[2016] UKFTT 0820 (TC)

TC05545

Appeal number: TC/2015/01877

AGGREGATES LEVY - Section 17 Finance Act 2001 – personal bar- not competent against the Crown - legitimate expectation – no jurisdiction - whether extraction from "site" of building –in large part not - line of highway – no – best judgement assessment – yes – no credible evidence to displace – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TSL CONTRACTORS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
DAVID MOORE

Sitting in public at George House, 126 George Street, Edinburgh on Monday 24 and Tuesday 25 October 2016

Mr Knight, for the Appellant

Ms Roxburgh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a review decision of the respondents ("HMRC") dated 15 January 2015 which reduced an assessment of aggregates levy ("the assessment") issued to the appellant on 18 August 2014 to £113,816 from £124,116. The assessment covered the tax periods 07/10 to 04/14 but the disputed decision limited the period to tax periods 10/10 to 04/14.

The issues in relation to the assessment

HMRC

2. HMRC invited the Tribunal to uphold the disputed decision on the grounds that

(1) The appellant had subjected aggregate to commercial exploitation, and

(2) The aggregate which had been exploited by the appellant did not, except to the limited extent set out in the assessment, come within the exemptions to aggregates levy contained in Section 17(3)(b) and (d) of the Finance Act 2001.

3. HMRC argue that the said exemptions are specific and do not cover site clearance and levelling in order to prepare the ground for construction at a later date.

4. It is freely conceded that the calculations underpinning the assessment are not, and cannot be correct, since the appellant has consistently failed, or refused, to furnish details of, for example, drainage. HMRC have endeavoured to compensate for that by allowing tonnage that would not be exempt, such as in respect of the foundations for the car parking by squaring off the building footprint, and by allowing all of the exempt items in the period 10/10 to 04/14, whereas it is clear that some of the exempt extraction must have taken place in the periods prior to that.

The appellant's arguments

5. Mr Knight argued that on 21 April 2010, HMRC wrote to the appellant in response to a claim that the aggregates extracted from Torosay Sand Pit ("the site") should be exempted from aggregate levies confirming that that was the case and that there would therefore be a repayment. The appellant was therefore entitled to proceed on the basis that the extraction of aggregates from the site was indeed exempt and fell within the statutory exemptions. There should be no assessment.

6. He states that aggregate has only been excavated from the site in accordance with the appellant's objective to create an industrial site on the basis of the requisite planning consents which had been obtained.

7. He contends that HMRC's calculations underpinning the assessment are not based on factual evidence and in particular states that 35,000 tonnes of material has

not been extracted from outwith the designed earthworks envelope. Even if it were to be accepted that a proportion is not exempt, the assessment is arbitrary and does not take account of the extent of extraction relating to services installation, the sewage treatment plant and the pipes and cabling from the substation. Further no account had been taken of the excavations required for the perimeter drain which is in a trench. The volume allowed by HMRC as exempt is only 2.6% of the total excavated and "that has to be wrong and majorly so".

8. Lastly, the appellant argues that HMRC are only able to raise assessments from November 2013 being the date on which the inquiry commenced.

The evidence

9. We had a joint bundle of documents and a joint bundle of witness statements. We heard evidence from Mr Knight who is the managing director of the appellant, Mr McLaughlin who is a director of the firm that provided surveying services to the appellant in respect of the development of the site concerned in this appeal, and Officers Mitchell and Villiers of HMRC.

10. We also had a joint bundle of authorities.

11. Mr Knight very helpfully lodged in process six photographs of the site taken the previous day.

The Legislation

12. It is not in dispute in this case that aggregate has been commercially exploited by the appellant. The dispute relates to whether the aggregate in question is taxable or whether it comes within one of the statutory exemptions in the Finance Act 2001. In particular the question is whether the exemptions in Sections 17 apply and the relevant subsections of Section 17 read as follows:-

> "17(3) For the purposes of this Part aggregate is exempt under this section if:-
>
> …
>
> (b) It consists wholly of aggregate won by being removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out—
>
> (i) in connection with the modification or erection of the building; and
>
> (ii) exclusively for the purpose of laying foundations or of laying any pipe or cable;
>
> …
>
> (d) It consists wholly of aggregate, won by being removed from the ground along the line or proposed line of any highway or proposed highway and in the course of excavations carried out—
>
> (i) for the purpose of improving or maintaining the highway or of constructing the proposed highway; and
>
> (ii) not for the purpose of extracting that aggregate.

