



[2020] UKFTT 0112 (TC)

TC07606

Aggregates Levy - rock extracted from quarry - whether rock exempt from aggregates levy as consisting "mainly of... slate" - section 17(4) Finance Act 2001 - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03559

BETWEEN

LOVIE LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER CHARLOTTE BARBOUR**

Sitting in public at Edinburgh on 21, 22 and 23 October 2019 and 28 and 29 January 2020

Philip Simpson, QC, instructed by Anderson Anderson & Brown, for the Appellant

Graham Maciver, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The appellant appeals against the decision by the respondent (“HMRC”) dated 26 February 2018 to reject its claim for repayment of aggregates levy in respect of its activities at Cottonhill Quarry, near Macduff (“the Quarry”).

2. That claim (“the 2017 Claim”) was for repayment of aggregates levy for the periods 07/02 to 10/16. It was rejected by HMRC on the basis that its consultant geologist had assessed the material extracted at the Quarry and had concluded that it did not consist mainly of slate, as was claimed by the appellant. If that was the case it did, and does, not attract the exemption from aggregates levy set out at Section 17(4)(a) of the Finance Act 2001 (“FA 2001”). The repayment claim was therefore rejected by HMRC.

Historical Background to Aggregates Levy

3. On 13 March 2019, a policy paper entitled “Review of the Aggregates Levy: Discussion paper” was published and at page 5 it set out the history and that reads as follows:-

“The levy has been subject to various litigation. In 2002, the European Commission (“Commission”) found that the levy as a whole did not contain state aid. This decision was challenged which resulted in the European General Court annulling the Commission’s decision. In 2012, the Court ruled that the Commission needed to make a new state aid design. The Commission investigated the levy on state aid grounds, and found the levy exemptions to be lawful, apart from the exemption for shale used in construction, which constituted an unlawful aid. As a result, the government removed the exemption for shale in 2015 and was obliged to pursue the collection of historical aid. There is no ongoing litigation in the European General Court.”

4. Aggregates levy is a tax on the commercial exploitation of sand, gravel and rock, in this case extracted from the ground. The appellant has paid aggregates levy since it was introduced in 2002.

Preliminary Issue

5. On 18 June 2019, HMRC applied to the Tribunal under Rules 8(3)(c) and 8(7) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) to have struck out of this appeal the appellant’s claim insofar as it pertained to sums paid by it before 7 February 2013 in respect of aggregates levy. The appellant had relied on earlier protective claims lodged at intervals during the litigations in the industry.

6. On 29 October 2019, we issued a Decision, which has not been appealed, to the effect that we struck out the appeal insofar as it pertains to sums paid by the appellant prior to 7 February 2013. By the appellant’s calculation this eliminates from the appeal the sum of £1,151,389. That leaves the extant appeal concerned with the sum of £427,292 being the total amount of aggregates levy paid by the appellant for the periods 10/12 to 10/16, which payments were made by it after 7 February 2013.

The Law

7. The relevant law is not in dispute. Section 16 FA 2001 provides that there will be a charge to aggregates levy. Section 17(4) FA 2001 provides that if the aggregate “consists wholly or mainly of...slate” then it will be exempt from that levy. Section 31 FA 2001 provides for repayments of overpaid levy.

The HMRC guidance

8. HMRC’s Public Notice, Excise Notice AGLI: Aggregates Levy (“AGL1”), provides what HMRC describe as a general guide to the aggregates levy. Section 3.2.1 is the only reference to slate and it only states that: “Any material, more than half of which consists of the following substances is exempt from the levy: ...slate...”.

9. Earlier versions of *AGLI* made express reference to, and contained extracts from, the British Geological Survey (“BGS”) Commissioned Report CR/03/281N titled “Definition and characteristics of very-fine grain sedimentary rocks: clay, mudstone, shale and slate”. HMRC commissioned that report and it was published in 2003. It is known as the “*Merriman*” report.

10. In 2014 significant changes were made to *AGLI* and, according to Officer Stokoe, the extracts from *Merriman* were removed, apparently on the basis that their purpose had been to assist HMRC officers and that content was not believed to be appropriate to a Public Notice.

11. We set out in detail under the heading *Merriman* below our views on it but it is appropriate to quote at this juncture the commentary in the introduction to *Merriman* which reads as follows:-

“Problems have arisen with the precise definition of the terms ‘shale, slate and clay’ (see Appendix 1). The purpose of this paper is to define these more carefully, in terms of their characteristics and geological origin, in a form that will assist HM Customs and Excise officers during site visits. However, the original choice of these terms for the purpose of the Act is believed to have been based on their use as economic mineral commodities rather than geological entities. With this in mind, the closely related rocks (*sic*) types siltstone and mudstone have been included in the paper.”

12. In their Skeleton Argument at paragraph 39 HMRC argued that because *Merriman* was commissioned expressly to assist in the implementation of the 2001 Act, no attempt should be made to provide a closer statutory or otherwise definition for “slate” as it appears in the 2001 Act. That is in stark contrast to the paragraph in the Review Decision to which we refer at paragraphs 125 to 128 below.

The evidence

13. The following persons provided witness statements and oral evidence and were cross-examined.

14. On behalf of the appellants those witnesses were:

- (a) Mr Bill Lovie, Managing Director of the appellant at all relevant times.
- (b) Dr Martin Kirk, a geologist and a director of Kirk Natural Stone Developments Limited, who gave expert evidence on behalf of the appellant.

15. On behalf of HMRC the witnesses were:

- (a) Officer Stokoe, an Environmental Taxes Compliance Officer with HMRC.
- (b) Dr Robert Barnes, a geologist and a director of GeoloGIS Ltd, which holds a contract with HMRC for the provision of technical advice and expert witness services.

16. We heard the first three witnesses during the October Hearing.

Expert evidence

17. Both parties offered expert evidence and, on that basis, Dr Barnes sat in court throughout the first three days of the hearing.

