NCN: [2021] UKFTT 230 (TC)

TC08179

***Landfill Tax** – Preliminary issue – Lower rate of tax – Mixed loads – Whether lower rate applicable to disposals of "hazardous mixed loads" – ss 42 & 63 FA 1996 – Landfill Tax (Qualifying Material) Order 2011 – HMRC Excise Notice LFT1*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeals numbers: TC/2018/7241 & TC/2019/1281

BETWEEN

AUGEAN NORTH LIMITED
AUGEAN SOUTH LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE PETER KEMPSTER

The hearing took place on 25 September 2020. With the consent of the parties, the form of the hearing was a video hearing conducted on the Tribunal video platform. A face to face hearing was not held because of social restrictions in response to the pandemic. The hearing was in public, and the attendance of several observers was facilitated by the Tribunal's administrative staff.

Mr Sam Grodzinski QC (instructed by Simmons & Simmons) for the Appellant

Mr James Puzey of counsel (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

INTRODUCTION

1. The Appellants operate a waste management business from UK sites involving the disposal of various different kinds of industrial and demolition waste materials, including ash from combustion processes, dredging spoils and radioactive waste. Their appeals before the Tribunal concern landfill tax assessments which, in aggregate, involve large monetary amounts; the outcome of the appeals may also affect other taxpayers in the waste management industry.

2. On 17 June 2020 ("**the June Decision**") Judge John Brooks directed that the two appeals be joined, and a preliminary issue in the appeal should be determined, formulated (at [40] of the June Decision) as follows ("**the Preliminary Issue**"):

> "This preliminary issue relates to the taxable disposals of mixed loads of materials which included a quantity of non-qualifying material (i.e. material not included in the Schedule to the Landfill Tax (Qualifying Material) Order 2011), the presence of which caused the load to be hazardous within the meaning of Waste Framework Directive 2008/98/EC ("Hazardous Mixed Loads").
>
> Prior to 16 December 2015, was it possible for disposals of Hazardous Mixed Loads to be taxed at the lower rate set out in s.42 Finance Act 1996? In particular, did the addition of the direction at paras 7.3 and 7.4 to LFT1 [ie HMRC Excise Notice LFT1: *A General Guide to Landfill Tax*], concerning the inclusion of small quantities of non-qualifying materials, change the law on Hazardous Mixed Loads, or did it only make explicit that which had previously been implicit in the legislation, including LFT1?"

3. The Preliminary Issue came before me in a video hearing conducted on 25 September 2020. Mr Sam Grodzinski QC appeared for the Appellants and Mr James Puzey for the Respondents ("**HMRC**"). I am grateful for the written and oral presentations of both counsel. As previously communicated to the parties, I apologise for the length of time it has taken to issue this decision notice.

4. In summary, which is sufficient for the purposes of the Preliminary Issue, the Appellants have for several years disposed of mixed loads - that is to say, loads which are a mix of qualifying and non-qualifying material – and have accounted for Landfill Tax thereon on the basis that the quantity of non-qualifying material in those loads was small, and so the whole mixed load attracted the lower rate of Landfill Tax.

THE STATUTORY BACKGROUND

5. I shall cite the relevant legislation as in force in the tax year 2014-15 (for relevance, see the June Decision at [31]) but highlight where there were any amendments material to the Preliminary Issue.

Primary Legislation

6. As stated by Judge Brooks in the June Decision (at [15]):

> "Landfill tax is charged by reference to the weight of waste disposed of at a landfill site at two rates, the standard rate and the lower rate. Since its introduction in 1996 these rates have changed but there has always been a difference between them, eg from 1 April 2017 to 31March 2018 the standard rate was £86.10 per tonne and the lower rate £2.70 per tonne."

7. Instead of monetary rates or amounts of tax I shall for simplicity refer to "the standard rate" and "the lower rate". Section 42 Finance Act 1996 ("**FA 96**") provides:

> "**42 Amount of tax**
>
> (1) The amount of tax charged on a taxable disposal shall be found by taking—
>
> (a) [the standard rate] for each whole tonne disposed of and a proportionately reduced sum for any additional part of a tonne, or
>
> (b) a proportionately reduced sum if less than a tonne is disposed of.
>
> (2) Where the material disposed of consists entirely of qualifying material this section applies as if the reference to [the standard rate] were to [the lower rate].
>
> (3) Qualifying material is material for the time being listed for the purposes of this section in an order.
>
> (4) The Treasury must—
>
> (a) set criteria to be considered in determining from time to time what material is to be listed,
>
> (b) keep those criteria under review, and
>
> (c) revise them whenever they consider they should be revised.
>
> (5) The Commissioners must publish the criteria (and any revised criteria) set by the Treasury.
>
> (6) In determining from time to time what material is to be listed, the Treasury must have regard to—
>
> (a) the criteria (or revised criteria) published under subsection (5), and
>
> (b) any other factors they consider relevant."

8. Section 63 FA 96 provides:

> "**63 Qualifying material: special provisions**
>
> (1) This section applies for the purposes of section 42 above.
>
> (2) The Commissioners may direct that where material is disposed of it must be treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material; and whether a quantity of non-qualifying material is small must be determined in accordance with the terms of the direction.
>
> (3) The Commissioners may at the request of a person direct that where there is a disposal in respect of which he is liable to pay tax the material disposed of must be treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material, and—
>
> (a) a direction may apply to all disposals in respect of which a person is liable to pay tax or to such of them as are identified in the direction;
>
> (b) whether a quantity of non-qualifying material is small must be determined in accordance with the terms of the direction.
>
> (4) If a direction under subsection (3) above applies to a disposal any direction under subsection (2) above shall not apply to it.

