Upper Tribunal for Scotland

2022UT26
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: Ruxandu (of the English Bar) Brodies LLP
Respondent: Thomson QC, Revenue Scotland

2 August 2022

Introduction

[1] This is the decision on the prescribed activities issues referred to in paragraph [86] of my decision of 9 May 2022.

[2] The prescribed activities issue was addressed in my decision of 9 May 2022 at paragraphs [8] and [77] to [86]. I indicated at para [86] that an oral hearing would be held with written submissions in advance and this has now been done.

[3] This decision should be read along with that of 9 May, which records parties submissions on the prescribed activities issue and sets out the statutory provisions. For the

sake of brevity I shall not repeat here these submissions nor all these statutory provisions. I will however, for ease of reference, set out Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015 as the interpretation of that Regulation was central to the discussion before me:

> **"Non-disposal areas**
>
> 12.—(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."

[4] The First-tier Tribunal's analysis proceeded on the basis that the respondent was founding on Regulation 12(2). This can be seen from paragraph [192] of the First-tier Tribunal decision which states:

> "Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers there to be a risk to the collection of SLfT, the material must be deposited in a NDA and the operator must give Revenue Scotland information and maintain a record in accordance with Regulation 12 of the 2015 Regulations."

The words "Revenue Scotland considers there to be a risk to the collection of SLfT" are a reference to the wording of Regulation 12(2). There is no reference elsewhere in Regulation 12 to a requirement for Revenue Scotland to consider there to be a risk to collection.

[5] On the basis of the First-tier Tribunal's analysis, which had not been challenged by the respondent, I made the following statement in paragraph [85] of my decision of 9 May:

> "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."

[6] Since my decision of 9 May the respondent has clarified its position. It now disagrees with the analysis of the First-tier Tribunal and argues that in this case liability arises under Regulation 12(4) and not Regulation 12(2), and that liability under Regulation 12(4) can arise without Revenue Scotland considering that there was a risk to collection. In view of this clarification I no longer hold to my provisional view, and instead in this decision give consideration as to whether liability arises under Regulation 12(4).

The appeal on prescribed activities

[7] The only remaining prescribed activities issue in this appeal concerns the Outer Cell Walls ("OCWs"). The OCWs at the appellant's sites at both Auchencarroch and Garlaff were designated as Non- Disposal Areas ("NDAs"). Various other parts of the sites were also designated as other NDAs but these do not concern us here as they were separate and different NDAs from the Outer Cell Wall Non-Disposal Areas ("OCW NDAs").

[8] The OCWs were constructed in the OCW NDAs. The OCWs consisted of processed waste mixed with site-won material i.e. clay and/or soils which had been extracted from the site. The appellant kept records of the processed waste used in the construction of the OCWs, and provided information about these to the respondent. The appellant did not keep records of the site-won material and was therefore unable to provide information about site-won material to the respondent. The First-tier Tribunal found that the appellant took legal advice that there was no requirement to maintain records for site-won material, as site-won materials were never discarded and therefore never disposed of as waste (paras [79], [467]). Following the request of the respondent, in September 2018 the appellant began to record site-won material which entered NDAs.

[9] The Closure Notice dated 31 July 2018 states:

> "Further, as you have not complied with the requirement to provide information as to the weight and description of all material deposited, and the intended or actual destination or use of such material, in the non-disposal areas within which you construct outer cell walls, in terms of section 30 of LTSA and regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015, ("the Administration Regulations"), I am of the view that this is a prescribed landfill site activity in terms of article 3(2)(a)(ii) and (b) of the [The Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014]".

[10] The Closure Notice does not give a specific sum due in respect of Scottish Landfill Tax in respect of the OCW NDAs as it is included in a global total. However, parties assured me that if I found that tax was due in respect of the OCW NDAs they could come to an agreement on the calculation of the sum due.

[11] In this appeal the appellant argued that the First-tier Tribunal had misinterpreted sec 30 of the Landfill Tax Scotland Act 2014 ("LTSA") and Regulation 12. It did not argue that sec 30 and Regulation 12 were disapplied under article 3(3) of the 2014 Order as the site-won material was exempt from tax. Nor did it argue that the sanction applied was

disproportionate in the circumstances of the case. This decision proceeds on the basis of the argument made before me.