18. Whilst we accept that Dr Barnes has always acted in good faith and tried to be fair, it rapidly became apparent to us that neither he, nor those in HMRC who had looked at and lodged his witness statement, had understood the role of an expert witness in Scots law.

19. Although most readers of this decision will be aware of the provisions in the Civil Procedure Rules (“CPR”) relating to experts these are proceedings in Scotland with a Scottish taxpayer so the CPR is not directly relevant.

20. The law on expert witnesses in Scotland is clearly explained in *Kennedy v Cordia (Services) LLP*¹ where Lords Reed and Hodge explained the position commencing at paragraph 38. We have set out at Appendix 1 the relevant excerpts from that decision. The crucial point is that expert evidence must be seen to be truly independent and uninfluenced by litigation.

21. In the course of Dr Barnes' examination-in-chief he was referred to paragraph 13 of his witness statement where, having referred to *AGLI* and *Merriman* in the previous two paragraphs, he stated:

"Based on Mr Stokoe's advice that AGL1 is the standard used by HMRC officers assessing claims for Aggregates Levy relief or exemption for slate I adopted the BGS report [Merriman] classification for investigation of the Aggregates Levy claim made by the Appellant."

In oral evidence he confirmed to the Tribunal that he had adopted *Merriman* in order "to be consistent with how HMRC operated".

22. That immediately gave us cause for concern in that if he was an expert witness then a stated objective of achieving consistency with HMRC's practice is not an independent approach.

23. Dr Barnes later conceded, in response to a question from the Tribunal, that *Merriman* contained a number of inconsistencies and it transpired that he neither agreed with everything that was in *Merriman* nor had he adopted it in its totality. However, he had relied upon it in his report dated 18 August 2017 ("the August Report") and subsequently.

24. In cross-examination he was again referred to that paragraph in his witness statement and he explained that he had felt that it was important that his assessment in this case was consistent with other assessments made by HMRC.

25. In cross-examination Dr Barnes also conceded that it had been an error to state in paragraph 2 of his witness statement that:

"2. I make this statement in support of the defence made by the Respondent, HMRC, in their rejection of the claim made by the Appellant, Lovie Ltd for repayment of Aggregates Levy paid in respect of aggregates produced at Cottonhill Quarry, Macduff, Aberdeenshire, Scotland."

In oral evidence he then retracted that part of his witness statement.

26. Dr Barnes was referred to paragraph 2 of the August Report to which he had referred at length in his oral evidence. Under the heading "Standards and Definitions" it reads as follows:

"2.1 Information relating to the Aggregates Levy legislation is provided by 'Aggregates Levy. HMRC Reference: Notice AGL1' dated 2017.

2.2 Geological terms are used in accordance with national and international standards (e.g. BS 5930, BS EN ISO 14688) other than as defined in BGS Report CR/03/281N (Merriman, RJ, Highley, D E, and Cameron, D G. 2003): Definition and characteristics of very-fine-grained sedimentary rocks: clay, mudstone, shale and slate."

27. On day four of the hearing he was asked whether those were the only reference materials that he had used. He confirmed that they were for the purposes of the August Report. However, he said that before writing the August Report he had also considered other British Standards and definitions when completing his desk study (ie background study). There was some confusion as to what precisely he had considered and the Tribunal asked if he had considered the BGS Rock Classification Scheme, Volume 2, Classification of metamorphic rocks, Research Report RR 99-02 ("99-02") which is referred to in *Omagh Minerals Ltd v HMRC*²

¹ [2016] UK SC 6

² [2019] UKFTT 0130 (TC)

(“Omagh”). Mr Simpson undertook to obtain that report and produced it to the Tribunal on day five.

28. Dr Barnes confirmed that he had been aware of that definition of slate in 99-02 and that he had looked at it before he had spoken to Officer Stokoe (see paragraph 41 below). He had decided to proceed with the definition in *Merriman*, which the officer had given to him, notwithstanding the fact that he did not agree with everything in *Merriman*.

29. In the course of Mr Maciver’s closing submissions we drew his attention to our concerns about Dr Barnes’ status as an expert witness and we heard submissions from both parties on the point. We make it explicit that, in our view, there was no impropriety on the part of Dr Barnes. Our concern was limited to the reasons for him adopting *Merriman* as what he described as being his “primary source” and also his limited reliance on *Merriman*.

30. We set out at length our views on Dr Barnes’ evidence, and he is clearly an expert in his field and was employed as such by HMRC, but it suffices to state at this point that we find that he was definitively not an expert witness in the sense required by any Court or Tribunal. It was clear that his approach was to find out HMRC’s stance on aggregates levy from Officer Stokoe and then apply that to the rocks in the Quarry. Unfortunately, as we discovered, there was a distinct lack of clarity about HMRC’s approach.

31. As Mr Simpson correctly submitted, the impact of Dr Barnes not being an expert witness is that it affects the weight attached to his evidence on some matters.

32. We also make the point, as we did orally, that we agree with, and are bound by, Mrs Justice Proudman in *HMRC v Sunico*³ at paragraph 29 where she states:

“29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties’ respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence.”

The simple point is that if he is not an expert, and we find that he is not for the purposes of this decision, we must disregard his views on the documents that have been produced or on Dr Kirk’s oral evidence.

The 2017 Claim and the history

33. Dr Kirk was contacted by Mr Lovie, the Managing Director of the appellant, in December 2016 and asked to examine and characterise the rock at the Quarry from a geological perspective and, in particular, to advise whether the rock should be classified as slate for the purposes of Aggregates Levy. He presented the results in a short report in February 2017.

34. His conclusion on geological classification reads:

“The rocks exposed in Cottonhill Quarry are typically low-grade regionally metamorphosed, fine grained rocks with a well developed cleavage, or where coarser grained an ability to split into layers.

