff sites in order to remain competitive and to

retain local authority contracts in the face of more stringent policy and increasing landfill costs. An MRF is a recycling and reprocessing centre designed to sort and process waste received by a landfill operator. The appellant's MRFs incorporate a number of mechanical processes to separate out the constituent parts of the incoming waste stream, in order to recover recyclable components and other relatively non-compactable materials. Using shredders, trommel screens (large cylindrical sieves), magnetic and eddy current separators, and density classifiers, in combination with manual hand-picking stations, they recover metals (both ferrous and non-ferrous), wood, textiles, rubble and plastic. The incoming waste stream comprises mixed municipal and construction waste and commercial and industrial material. Bulky items such as mattresses, carpets and large metal or plastic items are segregated. Recyclables such as cans, tins and bottles, when recovered from the MRF, are sent off-site for recycling. Both MRFs were designed with a view to producing material for the OCWs. The OCWs consist of two zones: Zone A forms the exterior of the cell and Zone B is between Zone A and the contents of the cell. The material used for the OCWs is derived from a combination of four separated fractions from the MRF. The incoming waste has the bulky recyclable material removed. It is then shredded to reduce the particle size to 150-300mm. That is the heavy fraction. The coarse or light fraction is smaller and is between 40mm and 300mm. The fines fractions are less than or equal to either 40mm or, after going through what is called the reclaimer, less than or equal to 10mm. The latter (10mm) fines are also used for restoration. The First-tier Tribunal found in terms that "undoubtedly Barr did make extensive use of the material" (para [272]). There was a passage of title to the material to the respondents prior to disposal (para [111]).

[18] Development of the landfill sites is carried out in a phased manner to construct containment cells. Each cell starts life as an engineered depression which is a large

excavated hole referred to as the cell base. To protect the environment and human health, the base of the cell is lined with a "basal lining system" ie a layer of clay, a geosynthetic clay liner, a layer of geomembrane and a geotextile layer. When waste decomposes it generates landfill gas and leachate. In each cell there is series of wells and pipes to collect the gas and leachate. The capping process is designed to capture residual landfill gas and leachate. The cap lining system is brought over the waste mass and tied into the basal lining system and then covered with restoration material.

[19] The OCWs are constructed by an excavator and compactor driver working together. The appellant has no written specification for the design and construction of OCWs and relies on the experience and knowledge of its senior site operators. It is the design and perimeter of the cell that dictates where the OCWs are constructed. There was an OCW of some sort prior to 2012 and there was an external layer of clay. The OCWs should have been constructed as follows. Once landfill in a cell reaches ground level the first section of OCW is constructed round the outer edge of the cell to a height of approximately 3 metres. This provides a containment barrier for waste disposal operations. Waste is tipped and compacted within the cell to the height of the cell wall. Then the next section of the OCW is constructed to a height of 3 metres and the process is repeated. The OCW is constructed by an excavator driver taking material recovered from the processing of different waste streams in the MRF and mixing that with site-won clay and/or site-won soils. The only materials which do not go into the OCWs are the bigger items of rubble, wood metals and bigger plastics. Since the output of the MRFs is variable the heavy fraction, the light fraction and the fines are mixed together and engineered by the excavator and landfill compactor with a view to achieving a fairly consistent result. At Auchencarroch that is then mixed with 15% site-won clay and 15% site-won soil and at Garlaff, where there is relatively little site-won

soil, it is mixed with approximately 30% clay. Site-won materials are mainly virgin clay and soils dug out from each site. Once mixed it is used to form the 3 metre high OCWs. A clay layer approximately 0.5 to 1m deep is applied to the outside face of the OCW to seal the outside of the wall to prevent leachate escape. The total height of the cell is as stipulated by the restoration management plan ("RMP"). The waste compacts whereas the clay does not so the ratio of waste to clay/soil is 70:30. The minimum wall width is approximately 10 metres. Towards the top of the cell, the wall gets thinner because the working area of the cell closes down.

[20] Containment of exposed waste is "obviously" a function performed by the OCW (para [346]). The OCW provides a health and safety function in the sense that it is a barrier at the edge of a high face when the cell is say 30 or 40 metres above ground level (para [347]). Barr have gone to a lot of trouble and effort in the construction of the OCWs (para [352]). Some engineering benefits such as gas and leachate control are gained from the OCW (para [352]).

[21] Restoration projects can only take place once a cell is capped. The last restoration projects at Auchencarroch and Garlaff ended in January 2016 and June 2016 respectively. The Restoration Management Plan ("RMP") for each site is a map and it identifies the height and contours to which the site must be restored and the different areas of vegetation. The maps were approved by the relevant local authorities in 2008 for Auchencarroch and 2002 for Garlaff. Effectively the RMP is part of the planning permission.

[22] The planning permission for Auchencarroch specifies restoration to a depth of not less than 0.9 metres. The RMP provides that the restoration will be initially to grassland to stabilise the soil. The Pollution Prevention and Control Permit ("PPC") issued by SEPA provides that the final cap will comprise soil or peat greater than one metre or other suitable

combination of materials as agreed in writing with SEPA. Nothing was ever agreed with SEPA.

[23] In terms of the planning permission for Garlaff restoration is to be of civic amenity site areas and use for agriculture, forest etc.

[24] A one metre depth is a minimum required for restoration and to guarantee that up to 20% more was in place according to industry guidance. Areas of the sites furthest away from cell walls are more susceptible to settlement. Materials used to restore settlement would be 60% site-won and 40% from the MRF. The First-tier Tribunal rejected the respondent's contention that restoration levels attributable to settlement were excessive (para [399]).

Submissions for the appellant

[25] The appellant's primary position was that on the findings of fact made by the First-tier Tribunal there was no charge to Scottish Landfill Tax. Its secondary position was that the First-tier Tribunal had it erred in law in making certain findings in fact.

[26] Senior counsel for the appellant submitted that the First-tier Tribunal erred in law in concluding that the material used in the construction of OCWs and the material used in restoration was disposed of by the appellant with the intention to discard as waste.