Appellant's further written and oral submissions on the prescribed activities issue

[12] Counsel for the appellant submitted that while the observation made in para [85] of the 9 May decision was correct, and there was no specific decision by the respondent or its officers regarding any risk to the collection of landfill tax, the appellant did voluntarily register the NDAs with the respondent and these were subsequently approved by the respondent. Accordingly, the appellant did not argue before the First-tier Tribunal or Upper Tribunal that the NDAs were not properly registered or that Regulation 12 did not apply to the relevant NDAs. The appellant's submission was that section 30 of the LTSA and Regulation 12 of the Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014, properly construed, do not require the inclusion of site-won material in the NDA records in any view, as such site-won material can never be subject to Scottish Landfill Tax: site-won material at no point is or becomes waste when put to use in engineering applications. On a purposive construction "material" in Regulation 12 meant material that would be potentially within the scope of the charge to tax. Any other construction would have the perverse result that a failure to include in the records non-waste material which was not within the scope of tax would trigger tax.

[13] In response to the respondent's submissions, counsel submitted that Regulation 12(4) should not be looked at independently of regulation 12(2): when interpreting a subsection other subsections should not be ignored. The statutory provisions were not directed at material which was not waste. "Material" should be given a purposive construction so that

for example it does not bring into the tax charge pipework to extract leachate and gas. Site-won material was exempt from Scottish Landfill Tax under sec 8 LTSA.

Respondent's further written and oral submissions on the prescribed activities issue

[14] Counsel submitted that the provisional view set out in para [85] of the decision of 9 May proceeded under a misunderstanding of the statutory framework. Regulation 12(4) contained a free standing requirement which did not require the existence of the circumstances provided for in 12(2). The risk referred to in 12(2) was concerned with the imposition of a requirement to deposit, not with the freestanding requirement under 12(4). In this case 12(4) applied but 12(2) did not. 12(4) required that records be kept of "all material" entering, being used in and leaving the NDAs. "All material" includes site-won material" "Material" in Regulation 12 has the same meaning as in section 30 LTSA, i.e. the definition in sec 39 LTSA (Interpretation and Legislative Reform (Scotland) Act 2010 sec 24). It includes material of all kinds. There is no exemption for site-won material. The point of section 6 LTSA was to bring within the scope of LTSA activities which are not otherwise taxable disposals. Even before the introduction of Scottish Landfill Tax, Revenue Scotland considered there was a risk of collection of that tax as a result of the appellant's activities: the risk identified did not have to be connected solely to the use of site-won materials. No tax was charged on site-won materials as the respondent did not know the tonnages involved as they were not recorded. There was no reason why site-won material would not be taxable where it was disposed of as waste: it was not exempt under secs 7, 8, 9 or 10 of the LTSA.

Analysis and Decision

[15] For the reasons set out in my decision of 9 May neither the processed waste used in the OCWs nor the site-won material used in the OCWs is in itself chargeable to Scottish Landfill Tax. However the respondent has sought to bring the processed waste in the OCWs within Scottish Landfill Tax by application of a sanction. The sanction applies where there is a failure in record-keeping or provision of information about material within a NDA. The sanction operates by treating the failure as a deemed taxable disposal.

[16] The sanction is set out in a series of interacting statutory provisions. The construction of the OCW is a "landfill site activity" under sec 6(a) of the LTSA: it is using material at a landfill site. If a landfill site activity is prescribed by Scottish Ministers the activity is treated as a disposal of the material and is chargeable to Scottish Landfill Tax (sec 6(3)). The Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014 provides:

> 3.—(1) The following landfill site activities are prescribed for the purposes of section 6 of the LT(S) Act 2014 (prescribed landfill site activities to be treated as disposals)—
> ……
> (h) any other landfill site activity to which paragraph (2) applies.
> (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.
>
> (3) Paragraph (1) does not apply to any landfill site activity if, or to the extent that, it involves material that is or has been otherwise chargeable to Scottish landfill tax or exempted from that tax"

Regulation 12 is made under section 30.