> (5) An order may provide that material must not be treated as qualifying material unless prescribed conditions are met.
>
> (6) A condition may relate to any matter the Treasury think fit (such as the production of a document which includes a statement of the nature of the material)."

Secondary Legislation

9. The order pursuant to s 42(3) FA 96 listing what material constitutes "qualifying material" is the Landfill Tax (Qualifying Material) Order 2011 SI 2011/1017 (as amended) ("**the QMO**").

10. The QMO states, so far as material:

> "*Qualifying Materials*
>
> 3 Subject to articles 4 to 6, the material listed in column 2 of the Schedule to this Order ("the Schedule") is qualifying material for the purpose of section 42 of the Finance Act 1996.
>
> 4 The Schedule shall be construed in accordance with the notes contained in it.
>
> 5 The material listed in column 2 of the Schedule must not be treated as qualifying material unless any condition set out alongside the description of the material in column 3 of the Schedule is met.
>
> 6 Where the owner of the material immediately prior to the disposal and the operator of the landfill site at which the disposal is made are not the same person, material must not be treated as qualifying material unless it meets the relevant condition."

11. The Schedule to the QMO is set out in Appendix 1 to the June Decision, and I do not need to quote it here.

Tertiary Legislation

12. The directions pursuant to s 63(2) FA 96 determining whether a mixed load "must be treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material; and whether a quantity of non-qualifying material is small" are (it is common ground between the parties) contained in HMRC Excise Notice LFT1: A General Guide to Landfill Tax ("**LFT1**"). It is common ground that such directions have legal effect as subordinate legislation, and I shall use the description "**tertiary legislation**".

13. It is relevant to the Preliminary Issue that LFT1 has undergone a number of editions since the introduction of Landfill Tax in 1996. The Appellants contend (and HMRC refute) that the December 2015 edition of LFT1 amended the tertiary legislation concerning mixed loads, with effect from 16 December 2015. In the evidence bundle for the hearing the earliest edition of LFT1 is dated September 2009; there was then "interim advice on lower rating" issued in July 2012; and further editions of LFT1 dated July 2013, March 2015 and (the contentious edition) December 2015. I understand from the parties that I need not look at any other editions of LFT1 in relation to determination of the Preliminary Issue. I describe the relevant parts of those documents in chronological order below.

14. Where an HMRC Notice contains tertiary legislation it is common practice for the Notice to make clear which part(s) of its contents take effect as law, in contrast to the rest being advice,

guidance, or expressing views held by HMRC. For example, the December 2015 edition of LFT1 states:

> "*Foreword*
>
> This notice cancels and replaces Notice LFT1 (March 2015).
>
> Paragraphs 6.4 to 6.11, 7.4 and 9.4 to 9.6 of this notice have the force of law."

The September 2009 edition of LFT1

15. The September 2009 edition of LFT1 does not explicitly state a commencement date. In the Foreword it is stated to replace the April 2009 edition of LFT1, but in paragraph 1.2 it is stated to replace the May 2004 edition of LFT1; I do not know which of those is correct but I assume it has no bearing on the Preliminary Issue.

16. This edition makes no reference (either at the outset or in the substance of the text) to any part of its text having "force of law".

17. The relevant parts are paragraph 3.3 and, according to Appellants, the last part of paragraph 3.2:

> "**3.2 Evidence for lower rate**
>
> …..
>
> Note: the only determining factor as to whether waste is lower rated is whether it is listed in the Landfill Tax (Qualifying Material) Order 2011. Whether or not waste is considered to be inert for environmental protection purposes is not relevant to matters of tax liability. Equally, the fact that waste is listed in the Landfill Tax (Qualifying Material) Order 2011 does not mean that the waste is inert for environmental protection purposes.
>
> **3.3 Mixed loads**
>
> Where a disposal to landfill contains both standard rated and lower rated materials, tax is due on the whole load at the standard rate. However, you may ignore the presence of an incidental amount of standard rated waste in a mainly lower rated load, and treat the whole load as taxable at the lower rate. For example, we would accept as qualifying for the lower rate:
>
> • a load of bricks, stone and concrete from the demolition of a building that has small pieces of wood in it and small quantities of plaster attached to bricks as it would have not been feasible for a contractor to separate them
>
> • a load of sub-soil that contains small quantities of grass
>
> • waste such as mineral dust packaged in polythene bags for disposal, and
>
> • a load of sub-soil and stone from street works containing tarmac (however, a load of tarmac containing soil and stone would not qualify).
>
> It is not possible for us to advise you on every disposal. It is your responsibility to decide whether a particular load disposed of at your site contains a reasonable incidental amount of standard rated waste - you need to satisfy yourself that the load contains only a small quantity of such waste. The difficulty in separating the standard rated components from the lower rated waste is a factor that you can take into account, but this cannot be used to justify applying the lower rate of tax if the standard rated waste is more than a small amount of the total load. You will need to justify your decisions to us."

The July 2012 "interim advice on lower rating"

18. This is not a new edition of LFT1 but is described as:

> "advice … drafted following recent consultation with parties representing the waste management industry and other stakeholders, it clarifies matters relating to the recent HM Revenue and Customs (HMRC) Briefs 15/12 and 18/12 relating to Landfill Tax.
>
> *Status of guidance*
>
> This advice does not replace the previous Briefs. It seeks to clarify matters relating to the acceptance of materials by landfill operators and deals with specific queries that have arisen since the Briefs were issued. This advice will be reviewed regularly and once finalised HMRC will consider the best means of consolidating the Briefs and this guidance. HMRC will also update the Landfill Tax Notice, LFT1."