Based upon these characteristics, it is concluded that the rock being worked at Cottonhill Quarry belonging to the Macduff Slate Formation can be classified geologically as: **SLATE**.”

35. On 7 February 2017, Mr Lovie, the Director of the appellant, emailed HMRC stating as follows:-

“Cottonhill Quarry, Macduff, Aberdeenshire. We have operated this site since the mid-1970’s and have paid Aggregate Levy since its inception in April 2002.

We now realise that the Rock at Cottonhill is Slate and as such is exempt from Aggregate Levy.

³ [2013] EWHC 941 (CH)

Please see the attached Geological report.

We now respectfully ask that Cottonhill Quarry be removed from the register of sites liable to pay Aggregate Levy and that the monies paid to date be refunded.”

36. Correspondence ensued and by 20 February 2017, the appellant had furnished HMRC with the statutorily required information for a valid claim.
37. Mr Lovie had also sent samples from the Quarry to an independent laboratory for testing and on 6 April 2017 he furnished HMRC with a report from Christian Clergeaud, the senior geologist at Geolabs Limited dated 5 April 2017 (“the April report”). That report read:-

“Strong grey fine grained SLATE. Low fissibility. Very fine foliations. Some orange oxide colouration. Some green colouration due to presence of Chlorite.”
38. HMRC responded asking for further information. HMRC instructed Dr Barnes and a site visit was arranged for the Quarry on 19 July 2017 and a visit to the appellant’s office on 20 July 2017.
39. On 11 May 2017, Mr Lovie sent to HMRC a further report from GeoLabs Limited. It seems to relate to the same sample. It was a petrographic analysis by X-ray Diffraction dated 9 May 2017 (“the May report”). It had the same description as that quoted in paragraph 39 above but stated the weight of the rock by mineral phase, namely: Illite 53%, Chlorite 10.9%, Quartz 10.9% and Hematite 8.4%
40. Prior to the site visit, Dr Barnes undertook the desk study investigating the background to the issues and a preliminary draft report was provided to HMRC on 10 July 2017. We have not had sight of that.
41. At that point Dr Barnes sought advice from Officer Stokoe as to the precise definition of slate to be applied for the purpose of the aggregates levy. As he stated in his witness statement he did that “...with specific reference to uncertainty over grain size limits for slate as presented in...” *Merriman*.
42. Officer Stokoe responded on 11 July 2017 referring to *Merriman*. He confirmed to Dr Barnes that *AGLI* was provided as an aid and general guide for officers visiting quarries. He quite properly stated that “I would defer to your experience as to which particle size is acceptable/correct.”
43. In his oral evidence Officer Stokoe confirmed that he was not a geologist, so he had left the interpretation of *Merriman* to Dr Barnes.
44. The site visit to the Quarry lasted approximately four hours and was attended by Dr Barnes with two officers from HMRC, Dr Kirk and Mr Lovie and his two sons. The sampling team for GeoloGIS Ltd’s sub-contractor for laboratory analysis was also present.
45. During that visit the main quarry faces (the north and south sequences) and the aggregate stockpiles were examined. Eight rock samples and two aggregate samples were collected having been agreed by all of the parties to be representative of the material in the Quarry. The rock samples focussed on the finer-grained parts of the succession other than two samples collected from the courser-grained rocks present.
46. The site visit was followed by a meeting at the offices of the appellant on 20 July 2017, attended by the same parties, other than the sub-contractor.
47. Dr Barnes then completed a petrographical analysis of thin sections of the samples.
48. In summary, in the August Report, Dr Barnes classified the rock from the Quarry as “...weakly metamorphosed sandstone, siltstone and mudstone”. Visual estimation of the rocks in the Quarry and his analysis of the thin sections of rock led him to decide that approximately 19 per

cent of the material present could be classified as slate, as defined by *Merriman* and two BS standards. On 21 September 2017, the appellant responded stating that they would undertake further analysis.

49. On 27 September 2017, Dr Kirk made a brief examination of the lithological character of the rocks exposed in the Quarry and six representative samples were selected for thin section analysis. The purpose of that analysis was to utilise the samples as control samples for grain size during the detailed lithological logging works.

50. On 24 and 25 October 2017, spending ten hours each day, Dr Kirk completed a lithological log over 140 metres of the north sequence and 130 metres of the south sequence. He observed the rock face on a cm:cm basis and he reported it on a 1:50 scale. The individual handwritten logs noted significant differences or variations. He very fairly conceded that it is possible that there may have been minor omissions of the “odd cm” since it was not practical to record every item but everything of significance had been included. We accept that.

51. He produced a report in November 2017 (“the Logging Report”).

52. On 17 December 2017 Dr Barnes produced a response (“the December Report”).

53. On 7 February 2018, Dr Kirk’s response (“the February Report”) was sent to HMRC and Dr Barnes replied on 21 February 2018 stating that, having reviewed that report, he had not changed his opinion that the rock at the Quarry “...is not composed mainly of slate as defined by Merriman et al. 2003”.

54. On 26 February 2018 HMRC wrote to the appellant rejecting the claim for repayment (“the Decision”).

55. On 14 March 2018, Dr Kirk submitted a report with additional supporting information.

56. On 25 May 2018, the Decision was upheld by HMRC following review (“the Review Decision”).

57. On 5 June 2018 the appellant appealed to the Tribunal and in October 2018 Dr Kirk produced a “BS Standards Review” being a review of the BS referred to in the Review Decision and two others.

The Issue

58. The substantive issue is whether the stone quarried at the Quarry is “...wholly or mainly ...slate” within the meaning of section 17(4)(a) FA 2001 and if it is then in terms of section 31 FA 2001 a repayment would be due to the appellant.