[17] A peculiarity in this case is that the Closure Notice uses the sanction to recover Scottish Landfill Tax in respect only of material in relation to which there has been no failure

in record-keeping or provision of information. No records were kept for site-won material used in the OCWs, but the respondent does not seek to recover tax on the site-won material. There was no failure of record-keeping/information provision in relation to processed waste material used in the OCWs, but the respondent seeks to recover tax on the processed waste material. The effect of the respondent's position is that the processed waste used in the OCWs, which for the reasons set out in my decision of 9 May is not a taxable disposal, is nonetheless taxed in the Closure Notice as a deemed taxable disposal. Although parties had not calculated the exact amount which would be due in respect of that deemed taxable disposal, it is likely to be several million pounds. In the circumstances of this case, where none of the material in the NDA was subject to tax and the sanction for failure to comply with the record-keeping/information requirements is being imposed only in respect of material in relation to which there was no such failure, that is a harsh result. Whether that result is correct in law is a matter of interpretation of the statutory provisions.

[18] In my opinion, the correct interpretation of Regulation 12(4) is that it covers both waste and site-won material. The obligation in Regulation 12(4) is to maintain a record and provide information relating to "all material". The word "material" in Regulation 12 has the same meaning as the word "material" in the LTSA (Interpretation and Legislative Reform (Scotland) Act 2010 sec 24*)*. "Material" is defined in section 39 of the LTSA:

> ""material" means material of all kinds, including objects, substances and products of all kinds"

That is a very wide definition. The definition is not restricted to waste. The definition is wide enough to include material which is not chargeable to Scottish Landfill Tax such as site-won material.

[19] The appellant invites me to apply a purposive construction to Regulation 12(4) and find that "material" refers to material that would potentially be within the scope of the charge if it were to be disposed of as waste: site-won material at no point is or becomes waste when put to use in engineering applications. I do not agree that the definition of "material" in Regulation 12(4) should be restricted in that way. It is in the nature of an NDA (and indeed inherent in the name "Non-Disposal Area") that it has in it non-taxable material. Record-keeping and notification requirements are imposed in relation to NDAs. The purpose of these requirements is that information is available to the Revenue Scotland about material which is on the landfill site but in respect of which the site operator maintains there is not a disposal. These requirements are not restricted to taxable material in the NDA but extend to non-taxable material also: this is made clear by Regulation 12 (4) which refers to "all material". The keeping of records and the provision of information about all material (including non-taxable materials) in an NDA assists Revenue Scotland in assessing what tax is due. The requirement of the keeping of records and the provision of information about material in an NDA is independent from determination of whether that material is taxable. That determination will not necessarily be known at the time when the material is placed in the NDA: it may take many years for the final determination to be made by Revenue Scotland or a tribunal or court. The keeping of records and provision of information about all material, including non-waste, preserves the position so that once the determination is made it can be applied to the material in the NDA.

[20] Further, Regulation 12 must be read as a whole so that all its subsections have meaning. The appellant's interpretation of Regulation 12(4) deprives Regulation 12(2)(b) of any purpose. Regulation 12(2) applies to material which is not to be disposed of as waste.

Regulation 12(2)(b) provides that Regulation 12(4) applies. So Regulation 12(2) envisages that the notification and record-keeping requirements apply to non-waste. The application, by Regulation 12(2)(b), of the Regulation 12(4) requirements to material which is not to be disposed of as waste would make no sense if (as the appellant contends) the Regulation 12(4) requirements were restricted to waste. Further, the purpose of Regulation 12(2) is to counter the risk to collection of tax. If the Regulation 12(4) record-keeping and notification requirements did not apply to non-waste material deposited in an NDA under Regulation 12(2), the mere depositing of that material in an NDA under 12(2)(a) without records or information would be of little assistance to Revenue Scotland in countering a risk to collection of tax: Revenue Scotland would not have the information it needed to calculate the tax due on the deposited material if it turned out to be taxable.

[21] I find that on a correct interpretation of Regulation 12(4) the appellant was required to keep records/provide information in respect of site-won materials in the OCW NDAs. Accordingly the appeal in respect of prescribed activities in relation to the OCWs fails.

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.