19. It quotes paragraph 3.2 of LFT1 (including the last part, as above) and states "This interim guidance expands upon the text of Notice LFT1 to provide additional clarification." It then includes:

> "*Clarification on liability of loads or consignments*
>
> …
>
> As explained in section 3.3 of LFT1, a consignment of qualifying material can contain an incidental amount of non-qualifying material and still qualify for the lower rate.
>
> …
>
> *Further guidance*
>
> HMRC are working with the industry to provide further guidance on a number of issues, including:
>
> …
>
> - more objective evidential requirements, including those relating to 'incidental' amounts of non-qualifying material in a load that is essentially of qualifying material
>
> …
>
> HMRC will keep stakeholders updated on progress relating to the new guidance. HMRC will also undertake discussions with a range of stakeholders while developing the policy and hope to produce a draft before the end of the summer."

The July 2013 edition of LFT1

20. The July 2013 edition of LFT1 replaces the May 2012 edition; it does not explicitly state a commencement date. It makes no reference (either at the outset or in the substance of the text) to any part of its text having "force of law".

21. Paragraphs 3.2 and 3.3 contain the same text as the September 2009 edition – see [17] above.

The March 2015 edition of LFT1

22. The March 2015 edition of LFT1 replaces the July 2013 edition (above) and is stated to come into effect on 1 April 2015. The introduction asserts the tertiary legislation: "Paragraphs 4.4 to 4.11 of this notice have the force of law." Paragraphs 3.2 and 3.3 have the same wording as the July 2013 edition, except that paragraph 3.3 starts with a new sentence: "This paragraph does not apply to mixed loads of fines. Please see section 4 for guidance on qualifying fines." Paragraph 4.1 states, "For landfill tax purposes, fines are particles produced by a waste treatment process that involves an element of mechanical treatment." Section 4 starts: "4. *Lower rate: qualifying fines* Note: Paragraphs 4.4 to 4.11 of this section of this Notice have the force of law".

23. Thus the parts of the March 2015 edition of LFT1 expressed to have "force of law" are Paragraphs 4.4 to 4.11 (all relating to qualifying fines); paragraphs 3.2 and 3.3 are not so expressed.

The December 2015 edition of LFT1

24. The December 2015 edition of LFT1 replaces the March 2015 edition (above); there is no explicitly stated commencement date but it was issued on 16 December 2015. The Foreword contains the text quoted at [14] above. Paragraph 7 states:

> "7. **Lower rate: mixed loads**
>
> 7.1 *Mix of standard and lower rated materials*
>
> The basic Landfill Tax liability is that where a disposal to landfill contains both standard rated and lower rated materials, tax is due on the whole load at the standard rate. However, see paragraphs 7.2 and 7.3 for the tax liability of mixed loads in certain circumstances.
>
> 7.2 *Mix of wholly qualifying materials*
>
> As long as the conditions in the 2011 Order and the evidential requirements set out in section 5 are met, where a landfill disposal consists of a number of different qualifying materials, the lower rate applies. This is the case even if the materials are in different Groups within the 2011 Order. For example, this means that:
>
> - for materials which are commonly referred to as 'trommel fines' or 'fines', the lower rate will apply where the fines that come out of the trommel/automated process constitute those materials or a mix of those materials included within the 2011 Order. By a mix of materials we mean a mix of qualifying materials from different Groups within the 2011 Order
> - for construction soils and soils from demolition of buildings or structures, the lower tax rate will apply where all the materials in the load being landfilled are included within the 2011 Order
>
> 7.3 *Mix of mainly qualifying material(s) with a small amount of standard rated material*
>
> Under section 63(2) of the Finance Act 1996, we can direct that where a disposal to landfill consists mainly of qualifying material(s), but includes a small amount of standard rated material, the whole load is taxable at the lower rate. This paragraph is a direction under that law.
>
> Whether an amount of standard rated waste is small will depend on the circumstances and is a matter of fact and degree. As a guide, the dictionary

definition of small is either small in size or weight; or insignificant or unimportant. Factors to consider therefore include (but are not restricted to) the:

- weight and volume of the standard rated material in relation to the qualifying material(s)
- potential for pollution/ to cause harm

It is not possible for us to advise on every scenario or disposal. It is your responsibility to determine whether the amount of non-qualifying material meets the terms of the direction so as to qualify it as small. You must apply the following considerations:

i) In order for an amount of standard rated material in a load to be regarded as small it must be incidental. This means that it must not have been deliberately or artificially blended or added to the qualifying material(s) after or in connection with removal from its originating site. Adding or blending materials, so increasing the amount going to landfill, is inconsistent with Defra's waste hierarchy and the duty of care on waste producers.

ii) The difficulty in separating the standard rated materials from the lower rated waste is a factor that you can take into account, but this cannot alone be used to justify applying the lower rate of tax (for example, if the standard rated waste is more than a small amount of the total load). Reasonable steps should have been taken to segregate or separate the standard rated material from the load.

iii) If the amount of non-qualifying material in a load of mainly qualifying material is such as to classify the load as hazardous, the amount of the non-qualifying material can never be regarded as small and the total load is taxable at the standard rate. You should always consult relevant guidance from your environmental regulator when assessing hazardous properties of waste.

iv) If a mixed load is classified as non-hazardous, this does not automatically mean that it can be treated as lower rated. The standard rated element of the load must still be small and incidental in relation to the qualifying material in order to qualify for the lower rate.