59. It is common ground that the appeal turns on the definition of “slate” and that is not defined in the legislation.

Mr Lovie’s evidence and the facts derived therefrom

60. We heard evidence firstly from Mr Lovie who furnished the background to the 2017 Claim, not all of which need be narrated here. We find the following facts.

61. At all relevant dates, Mr Lovie, his wife and two sons were the shareholders and the directors of the appellant.

62. The appellant now has five operational quarries, four of which are sand and gravel, and the last is the Quarry. The Quarry has been leased from a farmer since the mid-1970s. The appellant also has other business operations.

63. However, as far as the quarries are concerned, the appellant produces approximately 200,000 to 250,000 tonnes of sand and gravel and crushed rock but whilst the sand and gravel output has increased, the extraction from the Quarry is only between 30,000 and 50,000 tonnes per annum. That can be compared with the situation in the mid-1970s when, having leased the Quarry as an abandoned quarry, a crushing and screening plant was installed which supplied the local market. At that stage it did about 80,000 tonnes per annum but after the introduction of aggregates levy in 2002 the tonnage dropped considerably.

64. Mr Lovie states that the appellant absorbed the cost of the aggregates levy and sold the materials at the market price.

65. In late 2016 it came to Mr Lovie's attention that his nearest competitor, who lived only a few miles away, is registered as a slate quarry and does not pay aggregates levy. He investigated the position on Google and found that the Quarry was within a few hundred yards of the original Macduff slate quarries. All of the old geological maps referred to the formation as the Macduff Slate Formation, although that had been changed in 2002, and it is now known only as the Macduff Formation. The reason for the change is not known.

66. Mr Lovie freely conceded that until that point he had never even thought about whether any of the rocks were slate, or realised that there was an exemption, and so he instructed Dr Kirk. On receipt of his first report, Mr Lovie wrote to HMRC on 7 February 2017 claiming a repayment of aggregates levy on the basis that there was no liability to it.

Conclusion

67. We found Mr Lovie to be a wholly credible and straightforward witness. Whilst Mr Maciver agreed that he was a credible and reliable witness, he suggested that the fact that many years had elapsed before Mr Lovie argued that the Quarry was mainly comprised of slate was a strong indicator that that was not the case. We disagree. We accepted Mr Lovie's explanation for the 2017 Claim.

Description of the Quarry

68. We had a number of pictures of the Quarry but the best and unchallenged description is that to be found in the August report and that reads:

“3.2 The quarry has been in operation since the mid-1970's and presently extends over an area of about 7 ha including the soil bunds around the periphery. It is situated on a low hill with surface level 80-85 m above Ordnance Datum (aOD) below which the quarry is worked on three levels: in the south the access ramp from the B9031 leads to an area at 68-70 m presently used for the offices, weighbridge and vehicle parking; a ramp in the west of the quarry from this level leads to the main working area at 58-59 m aOD from which extraction is progressing into an intermediate level at 65-68 m in the south east of the quarry.

3.3 Blasting is used to loosen the rock, mainly along natural discontinuities, so that it can be extracted by mechanical excavator. Processing is carried out on site using mobile crushing and screening plant to produce a range of aggregate products (e.g. Appendix 3).

3.4 Desk study (Appendix 2) reveals that Cottonhill quarry lies within the outcrop of a group of rocks of early Palaeozoic (probably Cambrian) age now classified by the BGS as the Macduff Formation. In other published works by the BGS and other authors the rocks are termed the Macduff Slate Formation or referred to simply as the Macduff slates.”

Appendix 3 consists of photographs of the Quarry.

The Geologists

69. We find that both geologists put a lot of time and effort into analysing the detail of the rocks in the Quarry but the crux of the matter is that they were not applying the same criteria for a definition of slate.

70. Although we heard a great deal of detailed evidence about the various samples, in fact, Dr Kirk very fairly volunteered his opinion that Dr Barnes' analysis of the thin sections in the August Report was accurate geologically. For that reason, he did not himself test those samples as that would have been an unnecessary duplication of work. Although Dr Barnes and Mr Maciver argued that his failure to do so demonstrated a lax approach, we disagree. That would have been a waste of time and money since Dr Kirk agreed with the findings.

71. Another criticism made of Dr Kirk was that he focussed almost entirely on grain size and ignored cleavage, only conceding the relevance of cleavage in his oral evidence. That is simply not true. For example, at paragraph 9 of his witness statement he states: "The most significant features to determine whether to classify a rock as slate are (i) grain size, (ii) the presence of cleavage and (iii) chemical composition."

72. More pertinently, in his first report his mention of grain size is in very general terms in regard to the geological description of the rocks in the Quarry and the Macduff Formation. Furthermore, as can be seen from paragraph 34 above, he did focus on cleavage (an ability to split, or fissibility, is cleavage).

73. His first mention of specific grain size arose after he perused the August Report wherein Dr Barnes had provided considerable detail on grain size in his analysis of the thin sections of the samples and, of course, had referenced *Merriman*.

74. Dr Kirk has consistently argued that, based on the publication by Wentworth in 1922, entitled "*A Scale of Grade and Class Terms for Clastic Sediments*" ("Wentworth"), it is well established in geological circles that slate would have a grain size of less than 63 microns.

75. Dr Barnes relied on *Merriman* which, although it referred to *Wentworth*, suggests at the beginning of Appendix 1, the relevant extracts of which we set out in full at paragraph 84 below, that slate would have a grain size of less than 32 microns.

What test or tests apply in the assessment as to what constitutes slate?

76. It is clear to us that the primary issue for the Tribunal is to establish precisely what test or tests should be applied. Unfortunately, beyond what is said in *Merriman* (see the penultimate sentence in the quotation in paragraph 78 below) we were furnished with no information as to policy intention in FA01.

77. We observe that the opening line of *Wentworth* reads: "In no other science does the problem of terminology present so many difficulties as in geology" and goes on to describe the confusion that had been caused by indiscriminate use of terms which have been redefined over time.