[27] Counsel submitted that there had been no effective challenge to the evidence of the appellant's subjective intention. The First-tier Tribunal erred in holding that the fact that it had never been put to the appellant's employees Mr Ramsey and/or Miss Milligan that the appellant intended to discard the material as waste did not preclude a finding that the appellant intended to dispose of the material as waste (para [302]). The subjective intention of the appellant was an essential issue in the case (*HMRC* v *Devon Waste Management Ltd*

[2021] EWCA Civ 584 paras [57] and [80]). Clear and cogent evidence was given for the appellant that (1) it did not intend to discard the material used in the construction of OCWs and in restoration but intended to retain it for use, (2) the material performed a function and (3) the material was for the appellant's own purposes. Given the absence of any challenge to that evidence, it was not open to the First-tier Tribunal to conclude that nonetheless the material had been discarded as waste.

[28] Counsel further submitted that the First-tier Tribunal had incorrectly applied the law to the facts. In respect of the OCWs, the First-tier Tribunal's conclusion seemed to be an inference from lack of evidence that the Tribunal would have expected to see if the appellant had the intention not to discard the material as waste, eg documentary evidence of design and construction including analysis of engineering considerations. The Tribunal drew the inference that what was really going on was nothing more than a careful placement of waste that was being discarded, rather than an established engineering purpose. In relation to restoration, the basis of the First-tier Tribunal's decision was that it was not satisfied that the materials used were suitable for use and restoration and therefore the appellant must have intended to discard them as waste. The appellant's witnesses' evidence was that they did not have an intention of discarding the material used in the construction of cell walls or for restoration and that evidence should have been accepted. The contrary was never put to them in cross-examination. The First-tier Tribunal wrongly failed to give any (or sufficient) weight to the factors identified by Rose LJ in *Devon Waste* at para [57]. It failed to take into account the fact that the material used in the construction of OCWs and for restoration works was not placed "in the cell". It failed to give any (or any sufficient) weight to the fact that the material used in the construction of OCWs and restoration was mechanically sorted and processed. It did not give any (or any sufficient) weight to the material used being

separated out from the main body of waste and stored at the time at the processing areas. It did not take into account the fact that material used in the construction of OCWs and for restoration works is not "put into the cell". Although it accepted that there was a passage of title of material to the appellant before it was put to use, it incorrectly failed to give this factor any weight (para [111]). It failed to take into account the economic circumstances (in particular the substantial investment undertaken by the appellant) surrounding the acquisition of materials by the appellant and their use in the construction of OCWs and in restoration works (para [274]) but incorrectly assessed economic factors as a disadvantage (para [320] and [358]).

[29] Counsel further submitted the First-tier Tribunal's conclusions were infected by a series of further errors of law. The reason for dismissing the appellant's asserted intention was that there were tax considerations which also influenced its decision to construct OCWs and use certain material in restoration work (para 358 and 469): this was an error of law as just because there were tax advantages does not mean that the appellant did not intend to use the material in its onsite engineering activities. The Tribunal erred in concluding that the expert's opinions on functionality of the OCWs pointed towards an intention to discard: this was contrary to the findings of fact at paras [346]-[347], [352] and [271]. The Tribunal was wrong in law to focus on the question of suitability (paras [416] and [421]): the relevant question was the appellant's subjective intention in dealing with material. There was no proper evidential basis on which the Tribunal could have concluded that "putrescible material" was used in restoration (para 416): this was not accepted by Mr Ramsey in cross examination and was contrary to clear evidence that there had been no environmental breaches (para [127] and [282]) and no enforcement notices (para [129]). While the material used did sometimes originate from household waste (para [403]) only relatively dry, loose

soil was used in restoration (para [402]) and it did not follow that the material was necessary "putrescible". The Tribunal erred in law by failing to articulate why the evidence of Mr Ramsey and Miss Milligan that the appellant had no subjective intention to discard the material as waste was rejected.

[30] Counsel further submitted that the very substantial delay (in excess of 18 months) in delivering the decision had infected the Tribunal's approach to the evidence. (*AG* v *Murray Group* 2016 SC 201, *Natwest Markets plc* v *Bilta (UK) Ltd* (in liquidation) [2021] EWCA civ 680, *Macleod's Legal Representatives* v *Highland Health Board* 2016 SC 647).

[31] Counsel further submitted that certain particular findings were contrary to the evidence, unsupported by evidence or unreasonable applying the principles in *AG* v *Murray Group* and *Edwards* v *Bairstow* [1956] AC 14:

(a) In finding there was no plan that shows where the OCWs were built (para [65]), the Tribunal failed to take into account that the Non-Disposal Area applications to Revenue Scotland identified the locations for the OCWs.

(b) The Tribunal failed to provide any reasoning as to why the lack of written plans and specifications leads to an inference that the appellant's intention was to discard (para [342]). The appellant had consistently asserted that it believed the OCWs performed specific functions (eg paras [253]-[4]). A lack of expert reports cannot provide the evidential basis for the finding: a professional with experience in landfill can form a view on the functionality of landfill structure without commissioning third party reports.

(c) The Tribunal wrongly rejected on the basis of judicial knowledge Mr Ramsey's evidence that organic waste had been segregated from the MRF fines (para [191]). The expert witnesses could not help in this respect as by the time they

had become involved the restoration works had ceased and they had no knowledge of material used in restorations.

[32] Counsel further submitted that the UK Tribunal system has an absolute bar on adverse findings on credibility unless the points in question had been put to the witness (*Okolo* v *HMRC* [2013] STC 906, *Chen v Ng* [2017] UKPC 27). Scots law yielded the same conclusion based on fairness (*McKenzie* v *McKenzie* 1943 SC 108). Taking into account the overriding objective to deal with cases "fairly and justly" (First-tier Tribunal for Scotland Tax Chamber Rules of Procedure 2017 Rule 2) it was necessary to put the fundamental points in the case to witnesses in order to deal with the case fairly and justly.