You must hold evidence to substantiate applying the lower rate. You will need to justify your decisions to us. See section 5 for further information on the evidence requirements.

Note: The waste transfer note must include an accurate description of the non-qualifying element together with an indication that it was 'small' where appropriate.

Paragraph 7.3 is a direction under this section and has force of law. Whether a quantity of nonqualifying material is small must be determined in accordance with the terms of this direction.

7.4 *Flowchart to determine landfill tax liability for a mixed load*

Please see flowchart to determine Landfill Tax liability for a mixed load

*You should always consult the relevant guidance from your environmental regulator when assessing hazardous properties of waste.

**See section 5 for guidance on evidence for lower rating.

> The above assessment process does not replace or change any waste assessment process required by environmental legislation."

25. I note that the identification within the Notice of its content which constitutes tertiary legislation is contradictory. The Foreword to the Notice (quoted at [14] above) states that paragraph 7.4 (inter alia) is tertiary legislation, whereas it is paragraph 7.3 which is actually intended to be the tertiary legislation (see the penultimate sentence of paragraph 7.3). I have assumed for the purposes of determination of the Preliminary Issue that paragraph 7.3 is tertiary legislation.

The Consultation Exercises

26. It is now necessary to look at three consultation exercises conducted by HMRC concerning the wording of the guidance on Landfill Tax given by HMRC, including in LFT1. The first took place in September 2013, the second in July 2015, and the third in September 2015.

The September 2013 consultation

27. The September 2013 exercise set out draft guidance on four issues, one of which was "mixed loads"; it stated "This guidance is currently in draft to allow time for industry feedback on its contents prior to implementation. HMRC is conducting informal consultation with key industry stakeholders and welcomes any comments by 20 October 2013." Paragraph 4.3 of the draft guidance stated:

> "**4.3 Mix of mainly qualifying material(s) with a small amount of standard rated material**
>
> Under section 63(2) of the Finance Act 1996, HM Revenue and Customs can direct that where a disposal to landfill consists mainly of qualifying material(s), but includes a small amount of standard rated material, the whole load is taxable at the lower rate. Paragraph 4.3 and Figure 1 of this guidance is a direction under that law.
>
> Whether an amount of standard rated waste is small will depend on the circumstances and is a matter of fact and degree. As a guide, the dictionary definition of small is either small in size or weight; or insignificant or unimportant. Factors to consider therefore include (but are not restricted to) the:
>
> - weight and volume of the standard rated material in relation to the qualifying material(s);
> - potential for pollution/ to cause harm.
>
> It is not possible for HMRC to advise on every scenario or disposal. It is the responsibility of the landfill operator to decide whether a particular disposal at its site contains only a small quantity of standard rated waste, but it must apply the guidance set out below.
>
> i. In order for an amount of standard rated material in a load to be regarded as small it must be incidental. This means that it must not have been deliberately or artificially blended or added to the qualifying material(s) after or in connection with removal from its originating site. Adding or blending materials, so increasing the amount going to landfill, is inconsistent with Defra's waste hierarchy and the duty of care on waste producers.
>
> ii. The difficulty in separating the standard rated materials from the lower rated waste is a factor that you can take into account, but this

cannot alone be used to justify applying the lower rate of tax. Reasonable steps should have been taken to segregate or separate the standard rated material from the load.

iii. The standard rated materials in a load of mainly qualifying material must not be of an amount to classify the load as hazardous. You should always consult relevant guidance from your environmental regulator when assessing hazardous properties of waste.

iv. If a mixed load is classified as non-hazardous, this does not automatically mean that it can be treated as lower rated. The standard rated element of the load must still be small and incidental in relation to the qualifying material in order to qualify for the lower rate.

You must hold evidence to substantiate applying the lower rate. Please see section 3 for further guidance on the evidence requirements."

28. That draft guidance in paragraph 4.3 is almost identical to what later was included in paragraph 7 of the December 2015 edition of LFT1.

29. The Environmental Services Association (the trade body representing the UK's resource and waste management industry) made a comprehensive submission in response, which included the following:

"23. **Item (iii): (Hazardous Waste)** ESA notes that apparent clarification that any load that is classified as hazardous will attract standard rate landfill tax. However, further consideration is required on this point, to ensure that the possible consequences of this statement are fully understood. ESA would welcome clarification that the draft guidance equating hazardous status to the standard rate of tax aligns with the purpose of the tax, does not conflict with the law and therefore has sufficient legal justification in all circumstances to ensure it is able to be properly enforced.

24. As far as we are aware a distinction between hazardous and non-hazardous material, in terms of landfill tax rates, has not previously been made in the Landfill Tax legislation and in this respect the draft guidance is setting a precedent. Of particular note is the implication for the management of soil contaminated with asbestos, for which there is no real option but to dispose of at landfill. ESA is aware that currently there may be some variance in the application of landfill tax rates to soils contaminated with low levels of asbestos, but which are sufficient to render the waste stream 'hazardous'. However the clear statement in this guidance that hazardous material will always be charged at the standard rate may well drive some adverse outcomes which both HMRC and the Environment Agency need to explore further."

30. The Appellants also made a response which included the following:

"**Mixed loads of standard rate and lower rate tax materials.**

HMRC has long understood that lower rate materials may be mixed with standard rate materials and has accepted that small amounts of standard rate materials included in the lower rate material will not change the lower rate status of the waste as a whole. In the draft guidance (Section 4.3) the HMRC states that if the small amount of standard rate material results in the waste as a whole being classified as hazardous then the waste will be standard rate tax.