78. That is mirrored in *Merriman* where in the introduction it is narrated that:

"Problems have arisen with the precise definition of the term shale, slate and clay (see Appendix 1). The purpose of this paper is to define these more carefully, in terms of their characteristics and geological original, in a form that will assist HM Customs and Excise officers during site visits. However, the original choice of these terms for the purpose of the Act is believed to have been based on their use as economic mineral commodities rather than geological entities. With this in mind, the closely related rock types, siltstone and mudstone have been included in the paper."

79. *Wentworth* does not refer to slate, as such, but does refer to siltstone and specifies that 63 microns is the maximum size of silt grain.

Merriman

80. *Merriman* is at the heart of this appeal. It was first referred to by Dr Barnes in the August Report and unsurprisingly Dr Kirk, who had made no mention of it in his initial report, responded thereafter relying on his understanding of it.

81. At Appendix 6, the authors of *Merriman* cite their references namely:

(a) Hallsworth & Knox, 1999, BGS Rock Classification Scheme. Volume 3. Classification of sediments and sedimentary rocks *British Geological Survey Research Report*, RR 99-03 (“99-03”)

(b) Wentworth

(c) British Standards Institution 1999. Code of practice for site investigations. BS 5930. (“BS 5930”)

82. Although Dr Kirk agreed with some of *Merriman*, he pointed to a number of inconsistencies. Very fairly, since it was he who had relied upon it, Dr Barnes was also cautious about *Merriman*, as for example in the December Report at 2.6 where he described the introductory sentence in Appendix 1 as “imprecise” and he went on to prefer and adopt the definition in the Glossary in *Merriman*. In his oral evidence Dr Barnes pointed to other inconsistencies.

83. We have no hesitation in saying that we have also identified inconsistencies. *Merriman* is therefore worthy of close study.

84. Appendix 1 is headed “Properties and Definitions”. Given the dispute between the parties as to its meaning, it is appropriate to set out the first two paragraphs of the Appendix in full and those read:

“**Siltstone, clay, shale and mudstone are very-fine-grained sedimentary rocks.** Slate is the low-grade metamorphic equivalent of these rocks. The main constituents are clay minerals and quartz, and they have grain sizes of less than 0.032 mm (<32 µm) (Appendix 4). In this report the BGS size division 32 µm between very-fine sand and silt has been used (Hallsworth & Knox, 1999). The division based on the Wentworth scale and BS 5930, that is generally used by the industry and scientifically, is taken at 63 µm (Wentworth, 1922). However, 32 µm is a **useful** division for observation of hand specimens since it is the finest particle size that can be detected as granular material by using a hand lens and is, therefore, practical for use in field observation. Individual grains smaller than 32 µm cannot be resolved with the naked eye or with the aid of a hand lens.

The existence of different classification limits does mean that, in certain circumstances, depending on the grain size of the sediment, there may be doubt as to whether a material is actually predominantly a mudstone/shale or a siltstone. This can only be resolved by sampling and grain size analysis. Should any conflict arise it is recommended that the division at 63 µm be used as this is widely recognised.”

85. Appendix 4 is a table derived from 99-03, which was not produced to us, so we know nothing of its context. It defines the boundary between sandstone and siltstone, mudstone and shale (slate) as being 32 microns. We simply do not know why since we have no context.

86. Leaving to one side the difference between the parties as to whether slate is a metamorphic equivalent of siltstone (Dr Barnes originally said not but then conceded that very occasionally it could be so), as can be seen there is a reference to *Wentworth* and also to *BS 5930*.

87. HMRC argue that the effect of the second paragraph of the quotation from *Merriman* at paragraph 84 above is that the 63 micron standard would only be used in a dispute relating to mudstone, shale (at that time shale was also exempt) or siltstone. We disagree. It is made explicit in the second sentence of the first paragraph that slate is the metamorphic, that is to say compacted, equivalent of siltstone, clay, shale and mudstone.

88. Furthermore, there is an explicit acknowledgment that both *Wentworth* and *BS 5930* are the industry standard and they both use 63 microns. It is we who have highlighted in bold the word “useful” and it may well be useful for HMRC, who commissioned this report, to prefer the 32 micron standard which limits the extent of the exemption but that does not make it correct.

89. We had *BS 5930*, which was of limited assistance because it is a BSI Standards Publication relating to the Code of Practice for Ground Investigations. In its foreword it points out that it is simply guidance and recommendations and it should not be quoted as if it were a specification. In its “Introduction” it also points out that users of it may well have limited experience and its purpose is to help those selecting sites for construction. At Table 27, it does indicate that siltstone and mudstone are defined at 63 microns. Slate is included under the metamorphic rocks without a micron definition and is described as “Well-developed plain cleavage (foliation)”. It also states that metamorphic rocks are “Generally classified according to fabric and mineralogy rather than grain size”.

90. Dr Barnes was clear that grain size was the primary classifier for sedimentary rocks and that is not disputed.

91. Although not referred to in *Merriman*, it is appropriate, at this juncture, to describe the two other British Standards to which we were referred.

92. At paragraph 2.14 of the December Report Dr Barnes referred to *BS EN 14689:2003* as being authority for the proposition that siltstone comprises more than 50% of silt-sized particles and less than 50% of clay particles. That has not been produced to us.

93. We do not know why *BS EN ISO 14689:2018*, (not 2003) was produced to us in the Bundles.

94. At Annex A in Table A.1 of the 2018 version, siltstone is described as having a grain size of between 2 microns and 63 microns. Claystone and mudstone are described as being less than 2 microns. Slate by contrast was described as having a fine grain size of between 0.5 mm to 1 mm. Both Dr Barnes and Dr Kirk disagreed fundamentally with that and it certainly is not consistent with anything else to which we were referred.