Submissions for the respondent

[33] Senior counsel for the respondent submitted that the findings of the First-tier Tribunal in relation to the intention of the appellant to discard the materials purportedly used in the construction of OCWs disclosed no errors of law and should not be interfered with. The Tribunal identified the correct test, ie section 3 of the Landfill Tax (Scotland) Act 2014 and identified that the only issue in dispute was whether the appellant had intended to dispose of the material in question as waste. The Tribunal was correct to follow the decision of the Court of Appeal in *Devon Waste*. It correctly identified that any use of the material in question was not determinative of whether the material had been discarded (para [271]) while recognising that use may negate an intention to discard (para [272]). It correctly identified all factors and circumstances which should be considered (para [274]). The factors identified by Rose LJ in *Devon Waste* did not constitute an exhaustive list. In the present case a number of factors pointed towards an intention to discard and these factors were identified in the reasoning of the Tribunal. The appellant's own engineering expert

Mr Hodges conceded that the OCW did not provide a function of stabilising waste (para [348]). An engineered feature would be expected to have a clear criteria for design construction and testing (paras [323], [346]-[354], [362]). There was no evidence of training of operatives as to how to construct the OCW and no records kept for quality control reasons and the appellant's own engineering expert was unable to comment on the quantities used or the dimensions of the zones or layers of compaction. Management plans did not identify that OCWs were to be constructed to deal with the various hazards for which the management plans existed. The claim for benefits of vermin control, gas and leachate control were primarily achieved by Zone A without the need for Zone B.
Mr Ramsey conceded that the appellant had not produced any evidence from other landfill operatives that they adopted a similar practice, and the HMRC officer had never seen an OCW constructed of processed waste at any other landfill site. Insofar as there were any functional engineered benefits from OCWs as constructed, these could be achieved without constructing a Zone B of such large dimensions. The Tribunal was entitled to place little or no weight on separation as negating an intention to discard. The appellant's claim that one of the reasons for constructing the OCWs was to minimise the use of virgin clay was not borne out as the appellant's design for the OCW increased the use of clay. The objective intentions of Mr Ramsey and Miss Milligan were of limited importance and it was the objective intention of the landfill operator which must be judged. As the Tribunal found Mr Ramsey's evidence to be incredible on a number of points, it was entitled to place no or little weight on it.

[34] In respect of restoration, counsel submitted that the First-tier Tribunal's conclusion was fully supported by the evidence.

[35] Counsel further submitted that the high thresholds to be met before the Upper Tribunal could interfere with the First-tier Tribunal's finding of facts had not been met. The First-tier Tribunal was correct to find that no plan showing where the OCWs were built had been produced: the plans referred to by Mr Ramsey did not show any OCWs as built. The absence of any specification or modelling (and the lack of records and quality control) went to the heart of the appellant's case undermining the suggestion that there was an engineering function or purpose. The First-tier Tribunal's rejection of evidence about organic waste was based on evidence from officers visiting the sites, photographs and Mr Hodge's expert opinion (para [191]).

[36] In respect of the appellant's argument on failure to put the respondent's case to witnesses, counsel for the respondent submitted that the subjective intentions of Mr Ramsey and Miss Milligan were of very limited importance, and they were not prejudiced by lack of a formal accusation as they were given an opportunity to comment on the evidence which was being used to challenge their own evidence.

[37] Counsel further submitted that *Okolo* was not an authority for the proposition that there was an absolute bar on adverse findings and credibility of truth in this unless these points had been made to the witness. Further, in Scots Law failure to cross-examine will be fatal to the case only very rarely and the better approach is that the evidence would be subject to comment and wider consideration as a fairness in the whole circumstances, and whether there had been any real prejudice (*McKenzie* v *McKenzie*, *Dawson* v *Dawson* 1956 SLT notes 58, *Keenan* v *Scottish Wholesale Co-operative Society Ltd* 1914 SC 959, *Bryce* v *British Railways Board* 1996 SLT 1378, *Walker* v *McGruther & Marshall Ltd* 1982 SLT 345, *Gilluley* v *Greater Glasgow Health Board* 1987 SCLR 431).

Analysis and decision on the taxable disposals issue

The Law

[38] This Tribunal is a Scottish Tribunal applying Scots tax legislation and Scots law and procedure. It is not bound by decisions of the English courts on English or UK tax legislation. Nor is it bound by the same rules of procedure or evidence which apply in the English courts or the UK tax Tribunals system. Having said that, this Tribunal and the First-tier Tribunal are entitled to consider tax law and decisions from other jurisdictions within the UK or further afield which have relevance to the matters before them. In particular, where there is equivalent UK or English tax law, the decisions of the English courts are persuasive but not binding.

[39] Scottish Landfill Tax was introduced by the Landfill Scotland Act 2014. It is a devolved tax administered by Revenue Scotland, which was created by the Revenue Scotland and Tax Powers Act 2014. Prior to the introduction of the Scottish Landfill Tax, Landfill Tax was chargeable in Scotland under section 40 of the Finance Act 1996 and was administered by HMRC. The provisions of the 2014 Act in respect of Scottish Landfill Tax and the provisions of the Finance Act 1996 are in essentially identical terms. I was informed that an appeal by the appellant against HMRC on the taxable disposals issue under the 1996 Act for a period prior to the introduction of Scottish Landfill Tax has been stayed in the UK tax Tribunal system behind this appeal. To avoid confusion I shall refer to tax under the 2014 Act as "Scottish Landfill Tax" and the tax under the 1996 Act as "Landfill Tax" and to these taxes generically as "landfill tax".

[40] Landfill Tax has been considered by the English Court of Appeal in a number of cases. In *Customs and Excise Commissioners* v *Parkwood Landfill Ltd* [2002] EWCA Civ 1707 a local authority delivered waste to a recycling company which processed it and sold

recyclable materials to an associated landfill company for road making and landscaping purposes at its landfill site. The Court of Appeal held that Landfill Tax was not payable when waste material which had been recycled was used in a landfill site. In *Commissioners of HMRC* v *Waste Recycling Group* [2008] EWCA Civ 849 *certain* material from waste disposed of by a local authority to a recycling company was subsequently used by the recycling company to provide daily cover of waste on its site or the construction of roads. The Court of Appeal held the material used for daily cover and roads was not chargeable to Landfill Tax. In *Patersons of Greenoakhill Ltd* v *Revenue and Customs Commissioners* [2016] EWCA Civ 1250 [2017] 1 WLR 1210 a landfill site operator acquired for landfilling at its site biomass which produced methane which the operator extracted and used to generate electricity. The Court of Appeal held that the material which had been discarded was biomass, and not its byproduct of methane, and there had been a chargeable disposal of waste. In *Devon Waste* landfill cells were lined with soft black bag waste known as "fluff" to ensure the membrane was not damaged by large sharp objects in general waste which was then deposited on top of the fluff. The full cells were capped by fluff or shredded black bag waste known as "EVP". The Court of Appeal held that the fluff and EVP were chargeable to Landfill Tax.