A distinction between hazardous and non-hazardous material is not made in the Landfill Tax legislation. Indeed current guidance paragraph 3.2 of LFT1 specifically does not determine tax status based on environmental classification or protection purposes. In terms of the tax there has always been parity between non-hazardous and hazardous materials and in this respect the

draft guidance is setting a precedent: one which is likely to have a number of unintended and adverse consequences.

A tax differential between hazardous and non-hazardous classification will drive adverse behaviour particularly in the soils market which is highly competitive and where regulation of activities is already extremely difficult. At a tax differential of £69.50/t there will be an enormous incentive to "lose" hazardous soils by mixing with non-hazardous soils resulting ultimately in the dispersion into the environment of hazardous substances. Increased fly tipping may also occur.

Asbestos contaminated soils

The tax should drive waste streams to the Best Overall Environmental Outcome. The Best Overall Environmental Outcome for many hazardous waste streams is landfill where pollutants are fully contained. Most notably landfill is the best option for the management of asbestos. There are large quantities of soils from brownfield land which contain asbestos. With only a very small amount of asbestos (0.1%) a soil is classified as hazardous. There is no alternative to landfilling for this waste and the additional cost of standard rate tax will have a significant economic effect on property development on brownfield land. Taking into account also that the asbestos component in such soils is non-polluting and nonbiodegradable, hence does not generate landfill gas, it is considered that even if the proposal in respect of mixed loads is retained special consideration should be given to asbestos contaminated soils.

Hazardous qualifying materials

Several qualifying materials were identified in previous and current Qualifying Material Orders as lower rate tax, principally (as we understand) for economic reasons, to ensure that certain industries were not unduly burdened by the tax. Due to inherent contamination in raw materials or from industrial processing, some of the materials identified as qualifying for lower rate tax can be hazardous; bottom ash or some materials qualifying under Group 6 for example. There is a concern that although the materials have not changed since the original economic arguments were made to justify qualifying status, by virtue of the proposals of the current draft guidance on lower rating, where these materials are classified as hazardous, they could be subject to the standard rate of tax. This will result in a significant economic burden on industries that generate these materials with no environmental benefit. The guidance needs to maintain the lower rate status of qualifying materials that are inherently hazardous or contain hazardous substances as an inherent consequence of necessary industrial processes."

The July 2015 consultation

31. The July 2015 exercise set out draft guidance on three issues, one of which was "mixed loads"; it stated:

> "At the May LOI [loss on ignition working group] meeting it was agreed that the working group would be used as a platform for finalising the wider lower rate guidance, in relation to hazardous waste and mixed loads. We are seeking your views both on the content of the guidance, and how you think it may be received when made available to the wider audience. The guidance is scheduled to be published in the Autumn. We would appreciate it if the draft guidance could stay within the group.
>
> The main revisions include:

> • detailed guidance on the liability of mixed loads - which includes section 7.3 having the force of law. This section clarifies HMRC's position on the liability of hazardous waste
>
> …
>
> These revisions clarify existing HMRC policy."

32. The Environmental Services Association made a comprehensive submission in response; in paragraph 3 it set out its general concerns, including:

> "• The consequences (including unintended consequences) are not fully understood;
>
> • The draft guidance on lower rating for mixed loads is more than a clarification of the existing legal and policy position and the proposed changes could have wide implications which may also be in conflict with the existing legislation;
>
> • It is our view that some of the changes cannot be made without further amendments or additions to existing legislation;"

33. In relation to mixed loads the Environmental Services Association states:

> "**7.3 Mix of mainly qualifying material(s) with a small amount of standard rated material**
>
> 16. Section 7.3 of the draft LFT1 is new text which it is presumed is intended to replace section 3.3 in the current LFT1.
>
> 17. ESA is concerned to understand the status of this draft guidance and how it is proposed it will apply to operators once published. In your covering email enclosing the draft guidance (10th July 2015) you highlight the 'main revisions' in the draft guidance including section 7.3 but go on to state that 'these revisions clarify existing HMRC policy.' ESA considers that Section 7.3 represents a significant change in stance by HMRC to the treatment of mixed loads for the purposes of section 63(2) of the Finance Act 1996. It is noted that HMRC has explicitly referred to this draft guidance as a direction under section 63(2). ESA considers it is clear that this draft guidance represents proposed new policy to replace the current policy in existing LFT1. We consider there is all the more reason for these proposed changes in policy to be fully and formally consulted upon.
>
> …
>
> 19. ESA notes the guidance in section 7.3 that any load that is classified as hazardous will attract standard rate landfill tax. Whilst we understand that this distinction will provide a level of clarity for industry and encourage consistent interpretation, we remain of the view that this is a significant change and that proper consideration has not been given to the effect of this proposal. Further, we do not consider it is possible to introduce the hazardous waste exclusion from lower rating under paragraph 7.3 (iii) by means of a direction under section 63(2). Section 63(2) is a permissive power to allow HMRC to permit a small quantity of non-qualifying material (i.e. either hazardous or non-hazardous waste) to be present in a qualifying material load and for the whole load to be treated as qualifying material. In order to exclude hazardous waste from being capable of being subject to lower rate tax, as (iii) seeks to do, a change to the legislation is required. This is how the matter has been dealt with for waste fines which can only legally constitute 'qualifying fines' if they are not hazardous waste (paragraph 3(2)(b) of the Landfill Tax (Qualifying Fines)

Order 2015). It would be inconsistent and confusing for HMRC to attempt to adopt a different approach for all other waste streams.