…

(7) In this section …

'highway' includes any road within the meaning of the Roads (Scotland) Act 1984."

13. Section 151 Roads (Scotland) Act 1984 defines "road" as follows:-

"'road' means, subject to subsection (3) below, any way (other than a waterway) over which there is a public right of passage (by whatever means) [and whether subject to a toll or not] and includes the road's verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof."

The case law

14. We annex at Appendix 1 a Note of the authorities to which HMRC referred us.

15. The leading authority in this matter is *East Midlands 1*, which was robustly endorsed in *East Midlands 2* and that is a decision which is binding on us. We annex at Appendix 2 relevant excerpts from Chairman Bishopp's decision in the former case. Where we simply refer to a numbered paragraph in this decision that is a reference to Chairman Bishopps' decision.

The Facts

16. The appellant is a construction and haulage company with headquarters in Mull and customers and projects throughout Scotland. Up until 2003 the appellant owned and operated a quarry at Torosay Sand Pit, Craignure on the Isle of Mull. The appellant was therefore registered as a quarry with HMRC under Section 24(6) Finance Act 2001 for the purposes of aggregates levies. When operating as a quarry the appellant declared and paid aggregates levy on the aggregate extracted from that site. When the quarry was exhausted the appellant was required to restore it and remove its office and storage buildings.

17. In 2002 the appellant acquired the site, and it is adjacent to the quarry, with the intention of siting the headquarters and storage buildings there. In 2005 the appellant applied for planning consent for the whole site. The site was intended ultimately to comprise four areas of industrial units with associated roads, footpaths etc. On 5 May 2006, planning permission for the development of those four industrial units was granted and for construction on Unit 1 ("the TSL Unit") of the appellant's own buildings.

18. In 2006 the appellant had commenced the reduced level excavation required to bring the whole site to design levels as stated within the planning consent and that excavation yielded aggregates of varying quality but suitable for use within the construction industry. There is some dispute as to whether the appellant exceeded those levels. That is not material to this decision.

19. The appellant was still registered with HMRC and declared the tonnages of aggregate extracted to HMRC and paid aggregate levies thereon.

20. On 1 December 2009, the appellant's then representative McGrigors LLP submitted a protective claim regarding an alleged overpayment of aggregates levy for the period August 2006 to July 2009. On 19 February 2010, further and better particulars of that claim were submitted to HMRC. That indicated that one of the four units would be occupied by the appellant and the remaining units would be leased or potentially sold to other businesses. It stated that:-

> "… Most of the hard-standing necessary for these units has already been prepared as a result of the reduction of levels in these areas in accordance with the planning consent plans. TSL first commenced the ground works on the Site in August 2006. During the development of the Site, TSL extracted aggregate (consisting of sand, gravel and hard rock) from the ground and commercially exploited it by use in its own construction business or by onwards sale to third parties … Drainage from the Site itself is achieved by removal of aggregate to create a uniformly gentle slope in all directions …".

Arguments based on their interpretation of the law were then advanced.

21. On 21 April 2010, HMRC wrote to the appellant stating:-

> "Further to recent correspondence from your agent McGrigors LLP, I have reviewed the claim for repayment of aggregate levy paid by TSL Contractors in respect of aggregate won as a result of the development at the Torosay site.
>
> I am satisfied that the reason for the repayment is justified and that the levy paid in relation to it should not have been paid …".

That decision is hereafter referred to as "The 2010 Decision".

22. The only construction on the site, even now, is a new office building with six visitor parking spaces measuring 15 metres by 35 metres and a small footpath all on the TSL Unit. The appellant had expanded so new planning permission was sought and was granted on 29 June 2009. That planning permission also made provision for a staff car park and a storage building but neither have been constructed. The construction of the building and parking spaces was completed by 2011.

23. The planning permission for industrial use of Units 2, 3 and 4 is still valid but no detailed planning permission has been sought. The appellant hopes to attract industrial users to the site. In the interim, the appellant's operations have encroached slightly outwith the TSL Unit and construction related materials are stored on Unit 2.