95. We consider it to be largely irrelevant not least because the explanation states: “The purpose of Table A.1 is to provide the engineer, with limited geological knowledge, a means of simply assigning a rock a name, which may not be strictly correct geologically ...”! It goes on to say that rock names are mainly selected from non-specialist geological textbooks and are not used strictly.

96. We disregard it.

97. The second British Standard to which we were referred was *BS EN 12326-1:2014* (“12326”) on which HMRC relied in the Review Decision (see paragraph 125 below).

98. Again, it is not particularly in point because it is described as a definition of “Slate and stone for discontinuous roofing and external cladding”. Both experts agreed that it was an appropriate definition for roof tiles which are high quality slate. It is not slate generally. For completeness the definition of slate at 3.1 is given as:-

“Rock originating from clayey sedimentary rocks, including sediments of volcanoclastic origin and belonging petrographically to a range which begins at the boundary between sedimentary and metamorphic formation and ends at the epizonal – metamorphic phyllite formations.

Note 1 to entry: The predominant and most important components are the phyllosilicates and the cleavage resulting from a schistosity flux, caused by low or very low grade metamorphism.

Note 2 to entry: Slate is distinguished from sedimentary stones, which invariably splits along a bedding or sedimentation plane.

Note 3 to entry: The origin of the metamorphism can be due to tectonic or lithostatic compression or a combination of the two.”

Its relevance was unexplained in the course of the hearing.

99. We agree with Dr Kirk when he states that none of the definitions of, or references to, slate in these three BS standards are suitable or should be preferred to *Merriman* when considering slate in the round.

100. Returning to *Merriman*, Figure 7, in Appendix 1 between the definition of mudstone and shale and the definition of slate, is a map of the United Kingdom and although it is not very detailed, it seems to us that the Macduff Formation is clearly identified as being one of what are described as “Principal Slate Belts” in the key.

101. Appendix 1 goes on to define slate at 1.3 as follows: -

Slate is the metamorphosed equivalent of mudstone and shale, i.e. the result of heat and pressure applied to these mud rocks. Slate is a hard, splintery mudrock composed of variable proportions of quartz, silt and clay minerals with grain sizes less than 32 µm (<0.032mm). The fundamental feature of slate is the cleavage, which results from well-crystallised platy clay minerals arranged along a single set of micron-spaced parallel plains. Slaty cleavage controls the splitting properties and thickness of slate tiles or flagstones. It is a characteristic of considerable economic importance. Unlike shale, slate can only be split with a hammer and chisel. All previous sedimentary structures, such as bedding or fissility, are replaced during the metamorphic processes that generate slaty cleavage fabric. Although ‘ghost’ sedimentary structures may be preserved (Figure 6) they play no part in the mechanical or engineering properties of slate.”

102. The Glossary of terms which is included at Appendix 5 defines both slate and slaty cleavage as follows: -

“**Slate.** A low-grade metamorphic mud rock with well-developed slaty cleavage, and composed of variable proportions of quartz silt and clay minerals with grain sizes less than 32 µm (<0.032mm).

Slaty cleavage. A fundamental feature of slate which results from well-crystallised platy clay minerals arranged along a single set of micron-space parallel plains. Slaty cleavage dominates all other fabric elements of the mud rock and can be exploited to cleave the rock into thin (<10 mm) parallel-sided slate tiles, or thicker slate flagstones.”

103. As can be seen, although the introduction to Appendix 1 refers to the 63 micron standard, thereafter throughout *Merriman* that is simply ignored. We have little doubt that that is useful for HMRC but there is no explanation as to why that should be the case.

104. The other major inconsistency in *Merriman* is to be found in Appendix 2 which deals with the uses of various rocks. At 2.2 in Appendix 2, referring to slate, it reads as follows:-

“The most familiar use of slate is as thin, but extremely durable, roofing tiles, but there is a continuing demand for architectural slate in other, more decorative, fields. These include dimension stone, wall cladding, paving, sills, fireplaces, tabletops and ornaments for the home and garden. For some of these uses the characteristic property of slaty cleavage is less important and cutting and polishing may be the desired method of shaping and finishing the stone.

Bodies of commercial slate generally have a restricted occurrence within more extensive masses of less perfectly cleaved rock, which accounts for the large tips commonly associated with the industry. The slate belts that are or have been of economic interest in the UK are shown in Figure 8 [there is no Figure 8 and it should have read 7]. However, rocks exhibiting a weak slaty cleavage that would be unsuitable for cleaving may be much more extensive but still be classified as ‘slate’.

The term slate has historically been applied to other forms of sedimentary rocks, mainly sandstone and limestone, which can be split to form roofing ‘slates’ or tile. However, these rely on the cleavage along the original bedding plane rather than metamorphism. They are generally thicker and heavier than true slates.”

105. That seems to make it clear that notwithstanding the definition of slate in the glossary as being something with “well-developed slaty cleavage”, slate may nevertheless have a weak slaty cleavage.

106. That fits with the Summary before the Introduction in *Merriman* which states:

“However, the terms slate and shale may be applied to rocks that lack plasticity and a sufficiently well developed slaty cleavage to make of them (sic) of commercial interest. These materials may be suitable for use for low-grade aggregate purposes”.

It is also consistent with 99-02.

Conclusion on *Merriman*

107. The first and most obvious point is that this was a report commissioned by HMRC. Whilst it is interesting, it has a number of inherent inconsistencies. We do not consider that it is a definitive guide to the meaning of the term slate for the purposes of aggregates levy.

108. Secondly, it is important to note that it reports that the use of the word “slate” in FA 2001 was based on its use as an economic mineral commodity. *Merriman* recognises that the use of slate for roofing tiles would undoubtedly require well-developed slaty cleavage. However, it also recognises that slate does not have to have well-developed slaty cleavage for, for example, household ornaments. The fact that slate with under-developed cleavage is still termed slate and is used amongst other things for aggregate reinforces our view that, based on *Merriman*, to exclude rocks with weak cleavage from the definition would not be appropriate.