20. It is not clear if the statement "hazardous waste can never be lower rated" is meant to apply to all wastes e.g. qualifying materials or only to mixed loads.

21. As far as we are aware a specific distinction between hazardous and non-hazardous material, in terms of landfill tax rates, has not previously been made in the Landfill Tax legislation and guidance, apart from the recent regulations relating specifically to waste 'fines' and in this respect the draft guidance could have significant implications. The section of the Finance Act 1996 which deals with Landfill Tax refers only to qualifying and non-qualifying material, the former being subject to lower rate tax and the latter, subject to standard rate tax. The Act does not make a distinction between hazardous and non-hazardous wastes in landfill tax terms."

The September 2015 consultation

34. The September 2015 exercise set out proposed revisions to LFT1 on three issues, one of which was "mixed loads"; it stated:

"HMRC is currently running a 3 week informal consultation on its Excise Notice LFT1: a general guide to Landfill Tax.

You have been contacted as you are a registered operator for landfill tax.

The main revisions include:

• Detailed guidance on the liability of mixed loads – which includes section 7.3 having the force of law. This section clarifies HMRC's position on the liability of hazardous waste.

…

The consultation only concerns the revisions as highlighted above and we would welcome your comments on whether the guidance is clear and unambiguous on these points.

…

In the meantime, the existing guidance remains extant."

35. The Appellants made a response to that consultation:

"Whilst the proposed guidance on mixed loads provides improved clarity, it is a significant change from the extant LFT1. We recognise that, while on face value it is understandable that the Government might wish to tax differentially hazardous and non-hazardous waste, the purpose and consequence of this distinction must be questioned.

…..

We note that HMRC indicates in the covering e-mail to the Excise Notice that the guidance on the liability on mixed loads is a clarification of HMRC's position. However, in Section 1.2 of the Notice, the amendments to the guidance are identified as changes. There is no doubt in our mind that our customers will see the proposal, that mixed loads classified as hazardous will always be standard rated, as a clear policy change. It is a matter of fact that this proposal is not within the extant LFT1 or any other policy or legislative instrument produced by the Government. It would be helpful if the guidance is explicit about this change in policy and from when it will take effect because, as a company collecting this tax on behalf of HMRC, we would want

to avoid contentious debates with our customers over the interpretation of the rules, as and when they apply."

THE TREASURY CRITERIA

36. Finally in these relevant background materials, there are certain criteria published by HM Treasury. I start with the FA 96 provisions already cited above. In relation to the rate of landfill tax, s 42 provides:

> "(4) The Treasury must—
>
> (a) set criteria to be considered in determining from time to time what material is to be listed [ie in the QMO as qualifying material – see s 42(3)],
>
> (b) keep those criteria under review, and
>
> (c) revise them whenever they consider they should be revised.
>
> (5) The Commissioners [ie HMRC] must publish the criteria (and any revised criteria) set by the Treasury.
>
> (6) In determining from time to time what material is to be listed, the Treasury must have regard to—
>
> (a) the criteria (or revised criteria) published under subsection (5), and
>
> (b) any other factors they consider relevant."

37. Section 42(4 – 6) were introduced by Finance (No 3) Act 2010 with effect in relation to disposals made, or treated as made, on or after 1 April 2011.

38. In relation to qualifying material s 63 provides (and has always provided):

> "(5) An order [ie the QMO] may provide that material must not be treated as qualifying material unless prescribed conditions are met.
>
> (6) A condition may relate to any matter the Treasury think fit (such as the production of a document which includes a statement of the nature of the material)."

39. I was referred to the Treasury criteria published by HMRC in paragraph 19.2 of the March 2015 edition of LFT1:

> "**Lower rating criteria**
>
> In drawing up wastes to be listed in its lower rate Order, the Treasury will have regard to the criteria set out below. These are the principles that guide the Treasury's considerations - a waste will be lower rated for Landfill Tax from 1 April 2011 only if it is listed as a qualifying material in the Landfill Tax (Qualifying Material) Order 2011, as amended.
>
> *Non-hazardous*
>
> Wastes which are not 'hazardous' within the meaning of the revised Waste Framework Directive (2008/98/EC).
>
> *Low potential for greenhouse gas emissions*
>
> Wastes which are not biodegradable, have a low organic content or do not break down under the anaerobic conditions that prevail in landfill sites to produce methane. These include inert waste within meaning given under the Landfill Directive; and waste with little or no organic content such as inorganic residues or completely combusted residues from the incineration of biodegradable/organic wastes.

Low polluting potential in the landfill environment

• waste where the contaminants are unlikely to become mobile in the landfill and any leachate produced has little or no pollution potential

• where the pollution potential of the waste is reduced if deposited alone in mono-fill landfill sites or within separate cells (not mixed with other wastes) within a landfill site

• the engineering requirements for the landfill are lower that would be the case for a non-hazardous landfill (as laid out in the Landfill Directive) by virtue of a risk assessment agreed with the regulator.

• the aftercare period and requirements are significantly lower than would normally be required for a non-hazardous waste landfill, based on a risk assessment agreed with the regulator."

SUBMISSIONS

40. I summarise below the points made by Mr Grodzinski in support of the Appellants' case, and those made by Mr Puzey for HMRC.