[41] In view of the close similarity between Landfill Tax and Scottish Landfill Tax, the principles established in these cases and summarised in the following propositions also apply to Scottish Landfill Tax.

(1) The central purpose of landfill tax is to ensure that landfill costs reflect environmental impact thereby encouraging businesses and consumers in a cost effective and non-regulatory manner to produce less waste; to recover value from more of the waste that is produced; and to dispose of less waste in landfill sites (*Parkwood* para [10]);

(2) The tax is a landfill tax, not a landfill and recycling tax, and is not to be paid on recycled waste used in a landfill site: the purpose of the legislation is to tax waste material deposited at landfill sites and not to tax deposits at landfill sites of useful material produced from waste (*Parkwood* para [23], [28]);

(3) There is no principle that material once labelled as "waste" is always "waste" just because the original producer threw it away (*Waste Recycling Group* para [34]);

(4) All the conditions in section 40 of the 1996 Act and section 3 of the 2014 Act (ie that the disposal is (a) disposal as waste, (b) made by way of landfill and (c) made at a landfill site) must be satisfied at the same time, which is likely to be the moment when the material is disposed of as landfill (*Waste Recycling Group* para [30]; *Devon Waste* para [57]).

(5) The word "discard" in section 64(1) of the 1996 Act and section 4(1) of the 2014 Act is used in its ordinary meaning of "cast aside", "reject" or "abandon" and does not comprehend the retention and use of the material for the purposes of the owner of it (*Waste Recycling Group* para [33]);

(6) The question is not whether the taxpayer used the material but whether they disposed of it as waste because they disposed of it with the intention to discard it (*Devon Waste* para [54], [80]);

(7) In deciding whether Parliament intended that a particular activity in relation to particular material manifests an intention to discard the material the following non-exhaustive list of factors may need to be weighed up:

(a) whether the material is being placed in the landfill site but not in a cell;

(b) whether the material is processed;

(c) whether the material is separated and stored or placed in the cell immediately;

(d) whether the material is put in the cell with the expectation it will stay there permanently;

(e) whether there has been a passage of title to the disposer;

(f) the economic circumstances – who paid for the material and whether the disposer would need to buy in alternative material if there was not enough of the material in dispute;

(g) the practicality of applying or disapplying the tax to the material (*Devon Waste* para [57]).

[42] The parties to this case differed as to whether the intention to discard is to be ascertained subjectively or objectively. The appellant's position was that intention is ascertained by direct evidence of the subjective intention of the taxpayer which is then cross-checked by looking at objective factors such as those listed in proposition 7 above. It seems to me that breaking the ascertainment of intention down into these two different exercises is an unnecessarily elaborate process which could lead to practical difficulties. The evidence should simply be looked at as a whole. There is no warrant in the simple language of the section 4(1) of the 2014 Act for importing such an elaborate process. There is no logic in cross-checking an intention ascertained subjectively against an intention ascertained objectively as these are two different things. In a situation where the cross-check against the objective factors contradicted or undermined the direct evidence of subjective intention then the Tribunal would face an impossible task to reconcile the two parts of the process in order to come to a finding on subjective intention. It is not unreasonable to assume that this impossible task would arise frequently in landfill tax cases: a taxpayer is unlikely to appeal

to the Tribunal unless in his subjective view he did not intend to discard the material. Such a subjective view should not trump objective factors which demonstrate that the intention was to discard. The evidence is to be assessed as a whole in deciding objectively whether there is an intention to discard. The test is an objective one. That accords with the approach taken in *Devon Waste* of setting out factors which may help the Tribunal to decide whether the activity "manifests an intention to discard" (para [58]): the intention is ascertained objectively by looking at how it is manifested. It also accords with the statement in *Pattersons of Oakhill* that other circumstances may be relevant to deciding what the taxpayer's intention was (para [21]).

The application of test to the recycled material used in the OCWs

[43] In applying the test of whether there was an objective intention to discard the material it is important to bear in mind that the purpose of the tax is to change behaviour rather than just raise revenue. In an ideal world, the tax receipts from landfill tax would dwindle away as people changed their behaviour to increase recycling and reduce the amount of material disposed of as waste. It is of course unrealistic to think that the stage would ever be reached where there was no landfill and consequently no landfill tax revenue. However a reduction in the discarding of waste by landfill operators on account of increased recycling by them is in accordance with the purpose of tax. It must therefore be borne in mind that there is nothing wrong in principle with a landfill operator seeking to reduce its liability to landfill tax by recycling waste, and nothing wrong in principle with a landfill operator using the products of recycling. That is not to say that a landfill operator may reduce his landfill tax liability by a mere pretext of recycling: for example a cell which consisted as to 90 % of a wall of recycled waste and only 10% as to the waste surrounded by

the wall is unlikely to be genuine recycling. The test of an objective intention to discard is well suited to preventing any such abuse.

[44] In my opinion the appeal in relation to the taxable disposals issue succeeds for two reasons.

[45] Firstly, the First-tier Tribunal has erred in law in applying the test by failing to properly take into account that saving landfill tax by using recycled materials fulfills the objective of the tax. Instead, the Tribunal proceeded on the basis that there was something inherently wrong with reducing tax by using recycled materials. The first reason given by the Tribunal for concluding that there was no intention to discard the recycled materials was that saving landfill tax was a major driver for the construction of the OCWs (para [358]). A further reason given by the Tribunal was that the absence of any documented business case for the major investment in the MRFs led to an adverse inference that the intention was always to discard (para [358]). In my opinion these reasons are not relevant to the question of whether there was an objective intention to discard. One of the objectives of the introduction of the tax was to change behaviour by making the reduction of tax a driver for increasing recycling, and that is what has happened here. No inference can be drawn in respect of the intention to discard from the lack of a documented business case. The Tribunal has made findings as to the appellant's business model: the appellant invested in the MRFs to retain local authority contracts by saving their local authority clients' money by reducing their landfill tax charges by recycling waste (paras [28] and [29]). There is nothing wrong in principle with such a model, and it matters not whether the model happens to have been written down in a documented business case.