24. We can see from the photographs that the parking spaces immediately abut the building and are accessed from the adjacent main road by a short stretch of better compacted surface which peters out at the car parking spaces. There are some large boulders from the far edge of the car parking spaces and round the back of the building and that would deter parking next to the building. The appellant has created a turning area and some hard standing areas behind the building and that appears to have been done by 2010 (see paragraph 20 above). The rest of the TSL Unit appears to be roughly levelled, insofar as we could see it, with very big puddles and evidence of vehicle tyre tracks across it. Parked vehicles and construction materials are visible.

25. On 8 November 2013, Officer Mitchell wrote to the appellant stating that he was carrying out a compliance check for materials commercially exploited and declared as exempt aggregate in the Aggregate Levy Return AL100. Perhaps understandably, the appellant responded stating "We have agreement that these aggregates fall under the statutory exemptions in the Finance Act 2011, Section 17(3)(b) and (d)." HMRC disagreed and explained why, referring to the statutory tests.

26. Correspondence ensued with HMRC seeking information from the appellant who stressed that nothing had changed since the 2010 Decision. No further detail was provided to HMRC.

27. Officers Mitchell and Villiers visited the appellant's site on 16 April 2014 and, although the Minutes also record much other detail, the then current position was recorded as follows:-

> "Discussed current position at site:-
>
> - TSL unit and Unit 4 on plan fully excavated
> - TSL Office building completed in 2011 with six attached visitor parking spaces (15m x 35m)
> - Storage Building not yet constructed
> - Car park not yet constructed
> - Lorry park not yet constructed
> - roads not yet constructed
> - Units 2 & 3 being blasted (50% done)
> - Outer screening embankment and drainage not yet constructed
>
> Physical inspection of site carried out; site works and boundaries appear visually to agree with the plan submitted and agrees with the plans when superimposed on aerial photographs of the site."

28. Despite requests, Mr Knight has never confirmed the accuracy of the Minutes of that site visit but no challenge was made during the course of the Hearing and they were referred to on more than one occasion. We find that they are an accurate record of the then position.

29. Officer Mitchell thereafter corresponded with the appellant seeking detailed information in regard to the aggregate extracted, the tonnage per unit, topographical survey papers with estimated tonnages of rock sand/gravel mix to be extracted and the overburden estimate and confirmation that the minutes of the site visit were accurate. Unfortunately the appellant chose not to provide that information. In cross examination Mr Knight conceded that: "I didn't feel inclined to engage more than necessary."

30. Eventually on 13 June 2014, Officer Villiers sent a very lengthy pre-assessment letter to the appellant issuing a Direction to immediately cease declaring exempt aggregate on the returns and indicating that if there was a failure to respond with requisite information by 4 July 2014 an assessment for £106,356 would be raised based on the exemptions claimed between July 2010 and January 2014.

31. On 4 July 2014, Pinsent Masons LLP (formerly McGrigors LLP) wrote to Officer Villiers, stating that the "The site has met, and continues to meet, the buildings and highways exemption as a matter of fact and law." They relied on the 2010 Decision arguing that even if it were to be determined that the exemptions did not apply HMRC would be estopped from resiling from the acceptance in the 2010 Decision that the exemptions applied. That would apply until January 2014, when HMRC reviewed its position.

32. Wholly unsurprisingly, HMRC responded on 18 August 2014 pointing out that Estoppel did not apply because the concept did not exist in Scottish law. That is correct.

33. On 31 July and 13 August 2014, the appellant furnished some limited information to HMRC.

34. In the letter of 18 August 2014, Officer Mitchell also explained that the basis of the 2010 Decision was that HMRC had previously understood that all that the appellant was doing was reducing the levels on the site from those that existed in 2006 to the ones shown on the planning application (see paragraph 20 above) but that had proved not to be the case.

35. That letter set out in extensive detail the methodology underpinning the assessment and pointed out that the spreadsheet used to calculate the pre assessment had been amended to incorporate the figures recently furnished by the appellant.

36. The assessment Notice was also issued on 18 August 2014. A review was requested and the appellant ultimately furnished some further parts of the information sought by HMRC in regard to tonnage, volumes of excavation etc. However, information such as the extraction quantities for the TSL Unit and breakdown of other information has never been provided.

37. On 1 December 2014, Officer Mitchell asked whether HMRC's tonnage calculations were agreed or whether the appellant would be supplying alternative calculations. In particular he stated: "I would also like to point out that I have received no data relating to laying of pipes and/or cables. I would be happy to receive your calculations for volumes/tonnages used in the laying of any pipes or cables." Nothing has ever been provided.