41. For the Appellants, Mr Grodzinski submitted:

(1) There is nothing in the pre 2015 editions of LFT1 to differentiate between small amounts of standard rated waste which were hazardous (or which made the whole load hazardous) and those which were not.

(2) The pre 2015 editions of LFT1 expressly emphasised that environmental classification did *not* determine tax liability.

(3) There is nothing in the primary legislation or the secondary legislation which states or implies that waste which is hazardous for environmental purposes must be taxed at the standard rate.

(4) There are various categories of lower rated material listed in the QMO which are themselves hazardous, such as ash. Also, the examples given in the pre December 2015 editions of LFT1 of mixed loads which could be qualifying, despite containing a small amount of standard rated material, included "a load of sub-soil and stone from street works containing tarmac". Where tarmac contained coal tar (as it often did) and the overall concentration of the coal tar was > 0.1%, then the mixed load would be hazardous, within the meaning of Waste Framework Directive 2008/98/EC. Thus, HMRC's own example of a mixed load that was taxable at the lower rate, included a mixed load that would commonly have been hazardous.

(5) EU environmental legislation does not generally have any relevance to the interpretation of FA 96.

(6) The Treasury criteria, which included reference to whether materials were hazardous within the meaning of Council Directive 91/689/EC and the Waste Framework Directive 2008/98/EC, did not lead to a different result, for the following reasons:

(a) These were simply criteria to which the Treasury were required by s.42(6) FA 96 to "have regard", along with "any other factors they consider to be relevant", when determining what materials to include in the QMO, in the exercise of their discretion.

(b) These criteria accordingly did not and could not establish any absolute prohibition on hazardous materials qualifying for the lower rate. Indeed, if that had

been the position, the inclusion of hazardous materials in the Schedule to the QMO would have been unlawful. Instead, the Treasury, exercising their discretion and after having regard to a range of permissible factors, lawfully decided to include some hazardous material in the QMO.

(c) Further and in any event, while these criteria were relevant to the Treasury's functions under s.42, they were not matters which were required by the legislation to be taken into account by HMRC, when exercising their separate powers to give a "small quantity" direction under s.63.

(7) If, as HMRC contend, it was already implicit in the legislation that hazardous material (or mixtures of material) could never be lower rated, then there would have been no need for Article 3(2)(b) of the Landfill Tax (Qualifying Fines) (No.2) Order 2015, made pursuant to s.42(3A) FA 96. This Article provided that in order to qualify for the lower rate, a mixture of fines (which are particles produced by a waste treatment process that involves an element of mechanical treatment, such as trommelling, screening or soil washing) consisting of qualifying material and non-qualifying material "must (a) contain no more than an incidental amount of non-qualifying material; and (b) not be hazardous waste". On HMRC's case, the words in (b) would have been entirely unnecessary.

42. For HMRC, Mr Puzey submitted:

(1) In the directions in LFT1 the phrase "the presence of an incidental amount of standard rated waste in a mainly lower rated load" could not properly be construed as permitting loads to qualify for the lower rate where the non-qualifying material was such as to render the load hazardous. The nature of the material as well as the quantity, is relevant to the question of whether something is incidental or not. This is particularly so given that "non-hazardous" was one of the three criteria for qualifying material set by the Treasury and included in LFT1.

(2) Although there are some hazardous wastes listed in the QMO and some inert wastes that are not, this says nothing about whether other hazardous wastes are to be assessed solely by weight or volume when considering a mixed load. For example, 10kg of asbestos in a tonne of builders' rubble is a small proportion in absolute terms but could not fairly be described as insignificant or incidental. The Appellants fail to distinguish between the fact that a few materials may be included in the QMO as qualifying materials despite potentially having hazardous properties, and an assessment of whether another completely different hazardous substance is small in quantity or incidental for the purposes of the direction on mixed loads in LFT1. The statement in LFT1 that "environmental classification does not determine LFT liability" simply illustrates the point that the sole factor for determination of the lower rate of LFT is whether the material in question falls within the QMO.

(3) Section 63(2) FA 96 confers a broad power upon HMRC to direct that in certain circumstances mixed loads must be treated as qualifying material. The only restriction on this power is that the amount of non-qualifying material must be "small". The primary legislation therefore empowers HMRC to set out the criteria for what amounts to a "small" amount of non-qualifying material (which HMRC have done in the various iterations of the LFT1 guidance). If a mixed load is contaminated to the extent that it falls to be classified as hazardous, then the non-qualifying material is not the subordinate element in the load and cannot be regarded as 'small' in the context of that load. Furthermore, the existence of the criteria for qualifying material set by the Treasury pursuant to s. 42(4) FA 1996 should not be overlooked; one of those is whether the material is non-hazardous.

(4) In a few, clearly defined and very specific instances the Schedule to the QMO includes potentially hazardous materials. This says nothing about whether thousands of other wholly different hazardous substances which might be included in a mixed load are to be assessed solely by reference to their absolute quantity or their proportion within the whole load.

(5) The examples quoted in LFT1 are of loads which, depending on their precise composition may or may not have been hazardous; this illustrates that judgment is called for on a case by case basis as to whether the nature of the non-qualifying material is incidental to the whole or not. There was no acceptance by HMRC that waste within a mixed load at a level which rendered it liable to be classified as hazardous would attract the lower rate. The EU law definition of "hazardous waste" *is* relevant. The term is defined within Community Law (the Waste Framework Directive 2008/98/EC and Council Decision 2000/532/EC) and is referenced in the Treasury's published criteria. The words "hazardous waste" and "non-hazardous waste" feature within the Schedule to the QMO and throughout the draft guidance proposed by the Respondents in 2013 and the Industry responses. It cannot be correct that the concept of hazardous waste has no place in the discussion of how LFT1 is to be interpreted.