[46] Secondly, the First-tier Tribunal has further erred in law in its application of the facts of the case to the test by failing to consider material facts found by it. In applying the test

(paras [355] to [365]), the Tribunal gives no consideration to its findings that the OCW performed an engineering function in respect of containment of waste above ground level (para [346]) and a health and safety function as a barrier when the cell is above ground level (para [347]). The Tribunal makes a finding of fact that there is agreement between parties that the OCW had engineering benefits such as gas and leachate control (para 352) but then departs from that finding when applying the test, and instead treats the finding as a mere claim which it rejects (para [360]). One of the Tribunal's reasons for finding that there was no intention to discard was that the material in the OCWs was very similar in nature to the waste in the cell (para [356]). In coming to this conclusion the Tribunal does not consider its own findings in fact as to the recycling process which changes the nature of the material used in the wall (the removal of bulky waste and the shredding into four categories of fractions (para [186])), nor does it consider its finding that the processed material is mixed with clay or soil in order to create the material used in the walls (para [333]).

Re-making of the decision on the taxable disposals issue

[47] Both parties were in agreement that in the event that I was with the appellant I should not remit the case back to the First-tier Tribunal but should re-make the decision under section 47(2)(a) of the Tribunals (Scotland) Act 2014 and I now proceed to do so.

[48] Scottish Landfill Tax is a landfill tax, not a landfill and recycling tax, and is not to be paid on deposits at landfill sites of useful material recycled from waste (*Parkwood* para [23], [28]). The appellant processes waste through a recycling plant. Some of the output from the recycling plant is mixed with clay or soil and used to form part of the OCWs. Is that exercise simply a mechanism for discarding as waste? The answer is to be found in looking at the circumstances of the case to decide whether Parliament intended that the activity of the

appellant manifests an intention to discard the material so as to satisfy the condition in section 3(2)(a) of the 2014 Act that it is a disposal of material as waste (*Devon Waste* para [57]).

[49] In doing so it is helpful to consider the factors set out in *Devon Waste* (para [57]) and summarised in proposition 7 above.

(a) whether the material is being placed in the landfill site but not in a cell

[50] The recycled material forms part of the structure of the cell. It is not being placed within the cell. This factor supports the appellant's position.

(b) whether the material is processed

[51] The material was processed. The material used in the OCW was not raw waste as it arrived on site. The raw waste was put through a recycling process which separated out bulky and non-recyclable items and then created four different grades of recycled material. Some of that recycled material was then mixed with clay or soil to form the material used in the OCW. This factor supports the appellant's position.

(c) whether the material is separated and stored or placed in the cell immediately

[52] The material is not placed in the cell immediately. It is not placed in the cell at all: it forms the structure of the cell. On arrival at the site the raw waste is not placed immediately but is subjected to a recycling process to separate material which is to be used in the walls from material which is to be disposed of as waste within the cell. This factor supports the appellant's position.

(d) whether the material is put in the cell with the expectation it will stay there permanently

[53] The materials used in the cell walls are not put in the cell but form the cell. There is an expectation that the material used in the OCWs will stay permanently on the landfill site. However it is possible to leave material permanently in a landfill site without intending to discard it as waste, for example permanent roads. Cell walls, like permanent roads, are part of the structure of the landfill site. Cell walls are part of the structure of the site because they are walls, and walls do not cease to be part of the structure of the site just because the walls happen to be made of recycled materials rather than virgin materials such as clay. This factor favours the appellant: although the recycled materials are being left permanently they are being left as part of the structure of the cell.

(e) whether there has been a passage of title to the disposer

[54] There was a passage of title. This was not a situation where a landfill operator merely placed waste owned by its customers onto a landfill site. The appellant set up a recycling process. That process had an input and an output. The input was raw waste which the appellant obtained from its customers, and to which it acquired title. The output was recycled material, owned by the appellant, and designed to be used for the purposes of construction of cell walls as part of the structure of the sites owned by the appellant. This factor supports the appellant's position.

(f) the economic circumstances

[55] The appellant has used recycled materials in the cell walls. According to the appellant that has led to a reduction in the amount of Scottish Landfill Tax due. That

reduction is a cost saving which the appellant has passed on to its customers. The economic benefit to the appellant is that by making a substantial investment in an MRF it is able to offer lower prices to its customers and therefore have an advantage in obtaining and retaining customers over competitors who have not chosen to spend money on such an investment. The economic advantage to the appellant's customers is that they are able to obtain landfill services from the appellant at a lower price than from such competitors. As the customers are local authorities, the ultimate beneficiaries are the council tax payers and ratepayers. These economic circumstances do not point to the recycled materials having been disposed of as waste. Instead they are in line with the purpose of the legislation: the economic driver of saving tax has resulted in value being recovered from more of the waste (*Parkwood* para [10]). This factor supports the appellant's position.

(g) the practicality of applying or disapplying the tax to the material

[56] There are no practical difficulties in disapplying the tax to the recycled material used in the OCWs. The tonnage of the material can be measured. This factor supports the appellant's position.

[57] The factors identified in *Devon Waste* are not exhaustive and consideration must also be given to other factors which apply in the factual circumstances of this case.

[58] Although the First-tier Tribunal was critical of the appellant for not modelling or testing the claimed benefits of the OCWs, and for the lack of formal written designs, specifications, risk assessments or quality control, these criticisms are not factors with which I need to concern myself as I propose to proceed on the basis of the findings of fact which the First-tier Tribunal made notwithstanding these criticisms.

[59] The key findings in fact made by the First-tier Tribunal were:

(1) The containment of exposed waste above ground level is a function of the OCW (para [346]);

(2) The OCW provides a health and safety function in the sense that it is a barrier at the edge of a high face when the cell is say 30 or 40 metres above ground level (para [347]);

(3) Some engineering benefits such as gas and leachate control are gained from the composite structure (ie the structure of the OCWs composed of recycled waste and clay) (para 352).