109. Lastly, as we indicate above, whilst HMRC may consider the 32 micron measurement to be useful, it seems that the 65 micron standard is the more widely accepted.

Dr Barnes’ use of *Merriman*

110. It is absolutely clear that Dr Barnes decided to utilise *Merriman* as the benchmark for categorising slate simply because it was the standard utilised by HMRC. One of the major problems which arises in that regard is that Dr Barnes was quite frank in admitting that there were aspects of *Merriman* with which he disagreed, quite apart from the inherent inconsistencies in the document.

111. Although it was argued by HMRC that Dr Kirk had “cherry picked” *Merriman*, we find that indubitably Dr Barnes did so. As can be seen, notwithstanding the fact that there was conflict between the parties, he has always applied the 32 micron standard. We do not accept his argument that the 63 micron standard applied only when distinguishing between mudstone or silt stone.

112. Tellingly, in the December Report at sections 2.15 to 2.18, he makes it explicit that in deciding the micron limit to be applied, he had looked to *AGLI*. The extracts from *Merriman* in *AGLI* had excluded any discussion as to whether a 32 micron or a 63 micron limit should be applied giving the upper grain size limit of slate, for the purposes of aggregates levy, unequivocally as 32 microns. His conclusion was that if *AGLI* had been utilised, rather than *Merriman*, as the primary reference for assessing claims for aggregates levy, it was likely that the 32 micron standard had been uniformly employed. He relied on that as justification for his stance.

113. Essentially, he has simply relied on HMRC’s guidance. Furthermore in that regard he states at 2.15: “HMRC Notice AGL1 in its present form (updated 09 February 2017) states that: ‘BGS definitions of industrial minerals apply for the purposes of the Aggregates Levy’ but gives no specific definition of slate.” However, the only reference to slate in *AGLI* is at 3.2.1 and there is no definition of slate. Section 18 in unconnected with 3.2.1 and reads:

“18. Industrial minerals

See paragraph 4.2. British geological survey definitions apply.

The industrial minerals are :- ...”.

That is irrelevant and has nothing to do with slate.

114. In any event, we point out that *AGLI* is simply HMRC's guidance and as Lord Justice Lewison points out at paragraph four of *Leeds City Council v HMRC*⁴:

“HMRC provide the public with their own interpretation of points of difficulty; and information about the practice they adopt in various areas. These are variously contained in Notices, Business Briefs and the VAT Manual. They are not law: they are no more than HMRC's interpretation of the law. HMRC are not of course infallible...”.

115. Dr Barnes confirmed that he had rejected some parts of *Merriman*. In particular, he stated repeatedly that he did not accept that slate was a metamorphic equivalent of siltstone, albeit latterly he conceded that it was possible that on occasion it could have slaty cleavage.

116. He also confirmed that he had decided to entirely disregard the last two sentences of the Summary in *Merriman* (see paragraph 106 above). That was a crucial decision because it meant that, in layman's terms, he was only looking for high quality slate such as that used for roofing tiles and flagstones.

117. His reason for doing so was because the definitions in the Glossary supported the approach adopted by HMRC in applying a 32 micron approach. In his view only rock with a well-developed slaty cleavage could be defined as slate and anything else was a loose and colloquial use of the word “slate”. How that fits with the Introduction to *Merriman* (see paragraph 11 above) he did not explain.

118. Lastly, he confirmed that he had rejected most of 2.2 in *Merriman* and, in particular, the last sentence of the second paragraph (see paragraph 104 above). Again, if his approach is adopted, the definition of slate becomes very limited which is not consistent with 99-02 or *Merriman* itself.

119. Undoubtedly, the Glossary in *Merriman* is inconsistent with the narrative, but it is simply a brief description of terms used (which is what the word glossary means). It is, and must be, subsidiary to the narrative where there is repeated conflict.

120. In our view, although Dr Barnes is clearly a very competent, expert and thorough geologist, his position was fatally tainted by his initial decision to be consistent with HMRC's approach and rely on the excerpts from *Merriman* in *AGLI* and disregard anything that was not consistent with that narrow approach.

Discussion

121. We are somewhat bemused by HMRC's approach to this matter. Officer Stokoe issued the Decision which was extremely brief. He simply stated that Dr Barnes had not changed the opinions expressed in the August and December Reports. As we have made clear those Reports explicitly relied on *Merriman*.

122. During the Hearing there was considerable focus on cleavage and in particular on well-developed slaty cleavage and Dr Barnes went as far as to state that he would not use grain size other than to distinguish sandstone.

123. We put it to Dr Barnes that that had not been his original approach. Quite apart from his very detailed findings in relation to grain size in the August Report, in his December Report at paragraph 2.8 Dr Barnes criticised Dr Kirk for only referring to the introductory paragraph of Appendix 1 of *Merriman* and said that the full definition in *Merriman* identified three issues, namely: -

⁴ [2015] EWCA Civ 1293

- (a) The protolith of slate for the purpose of definition,
- (b) The upper grain size limit of slate as defined for the aggregates levy, and
- (c) The significance of cleavage in the definition of slate.

(In his evidence (see paragraph 71 above) Dr Kirk agreed with that, albeit he said chemical composition rather than protolith.) Dr Barnes could only reiterate his explanation that grain size was only relevant to distinguish sandstone.

124. Having now read the lengthy Review Decision, to which we were only referred in passing during the Hearing, on the balance of probability, we can understand why Dr Barnes appears to have changed his stance and placed almost complete reliance on cleavage.

125. In the Review Decision, at pages five and six, the Officer criticised the appellant's reliance on *Merriman* and quoted the first paragraph of Appendix 1 (see paragraph 84 above) stating that the appellant considered that to be a "complete definition of slate", namely grain size. The Officer argued that, by contrast, HMRC relied on the definition in *12326* (see paragraphs 97 and 98 above).