38. On 15 January 2015, the review decision, being the decision under appeal, focussed on three issues with the outcome being summarised as follows:

(a) The exemption is specific and does not cover site clearance or levelling to prepare for construction to follow. The only aggregate that the appellant was entitled to treat as exempt was that won in the construction of the only building

and the associated parking on the site together with aggregate won in laying pipes and/or cables in respect of that building. Therefore HMRC were entitled to assess for any exemption over claimed.

(b) In the absence of provision of detailed information by the appellant the assessment had been calculated to the officer's best judgement and the officer had erred on the side of being overly generous. One period of the assessment was time barred and therefore removed.

(c) HMRC were entitled to revisit the 2010 Decision, partly because there is no Estoppel in Scotland and primarily because HMRC had never been aware of the precise factual context and aggregate had **not only** been removed according to the terms of the planning consent to which HMRC had been referred.

Discussion

39. In essence, HMRC's position remains as set out in the review decision. In addition to the arguments relating to the assessment (set out at paragraphs 5 to 8 above), Mr Knight argues that

(a) Personal Bar operates to enable reliance on the 2010 Decision, and

(b) The appellant had not expected HMRC to revisit the 2010 Decision and it was unfair.

Personal bar

40. It was argued that the appellant was entitled to rely on personal bar because the 2010 decision was express confirmation that all extraction of aggregate from the entire site was exempt and that that allowed the appellant to advance a case on legitimate expectation. As far as personal bar is concerned, HMRC referred us to the case of *Milne* which reviews the authorities on personal bar and states explicitly

> "We are of opinion that in Scotland the plea of personal bar, at all events in matters of taxation, does not operate against the Crown, which cannot be prejudiced by neglect or omissions on the part of its officials."

The Chairman of the Tribunal went on to quote from *Millers* where Lord Fraser said:

> "… it is the privilege of the Crown not to be bound by the omission of neglect and blunders of its officers."

and Lord Moncrieff in *Alston's* where he stated

> "It is settled law that the Crown is not barred by the negligence or omission of its officers, and it is difficult to define the limits of this exemption."

We have no hesitation in agreeing with HMRC that the appellant's reliance on personal bar is irrelevant and cannot be upheld because a plea of personal bar is not competent against the Crown in matters of taxation.

Legitimate expectation and fairness

41. Mr Knight alleged that he had been unfairly treated because he had relied on the 2010 Decision and HMRC had effectively "changed the goalposts". There was no evidence produced in regard to any basis for legitimate expectation but in any event HMRC had referred us to *Noor*. That decision of the Upper Tribunal, which is binding upon us, makes it clear that the Tribunal does not have any general "supervisory" jurisdiction, when dealing with an appeal such as this, to consider a taxpayer's claim based on the public law concept of "legitimate expectation".

42. *Noor* does not have the effect that public law rights can never be within the jurisdiction of the First-tier Tribunal. As stated in *Simon Newell v HMRC*[1]

> "While … the absence of a supervisory jurisdiction does not preclude public law rights being considered or given effect to [the passage at [31] of *Abdul-Noor*] makes it clear that whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction."

43. In this appeal the statutory provision is Section 40 of the Finance Act 2001 and it provides so far as relevant:-

> "(1) Subject to section 41, an appeal shall lie to an appeal tribunal from any person who is or will be affected by any decision of HMRC with respect to any of the following matters—
>
> (a) whether or not a person is charged in any case with an amount of aggregates levy;
>
> (b) the amount of aggregates levy charged in any case and the time when the charge is to be taken as having arisen;
>
> (c) …
>
> (d) the person liable to pay the aggregates levy charged in any case, the amount of a person's liability to aggregates levy and the time by which he is required to pay an amount of that levy;".

44. The question of "whether or not a person is charged" is a reference to the charging provisions in Section 16 of that Act. These are not matters which permit any public law jurisdiction.

45. Accordingly we agree with HMRC that HMRC were entitled to choose to raise an assessment in this matter and were not barred from doing so because of the 2010 Decision and this Tribunal has no jurisdiction in regard to any legitimate expectation which the appellant might claim.