It follows from these findings in fact that the recycled materials were used for an engineering function at the site. That is a factor which supports the appellant's position.

[60] The Tribunal found that rather than (as the appellant had claimed) reducing the amount of clay used, the appellant's method of construction of OCWs increased the use of clay (para [322]). There was evidence before the Tribunal supporting the appellant's claim, and also evidence against it. It is not appropriate for this appellate Tribunal to interfere with the view taken by the Tribunal on that evidence as the Tribunal was entitled to come to the view it did on the evidence before it. Normally the effect of reusing recycled materials is to reduce the need to use new virgin materials. Here the use of recycled material has resulted in an increase in the use of virgin material. That is a factor which is against the appellant.

[61] In relation to the construction of the OCWs, the First-tier Tribunal placed considerable weight on the factor that the method of construction was an operational choice for the appellant (para [354]). The Tribunal did so on the basis of expert evidence to the effect that the wall was thicker and more complex than might have been satisfactory, the engineering benefits are usually provided on other sites without a recycled material structure, the width of the wall was a function of methodology rather than necessity and a different design of wall could be constructed using a different method which could have allowed it to be smaller (para [355]).

[62] In my view the fact that a landfill operator has made an operational choice is not, in the circumstances of this case, a factor which points to an intention to discard.

[63] The appellant made a choice to construct the OCWs differently from the industry norm. It decided to innovate on industry practice and use recycled materials. It had an operational choice as to how to construct OCWs. It could construct them using recycled materials, which performed the functions of containment, health and safety and gas and leachate control benefits, and in addition fulfilled the landfill tax objective of recovering value from waste materials. Or it could construct the OCWs without using recycled materials in the way, and to the lesser width, done on other sites where there had not been investment in recycling facilities and value was not being recovered from waste. Either of these choices would have been a legitimate one for the appellant to make, and neither of them points to an intention to discard.

[64] Weighing up all these factors, I find that there was no intention to discard in respect of the OCWs. The sole factor in favour of there being such an intention (the increase in the use of clay) is outweighed by the other factors. The appeal on taxable disposals in respect of the OCWs succeeds.

The application of test to the recycled material used in restoration

[65] The First-tier Tribunal gave two grounds for finding that the appellant intended to dispose of material used in restoration as waste ([420]).

[66] The first ground was "for many of the same reasons as for our decision on the OCWs". As I have found above that the Tribunal erred in respect of that decision, it follows that it erred in relation to restoration also and the decision on restoration should also be set aside and remade.

[67] The second ground was the use of putrescible material. As the decision on restoration requires to be remade in any event because of the error in relation to the first ground, it is not necessary to consider the second ground at this stage but I shall consider it when remaking the decision.

Re-making of the decision on the restoration issue

[68] In deciding whether the appellant had an objective intention to discard recycled material used in restoration I shall, as before, look first at the factors identified in *Devon Waste* and then at factors arising in the particular circumstances of this case.

[69] In my view the *Devon Waste* factors support the appellant's position. The recycled material was not being placed in the cell but on top of the cell cap as part of the overall structure of the landfill site. The material was processed. The raw waste was not placed in the cell immediately but was processed and then placed on top of the cell cap. Although the recycled material was left permanently it was not left in the cell but on the cell cap as part of the permanent structure of the site. There was passage of title. The economic circumstances were the same as for the cell walls. There were no practical difficulties in disapplying the tax as the tonnage can be measured.

[70] The key findings in fact made by the First-tier Tribunal were:

(1) restoration is a requirement of the sites' planning permission (para [380])

(2) there is no requirement that the restoration has to be done with specific types of material (para [415]).

It follows from these that the recycled materials were used for the function of compliance with the sites' planning permission. This is a factor which supports the appellant's position.

[71] The First-tier Tribunal found against the appellant because of the use of putrescible material (para [420]), which it found was a significant factor (para [416]). In my view if it were established by evidence that putrescible material had been used in restoration, that would be a factor which it would be appropriate to take into account. It goes to the suitability of the material to the use for which it was put, which is an element in ascertaining the objective intention of the appellant. Old tyres piled on top of a cell cap would be a manifestation of an intention to discard the tyres. The use of recycled construction waste for restoration, which the Tribunal has found to be standard practice across the UK (para [419]), would not manifest an intention to discard. A cap strewn with rotting food waste would not be acceptable as restoration, and would manifest an intention to discard.

[72] However, in remaking the decision on restoration, I find that it has not been established on the evidence that putrescible material was used in restoration. The Tribunal had no direct evidence before it that putrescible material was used in restoration. In founding on the use of putrescible material (para [420]) it relied entirely on the inference that because the raw waste included unsuitable putrescible material (para [191]) then the processed material used for restoration included unsuitable putrescible material. That inference is illogical as it does not take into account the processing of the material. I find that it cannot be inferred from the findings in fact of the First-tier Tribunal that putrescible material was used in restoration. At its highest these findings establish merely that there was a risk that putrescible material might be used. They do not establish that putrescible material was actually used. There was expert evidence that there was an inherent risk that any fines fraction would be contaminated, and that care needed to be taken to ensure material incorporated in the restoration was contamination free (para [411]). Steps were taken by the appellant to ensure there was no contamination: there was a visual inspection

to ensure that the material used in restoration looked like relatively dry loose soil (para [402]). An email from a SEPA officer of 15 June 2017 (para [404]-[405]) is evidence that although there was a risk of contamination, there was not actual contamination. The officer had seen food waste in a pile of waste in 2016, and it had been agreed then that a separated fraction of that waste could be used in restoration after further processing. The officer confirmed in the email that he had seen no evidence that inappropriate fines material had been used for restoration purposes (para [404]). There have been regular inspections by SEPA (para [282]) and no environmental breaches (para [417]).

[73] In the light of my findings that it has not been established on the evidence that putrescible material was used for restoration, and that the other factors are supportive of the appellant's case, I find that there was no objective intention to discard the recycled material used in restoration and accordingly that it was not disposed of as waste.

Observations on other issues raised by the appellant

[74] As I have found for the appellant on the basis of the findings of fact made by the First-tier Tribunal, it is not necessary for me to consider the appellant's challenges to the findings in fact. However there are two matters on which I would make observations.