126. Curiously, the officer then went on to say that the BS report on which the Officer relied, had been considered by Dr Barnes in conjunction with *Merriman*. As can be seen at paragraph 26 above, that was not one of the BS considered by Dr Barnes.

127. The officer then went on to say that the BS stated at table 14 that:

"metamorphic rocks are generally classified according to fabric and mineralogy rather than grain size. Most metamorphic rocks are distinguished by foliation which may impart fissility."

There is no table 14 in any of the BS produced to us. We suspect that there may be a table 14 in the other BS referred to in the quotation in paragraph 26 above but that has not been produced to us and we do not know the context for the alleged table 14.

128. Lastly, in that context, the officer went on to argue that cleavage was the defining quality of slate and indeed that was the stance adopted by Dr Barnes in oral evidence.

129. As we indicate we do not know why HMRC changed their stance, but they did, and they did so again in the Skeleton Argument and the Hearing choosing to rely on *Merriman* and the alleged fundamental requirement for well-developed cleavage based on the Glossary.

130. As we indicate at paragraph 27 above, on the last day of the hearing Mr Simpson lodged 99-02 which had been cited in *Omagh*. Accordingly, we did not have the benefit of Dr Kirk's opinion on it although, given the general tenor of his evidence it seems very likely that he would endorse it. It reads as follows:

"201. The term **slate** has been used traditionally as a rock name for a compact, fine-grained, low-grade metamorphic rock with a slaty cleavage, that is, a strong fissility along planes that allow the rock to be parted into thin plates, indistinguishable from each other in terms of lithological characteristics. However, the name also has industrial connotations for a rock which is, or has been used for roofing, billiard tables, drawing boards, damp proof courses et cetera on account of its strong fissility. In this context, the facility may be of either tectonic or bedding depositional origin. The protolith of a "slate" is almost invariably fine-grained but can include mudstones, volcanoclastic rocks or even pyroclastic rocks. It may therefore be in igneous or sedimentary rock. On the basis of the range of lithologies that have been encompassed within the name slate, together with the practical connotations in the name, it is not a preferred route name. However, it is accepted that the name is entrenched in the literature and that it is useful as a general field name for fine-grained fissile rocks of undefined protolith, many of which can be hard to classify modally because of the fine grain size. Few qualifiers other than colour, for example *grey-green slate*, will be appropriate for the root name **slate** since the use of the name implies that little is known about the rock other than grain size and texture. If a protolith or modal root name can be used, it is preferable to indicate the presence of a slaty cleavage by textural qualifier *slaty*, for example *slaty meta-mudstone*, *slaty slate semi-pelite*, *slaty metatuffite*."

131. We did have Dr Barnes opinion and it suffices to say that he agreed only with the first sentence. We have disregarded his opinion since we do not accept that he was acting as an expert witness and in any event, we disagree with him.

132. We find that this is a useful definition. Firstly, it was published before FA01. Secondly, although the first sentence includes reference to slaty cleavage, it goes on to point to some industrial uses of slate and crucially for our purposes it states: “However, it is accepted that the name is entrenched in the literature and that it is useful as a general field name” and these points are entirely consistent with

- (a) the summary,
- (b) the wording in the introduction, and
- (c) section 2.2

in *Merriman*.

133. Furthermore, the penultimate sentence is very clear: “Few qualifiers other than colour, for example *grey-green slate*, will be appropriate for the root name **slate** since *the use of the name implies that little is known about the rock other than grain size and texture.*” We have highlighted in italics the key words.

134. What we derive from that definition is that there has to be fissility ie cleavage (and both Dr Barnes and Dr Kirk are agreed about that), that the cleavage does not have to be well developed and that grain size and texture are key. Slate with well-developed and thus slaty cleavage will be used for roof tiles and flagstones but less high quality slate will have industrial uses including use as aggregate.

135. Dr Barnes agreed with Mr Simpson that he had no reason to doubt the findings in the Logging report, albeit he would have adopted a different approach.

136. We accept that Dr Kirk’s 20 hours in the Quarry minutely observing and reporting on the rock is likely to be more accurate in relation to any finding as to the quantity of sandstone as opposed to Dr Barnes’ observation in the four hours that he spent in the Quarry.

137. We find that the summary of the detail in the manuscript logs is very helpful, since, in broad terms, it indicates that a significant majority of the rock in the Quarry is fine grained, shows some cleavage, however weak, and therefore has the properties of slate.

138. Looking at the totality of the evidence we find that the rock in the Quarry is mainly comprised of slate.

Decision

139. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

140. 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: 25 FEBRUARY 2020

Appendix 1

38. In our view four matters fall to be addressed in the use of expert evidence. They are (i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation. ...

39. Skilled witnesses, unlike other witnesses, can give evidence of their opinions to assist the court. This gives rise to threshold questions of the admissibility of expert evidence. ...

40. Experts can and often do give evidence of fact as well as opinion evidence. ... There are no special rules governing the admissibility of such factual evidence from a skilled witness.

41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. ...

42. ... But Lord Hughes, in delivering the advice of the Board at para 58, warned that "care must be taken that simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise." To avoid this, the skilled witness must set out his qualifications, by training and experience, to give expert evidence and also say from where he has obtained information, if it is not based on his own observations and experience.

...

44. ... As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

- (i) whether the proposed skilled evidence will assist the court in its task;
- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
- (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.

...

48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, ... As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

52. The Scottish courts have adopted the guidance of Cresswell J on an expert's duties in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 in both civil and criminal matters: see Lord Caplan in *Elf Caledonia Ltd v London Bridge Engineering Ltd* September 2, 1997 (unreported) at pp 225-227 and *Wilson v Her Majesty's Advocate* (above) at paras 59 and 60. We quote Cresswell J's summary (at pp 81-82) omitting only case citations:

“The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. ...”