46. The Upper Tribunal in *HMRC v Hok Ltd*[2] was considering whether penalties imposed by statute could be waived or altered on the basis that they were unfair and set out the position as follows at paragraph 56:-

> "Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does

[1] 2015 UKFTT 535 at paragraph 97

[2] 2012 UKUT 363 (TCC)

> not matter whether the Tribunal purports to exercise a judicial review function or instead claim to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by Statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it - a power to override a Statute or supervise HMRC's conduct."

The common law principles referred to were the obligation for a public body such as HMRC to act fairly.

47. We must simply find the facts and apply the relevant law. We do not have a discretion.

Quantum of the assessment

48. The burden of proof falls upon the appellant to show, on the balance of probability, that it is entitled to claim the relief afforded by the exemption.

49. Although the appellant has been professionally advised by solicitors and surveyors, the surveyors were not asked to produce evidence to displace the assessment. Mr McLaughlin's evidence was not contentious but was essentially restricted to opining that the method of excavation on the site and the types of surveys conducted were not what he would expect in a quarry. Firstly, that is an opinion and since he is not an expert witness it falls to be disregarded. Secondly we are not concerned with whether the extraction at the site was efficient or looked like a quarrying operation. The only question is whether, or to what extent, such extraction is exempt. Thirdly, he was unable to offer any information in regard to the detail of the assessments. He simply confirmed that his firm had the capacity to generate detailed information but that he had not been asked to provide same.

50. Mr Knight concedes that, with the benefit of hindsight, perhaps he should have provided the information sought by HMRC. As long ago as November 2009, HMRC advised the appellant that "Aggregates Levy is effectively a self assessed tax", referred Mr Knight to the Public Notice and quoted Section 17(3)(b) and (d). Mr Knight should have been aware of the limits of the exemption and the need to keep and furnish information to support any claim for exemption.

What is the site?

51. The appellant sought exemption for the whole of its site including Units 2, 3 and 4. The key words in paragraph 25 are "I am satisfied that the word 'site' is to be construed so as to include the whole of the area of land on which the work of erecting a building is to be undertaken". To date there has not even been an application for planning permission for any construction for Units 2, 3 and 4. There has been no construction on those units and indeed at the site visit only half of the blasting had been completed for Units 2 and 3, and none for Unit 4. The roads and perimeter drain had not been constructed (see paragraph 27 above). Simply put, even now no building work has been undertaken on Units 2, 3 and 4. Aggregates won from those units cannot fall within the exemption.

52. Turning then to the TSL Unit, the question is what constitutes the site for the purposes of the legislation. The appellant argues that it is the whole unit since it is actually used for the business. The public and staff have access and, in particular, there is vehicular access, to the whole unit.

53. The key words in paragraph 22 are "The exemption is available only if the aggregate is obtained wholly from the *site* of a building, in the course of excavations carried out *exclusively* for the purpose of laying foundations, pipes or cables … " It was a matter of agreement that the footprint of the building was undeniably part of the site. It is also clear from paragraphs 25 and 26 that a building is something which is erected but also that inevitably pipes and cables will not be confined to the precise footprint of a building. Paragraph 25 also makes it clear that material removed for something that is not erected, such as a lorry park or an exposed slope, can only be exempt if it is in connection with the erection of the building.

54. I therefore agree with HMRC when they argue that these paragraphs and the others quoted from this case, are authority for the proposition that it is only aggregates which are necessarily removed from the site of the building exclusively for the purposes of laying foundations, pipes or cables which is exempt. The site is not restricted to the foot print of the building but encompasses the land on which the work of erecting the building or laying the cables or pipes is undertaken.

55. In this instance the lorry and car parks had not been constructed (paragraph 27). The only foundations are for the footprint of the building. The car parking spaces have no foundations.

56. Officer Villier's evidence was very clear and wholly credible. He accepted that the footprint of the building was the starting point. He had no information about the sewage plant (indeed that came as a surprise at the hearing), he knew that there had to be drains, pipes and cables but had been wholly unable to obtain any information in that regard.

57. He repeatedly emphasised that he had taken every possible precaution to ensure that, in the absence of relevant information, he did not overcharge the appellant since he knew that material removed from beyond the footprint would be exempt. The plans produced by the appellant show the building on the land to be 35.463 metres long and the building itself is 8.35 metres wide with parking spaces being a further 7.088 metres.