[75] Firstly, whatever the position may be under English law or before UK Tribunals in respect of an absolute rule that it is necessary to formally put one's case to witnesses, Scottish Tribunals apply Scots law and practice. In Scotland, the putting of a case to witnesses is treated as an aspect of fairness (*McKenzie* v *McKenzie* p109). It may well be unfair for a party to present a case without affording the other party who has testified as a witness an opportunity to comment on it in advance (*Murray v HMA* [2022] HCJAC 14

para [66]). Whether there is any unfairness in a particular case will require to be considered in the context of the particular circumstances of that case.

[76] Secondly, this is not a case where delay has so affected the quality of the decision that it cannot be allowed to stand (*Natwest Markets plc v Bilta (UK) Ltd* (para [43]). The First-tier Tribunal heard evidence on 16-19 December 2019. Further evidence was heard on 2-5 March 2020. Shortly thereafter the country went into Covid lockdown. That resulted in considerable disruption to the work of courts and Tribunals and it is entirely understandable that written work would not be produced as quickly as it might otherwise have been, particularly as presidents of Tribunals required to devote increased time and attention to administrative matters to enable Tribunals to continue to function during the pandemic. The Court of Appeal decision in *Devon Waste* was issued on 22 April 2021 and the Tribunal ordered parties to lodge submissions thereon by 7 June 2021. The Supreme Court decision in *HMRC* v *Tooth* [2021] UKSC 17 was issued on 14 May 2021 and the Tribunal invited submissions, also by 7 June 2021. The original decision was issued on 5 October 2021 and a decision amended under Rule 37 (correction of clerical mistakes or accidental slips or omissions) was issued on 18 November 2021. In the circumstances of this case the delay does not mean that the decision of the First-tier Tribunal must be reduced. The Tribunal did not require to rely on its memory of the evidence or submissions. The Tribunal had the benefit of a full transcript of the hearing, including the oral evidence, and detailed written submissions. They also considered documentary evidence amounting to some 6,500 pages. In all of these circumstances, it cannot be said that delay has so adversely affected the quality of the decision that it cannot be allowed to stand.

The prescribed activities issue

[77] As the respondent has conceded the appeal in respect of roads, the only remaining prescribed activities issue was whether site-won materials which would not otherwise have been subject to Scottish Land Tax have become subject to Scottish Landfill Tax as a prescribed activity under Article 3(2)(a)(ii) of the 2014 order and Regulation 12 of the 2015 Regulations.

[78] The First-tier Tribunal held that the construction of the OCWs and restoration were prescribed activities within the meaning of Article 3(2)(a)(ii) (paras [435], [78]). Parties were agreed that due to lack of reasoning for that finding, it should be set aside and made anew by the Upper Tribunal.

[79] Article 3(1) of the 2014 Order provides:

> "The following landfill site activities are prescribed for the purposes of section 6 of the Landfill Tax (Scotland) Act 2014 (prescribed landfill site activities to be treated as disposals)-
> …
> (h) any other landfill site activity to which paragraph (2) applies."
>
> Paragraph (2) provides:
>
> "(2) This paragraph applies to an activity if-
>
> (a) the activity is one which gives rise to a requirement-…
> (ii) imposed by Regulations under section 30 of the LT(S) Act 2014 (information: material at landfill sites) for the designation of a part of a landfill site as a non-disposal area or the giving of information or the maintenance of a record in respect of the area; and
> (b) that requirement is not complied with."

[80] Such a requirement has been imposed by Regulation 12 of the Scottish Landfill (Administration) Regulations 2015 which provides:

> "Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers, or one of its officers considers, there to be a risk to the collection of landfill tax-

(a) the material must be deposited in a non disposal area; and

(b) a registrable person must give Revenue Scotland, or one of its officers, information and maintain a record..”

[81] The appellant submitted that Regulation 12 should be interpreted purposively so that it did not bring non-taxable materials within the scope of the tax. The respondent argued that the Tribunal had interpreted the regulation correctly.

[82] The factual background as it appears from the decision of the First-tier Tribunal is that in March 2015 the appellant applied to Revenue Scotland to have certain areas at the Auchencarroch site registered as Non-Disposal Areas. One of these areas was NDA4. In respect of NDA4 the appellant specified the use of the material to be “construction of outer landfill containment wall”. It specified the types of material deposited to be “aggregates, mineral clay, construction and demolition wastes, fines from processing of mixed waste loads”. It specified that the estimated length of storage time was “permanent”. A similar application was made for Garlaff (paras [193]-[5]).

[83] The First-tier Tribunal states that on 7 September 2015 at a site meeting the respondent made the appellant aware of their concern that site-won materials were not included in the NDA records (para [76]). However, this is not recorded in the respondent’s Site Visit Report for that visit. The appellant’s position, as set out in a letter by its legal advisers to the respondent on 14 February 2018, was that there was no requirement to maintain records for site-won materials being used in cell walls: the site-won material was never discarded at any time and therefore was never disposed of as waste at any time and was therefore out of the scope of Scottish Landfill Tax (para [79]).

[84] In order to decide the prescribed activities issue anew, I would like to be addressed on it in greater detail and have a better understanding of the relevant factual circumstances.

[85] Liability arises by reference to Regulation 12 only if the respondent or one of their officers consider there to be a risk to the collection of landfill tax. My provisional view (subject of course to any submissions to be made by parties) is that for liability to arise in this instance, the respondent or an officer would have had to come to a decision in respect of each site that there was a risk to the collection of tax by the use of site-won clay and soil in constructing the OCWs and restoration. It is not clear to me what evidence there was before the First-Tier Tribunal as to whether such a decision was made, who made it, when it was made or the reasons for the decision. Nor is it clear to me what evidence there was as to whether if, when or how the decision and the reasons for it were communicated to the appellant.

[86] A hearing will be set on the prescribed activities issue for a date to be fixed with written submissions to be lodged in advance. In view of the significant amount of Scottish Landfill Tax which turns on the other issues in this case, and the implications for the solvency of the appellant's business, I shall not hold up the issuing of my opinion on the other issues pending further submissions on the prescribed activities issue, and will issue a separate decision on the prescribed activities issue in due course.