58. The ground under the building was not uniform in height and, using the information contained in the appellant's plans, HMRC measured the volume of the foundations by reference to eight separate sections.

59. HMRC have accepted that the footprint of the building and the six car parking spaces should all form part of the site. That is an irregular shape and they have extended that to be a rectangle which encompasses that shape. They applied the maximum found depth to that site even although the car park has no foundations and consisted only of block work. That is to the benefit of the appellant.

60. Having calculated the volume of the foundations, HMRC calculated that the excavation would amount to 743.170 cubic metres and a weight of 2.059 tonnes per cubic metre was then applied to that figure, giving a total tonnage of 1,530.187 tonnes. Duty was charged at about £2.00 per tonne which then provided a duty exemption of £3,060.

61. We found that the HMRC had taken into account all of the information with which they had been provided, they had certainly exercised best judgement, not least because the appellant had already received a repayment of £54,749.75, for the period before that with which we are concerned, and that will have included extraction that is again being treated as exempt in this calculation.

62. Mr Knight did advance an argument that there was a road whereby the seven dedicated timber and eight general haulage lorries accessed the area behind the building as did visitors, the postman and waste operatives. The access road from the main road gives access both to the quarry and the TSL Unit, thereafter there is simply compacted ground which has not been surfaced. Mr Knight eventually conceded in cross-examination that that access was not via a road that could be defined, but rather via rough tracks, so it was not a road. We find that it was simply open ground over which vehicles passed. There was no line of any road on the site, the boulders did not constitute the line of a road, and there was not a highway within the meaning of the legislation.

63. We also find that material removed for the purpose of reducing a slope, whether or not a slope is regarded as part of the site of a building, cannot be exempt since its removal is not required exclusively for the laying of foundations, pipes or cables.

Decision

64. For the reasons set out above, we have found that nothing that was extracted relating to Units 2, 3 and 4 can be exempt.

65. We do understand that at every stage, the appellant has proceeded on the basis that Mr Knight thought that all extraction from the site would be exempt and therefore he did not need to provide information to HMRC other than the total quantity extracted. (Although belatedly some information has been produced, it has already been incorporated in the calculations underpinning the assessment.)

66. He was wrong and that has consequences. Firstly, to the extent that there is no exemption, the appellant cannot now recover a contribution from customers. That is unfortunate but not a matter for us.

67. Secondly, and crucially, it is trite law that an appellant wishing to challenge a tax assessment, including an assessment to this levy, must produce credible evidence from which the Tribunal can determine the correct amount of tax or levy.

68. We have absolutely none of the credible evidence we need if we are to make an adjustment to the assessment. Any adjustment we did make would amount to nothing

more than a guess, and a guess is not open to us. It follows that there is no adjustment, and the appeal is accordingly dismissed.

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 12 DECEMBER 2016

APPENDIX 1

NOTE OF AUTHORITIES

Legislation

1. Roads (Scotland) Act 1984, section 151
2. Finance Act 2001, sections 16, 17, 19 and 40

Case Law

3. *Lord Advocate v Meiklam,* &c (1860) 22 D. 1427
4. *Lord Advocate v Miller's Trustees* (1884) 11 R 1046 ("Millers")
5. *Lord Advocate v Hamilton* (1891) 29 SLR 213
6. *Alston's Trustees v Lord Advocate* (1896) 33 SLR 278 ("Alstons")
7. *Milne and Mackintosh (t/a Jack and Jill)* (VTD 1063) (TVC 2.108, 2.109) ("Milne")
8. *British Aggregates Associates and Others v HM Treasury* [2002] 2 CMLR 51
9. *East Midlands Aggregates Ltd v Customs and Excise Commissioners* [2004] 2 P & CR 1 ("East Midlands 1")
10. *East Midlands Aggregates Ltd v Customs and Excise Commissioners* [2004] STC 1582 ("East Midlands 2")
11. *Revenue and Customs Commissioners v Noor* [2013] STC 998 ("Noor")
12. *Northumbrian Water Ltd v Revenue and Customs Commissioners* [2015] STC 1458

APPENDIX 2

Excerpts from East Midlands Aggregates Limited v Commissioners for Customs and Excise [2004] 2 P & CR 1

1. Paragraph 21 reads:-

"… It is apparent that subs.17(3) is directed at the exemption from the levy of aggregate which is obtained as a by-product of activities which would not normally be regarded as quarrying, but which do involve the moving or processing of material which does or might include substances suitable for use as aggregate. The limitations on the exemption are designed, as I perceive them, to ensure that aggregate so obtained is genuinely a by-product, and that the exemptions are not abused in order that activities which are in truth quarrying escape the levy by being carried on in the pretence that they are something else."

2. Paragraph 22:

"… By contrast, para.(b) is much more closely confined. The exemption is available only if the aggregate is obtained wholly from the *site* of a building, in the course of excavations carried out *exclusively* for the purpose of laying foundations, pipes or cables … It seems to me that if Parliament had intended to exempt the spoil from all genuine building works, a limitation similar to that contained in para.(d)(ii) would have been sufficient; the much more restrictive wording of the limitation here must be lead to the conclusion that the exemption is intended to be construed more narrowly."

3. Paragraph 23:

"In my judgment what is meant is that material *necessarily* removed for the purpose of laying foundations, pipes or cables is exempt, and the word 'exclusively' is used in order to take out of the exemption material removed for reasons not intimately connected with that purpose — for example, for landscaping, or for the provision of an access road. It would certainly be a remarkable result if the exemption were not available because of the dual role of the slab as both foundation and floor."

4. Paragraph 24:

"I have reached the conclusion, therefore, that the exemption is available, in principle, in respect of all the material removed from the site of the new building for the purpose of laying foundations, pipes or cables, by which I mean material removed in order to make their being laid feasible, and not merely so much of it as is displaced by them. That determination, however, leads to the further question, what is the extent of the site?"

5. Paragraph 25:

"There is no definition within the Act of the word 'site', nor, indeed, of 'building', but I take it as obvious that the new warehouse is, or will be, a building. I do not consider that either the lorry park or the slope could, realistically, be so described. In my judgment a 'building', in this context, is something which rises above ground level, and which has been erected: that interpretation is consistent with the wording of para.(b)(i), which refers to the 'erection' of a building. One might construct or even build, a lorry park, but I do not think one would describe a lorry park as something which has been erected. Thus the lorry park will not, in my opinion, be a building; nor, plainly, will the exposed slope. It follows that the material removed for the construction of the lorry park (which has foundations and also pipes laid under it) will be exempt only if the lorry park — which, in my view indisputably, is to be constructed 'in

connection with the … erection of the building', so as to satisfy para.(b)(i) — can properly be considered to occupy part of the site of the building, since the limitation of the exemption, by para.(b)(ii), is not so strict as to confine it to the foundations of the building itself; any foundations, pipes or cables installed within the site are included."

6. Paragraph 26:

"I am satisfied that 'site' is not to be construed as narrowly as Mr Sephton argued. Even if one assumes that the foundations of a building are confined to its footprint (and that may not always be a correct assumption) it is almost inevitable that pipes and cables will not be so confined, since their purpose is to enable supplies, of water, gas and electricity, to be obtained from sources remote from the building and, in the use of pipes, to provide for the discharge, away from the building, of effluent. The plans produced at the hearing show that the drains serving the building are to be laid, at least in part, beneath the lorry park. I cannot accept that it could have been the intention of Parliament that the exemption should extend only to the material removed from the footprint of the building order to accommodate such pipes and cables, while aggregate removed from the immediate area of building operations but outside the footprint of the building itself would be taxable. I am satisfied that the word 'site' is to be construed so as to include the whole of the area of land on which the work of erecting a building is to be undertaken. In reaching that conclusion I have been conscious that there is no threshold of value, weight or volume below which aggregate is not taxable or the person exploiting it is not required to register, and that the tax is charged proportionately on quantities of less than a tonne."

6. Paragraph 27:

"The lorry park, in my view, comes within the immediate area of building operations. Since, as I have already commented, the limitation in para.(b)(ii) is not restricted to the foundations of a building, nor to pipes and cables serving a building, I conclude that the material removed from the land in order to make possible the construction of the foundations of the lorry park (which are co-extensive with its surface), and the installation of the drains to it, is also exempt."

7. Paragraph 28:

"However, it seems to me equally clear that the material removed for the purpose of reducing the slope, whether or not the slope is to be regarded as part of the site of the building, cannot be exempt since its removal is not required for the laying of foundations, pipes or cables."