The penalties and assessments issues

[87] Penalties and assessments were upheld by the First-tier Tribunal in relation to taxable disposals (para [469]), roads (para [468]) and filter cake (para [466]) and were not upheld in relation to prescribed activities (para [467]).

[88] The appeal to this Tribunal has succeeded in relation to the substantive issues in relation to taxable disposals and has been conceded in relation to the substantive issues on roads. As the appellant has been successful on these substantive issues, it follows that they

also succeed on the appeal on penalties and assessments in relation to these issues. A penalty is due where there is an inaccuracy which amounts to or leads to an understatement of a liability to tax (section 182 Revenue Scotland and Tax Powers Act 2014). The effect of my decision and the concession is that there is no such inaccuracy. Accordingly I will allow the appeal against penalties and assessments in relation to taxable disposals and roads.

[89] In relation to filter cake, the appellant conceded the substantive issue but not the penalties and assessments issue.

Penalties and assessments on filter cake

[90] A lower rate of Scottish Landfill Tax is due where the material disposed of "consists entirely of qualifying material". Qualifying material is the material listed in the Schedule to the Scottish Landfill Tax (Qualifying Material) Order 2015, and subsequently the Scottish Landfill (Qualifying Material) Order 2016. The Schedule is to be construed in accordance with the notes contained in it (2015 Order Article 2(2), 2016 Order Article 3(2)). The schedule to each order lists as Group 6 "low activity inorganic compounds" Further definition of Group 6 is given in Note 6 in each order which states "Group 6 comprises only" and then specifies 10 items of which the only one relevant here is "aluminium hydroxide".

[91] The First-tier Tribunal found that the standard rate of Scottish Landfill Tax applied (para [114]). The appellant has withdrawn its appeal to this Tribunal on that substantive finding, but maintains its appeal in relation to penalties and assessments.

[92] The law on assessments and penalties is set out in the Revenue Scotland and Tax Powers Act 2014.

[93] Section 98(1) provides that an assessment may be made if an officer comes to the view honestly and reasonably that an amount of devolved tax which ought to have been

assessed as tax chargeable has not been assessed, an assessment is or has become insufficient, or relief claimed or given is or has become excessive. Section 102 is headed "Conditions for making Revenue Scotland Assessments" and states that "A Revenue Scotland assessment may be made only where the situation mentioned in section 98(1) was brought about carelessly or deliberately by the taxpayer".

[94] Section 182 provides:

> **"182 Penalty for inaccuracy in taxpayer document**
>
> (1) A penalty is payable by a person ('P') where-
> (a) P gives Revenue Scotland a document of a kind mentioned in the table below, and
> (b) Conditions A and B below are met.
>
> (2) Condition A is that the document contains an inaccuracy which amounts to, or leads to-
> (a) an understatement of a liability to tax,
> (b) a false or inflated statement of a loss, exemption or relief, or
> (c) a false or inflated claim for relief or to repayment of tax.
>
> (3) Condition B is that the inaccuracy was-
> (a) deliberate on P's part ('a deliberate inaccuracy'), or
> (b) careless on P's part ('a careless inaccuracy')."

[95] The Supreme Court has held, in respect of the equivalent provision for UK taxes, that for there to be a deliberate inaccuracy in a document there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement (*HMRC* v *Tooth* para [53]). In view of the similarities between the UK and devolved tax provisions, that statement of the law also holds good in relation to devolved taxes.

[96] The First-tier Tribunal held that the appellant's behaviour in relation to filter cake was deliberate (para [110], [466]).

[97] The appellant submitted that where there was (at least) a clear doubt on the taxability of the material, such as an inconsistency between the description of the material by the appellant's clients and the chemical analysis, it could not be concluded that the appellant acted deliberately in bringing about a loss of tax when it, acting bona fide, relied upon the client's description of the material. The respondent submitted that the First-tier Tribunal was entitled to come to the decision which it did.

[98] The respondent has succeeded on the substantive issue. It follows from that there is an inaccuracy. But it does not automatically follow from that that an assessment could be made or that penalties are due: the respondent requires to demonstrate an intention on the part the appellant to mislead the respondent as to the truth of the statement.

[99] It is important to bear in mind that the material in issue here is filter cake resulting from the treatment of urban waste water (code 19 08 05), and not filter cake resulting from the treatment of fresh water (code 19 09 02). The penalty notices refer specifically to 19 08 05. When a letter from Scottish Water about fresh water filter cake 19 09 02 was drawn to the appellant's attention in 2016 the appellant changed its treatment of fresh water filter cake and paid the full rate on that.

[100] In making its returns, the appellant relied on emails from the clients who provided the filter cake to it to the effect that the filter cake provided to the appellant by the client fell within Group 6 (F-tT decision para [87], [91], [92]). As the appellant is not insisting on its substantive appeal, I must proceed on the basis that the clients were wrong about this. So the issue becomes whether by relying on the wrong information given to it by its clients the appellant intended to mislead the respondent as to the truth of whether the filter cake fell within Group 6. The First-tier Tribunal found that appellant did so intend for the following reasons. Firstly, although the client email had said it was Group 6, this was not borne out by

the chemical analysis attached to the email which demonstrated that the filter cake did not consist entirely of aluminium hydroxide (para [106]). Secondly, the appellant had sought advice from KPMG who had made the appellant aware that in order to be taxed at the lower rate the filter cake would have to be entirely comprised of aluminium hydroxide ((para [107], [88]). In my opinion the First First-tier Tribunal was entitled to come to the decision it did for the reasons it gave. The email correspondence was explored in cross-examination of the appellant's Mr Ramsey. The Tribunal had the benefit of seeing Mr Ramsey give oral evidence, and have considered the documentary evidence which was before them. In these circumstances it would not be appropriate for this Tribunal, as an appellate Tribunal, to interfere with its findings. The appeal on penalties and assessments in respect of filter cake fails.

Conclusion

[101] The appeal succeeds in relation to taxable disposals and roads. It also succeeds in relation to penalties and assessments on taxable disposals and roads. It fails in respect of filter cake and penalties and assessments on filter cake.

[102] A hearing will be fixed for me to be addressed on the wording of an order to give effect to my decision and for me to be addressed further on prescribed activities.

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.