(6) "Non-hazardous" features as one of the three Treasury criteria. There are only three criteria referable to "qualifying material" and one of those is that the material is non-hazardous.

(7) There are substances in the QMO which are potentially hazardous and they are carefully defined by the Notes to the QMO. Nevertheless, there are thousands of other different but hazardous substances which may be included in a mixed load and their status as hazardous is highly relevant to whether they come within the terms of the direction in LFT1. The fact that a mixed load is classified as hazardous is highly relevant to the question of whether the non-qualifying material is incidental or subordinate to the other components of a mixed load. The Treasury criteria are clearly directed towards limiting the potential for harm to the environment or health from landfill deposits. That is entirely consistent with the clear statutory objectives underpinning the legislation and LFT1.

(8) The fact that different legislation has been drafted at a later date (the Landfill Tax (Qualifying Fines) (No.2) Order 2015) so as to ensure that the present point could not be raised in that context does not assist with the construction of LFT1 as originally drafted in 2009 and reissued in 2013 in relation to the mixed loads in this case. HMRC explained in the draft guidance in September 2013 their approach to the application of the law which is entirely consistent with the edition of LFT1 issued in December 2015. The waste industry body, ESA, resisted that approach but did not suggest that the fact that material was hazardous should not be taken into account in determining whether it was small in quantity or incidental within a mixed load.

CONSIDERATION

43. The Preliminary Issue for determination is as stated at [2] above.

44. The dispute between the parties was succinctly summarised by Mr Puzey in his skeleton argument (at paragraph 8) as follows:

> "These loads comprise material that would otherwise be qualifying, because it is of a type listed in the Schedule to the QMO, but for a proportion of the load which is non-qualifying. The non-qualifying substance is either inherently hazardous or is present in sufficient quantities for the load as a

> whole to be classified as hazardous pursuant to the provisions of the European Waste Catalogue. The Appellants claim that these loads were correctly accounted for under the lower rate of LFT because the quantity of non-qualifying material is small and thus they come within the terms of the direction on mixed loads provided in Public Notice LFT1. The Respondents have determined that since these loads are properly classified as hazardous waste they cannot come within the terms of the direction provided in LFT1, whether that be before or after the revisions to that Notice in December 2015."

45. For clarity, without extending the terms of the Preliminary Issue, I understand that:

(1) It is common ground that loads classified as hazardous which were deposited on or after 16 December 2015 cannot come within the mixed loads eligibility for the lower rate, because of paragraph 7.3 of the December 2015 edition of LFT1.

(2) There are further areas of dispute between the parties relevant to the appeal – such as whether the amounts of non-qualifying material within the loads were "small" – which may require separate adjudication by the Tribunal.

46. Rather than address each of the parties' particular submissions in turn, I cover below several themes my conclusions on which I consider must result in the Preliminary Issue being determined in the favour of the Appellants.

What does the legislation say?

47. I consider that I should apply the relevant legislation using the normal rules of statutory construction. That should be done whether the legislation has been enacted – at the discretion of Parliament – as primary legislation (here, FA 96), secondary legislation (here, the QMO), or tertiary legislation (here, directions pursuant to s 63(2) FA 96, which HMRC have chosen to make through statements in LFT1).

48. I consider that the normal rules are applicable because the legislation concerning landfill tax is one constituent part of the UK tax code, which neither requires nor deserves any special or distinct interpretive treatment. That view is reinforced by the comments of Lady Rose in the recent combined case of *Devon Waste Management Ltd and others v RCC, & Biffa Waste Services Ltd v RCC* [2021] STC 990[1]:

> "[68] … [Counsel for HMRC] referred to two kinds of policy that might be relevant here, the environmental policy pursued by the imposition of the landfill tax and the policy of the legislation in the sense of Parliament's purpose in enacting the particular wording of these provisions. As to environmental policy there are, as the FTT said, limits to the assistance that can be derived from that in this particular case. In some of the earlier cases I have described, the underlying policy of discouraging disposal into landfill was helpful in determining the scope of the tax, … However, such broad-brush policy goals are not usually helpful in determining where more precisely the line was intended to be drawn by Parliament between what is a taxable disposal and what is not.
>
> [69] As regards the policy behind the legislation, it is part and parcel of the ordinary canons of statutory construction for the court to have regard to the need to interpret legislative provisions so as to give effect to Parliament's purpose. That involves looking at the provisions in the context of the statute

[1] The Court of Appeal decision was issued after the hearing of the Preliminary Issue; it upholds the decision of this Tribunal in that case, to which I was referred; I determined that it was not necessary for me to invite further representations from the parties on the single point which I have quoted in this decision notice.

> as a whole. That much should be uncontroversial: see Lord Bingham of *Cornhill in R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687 at [8], cited recently in the context of a taxing statute in *News Corp UK & Ireland Ltd v Revenue and Customs Comrs* [2021] EWCA Civ 91, [2021] STC 273 at [55]. … [The FTT] had found policy arguments of little assistance; it is up to every tribunal and court to form its own view about what canons of construction it finds useful to deploy in arriving at Parliament's intention."

49. I find that there is nothing *explicit* in FA 96, or the QMO, or the pre December 2015 editions of LFT1 stating that Parliament's intention was that loads properly classified as hazardous waste cannot come within the pre December 2015 tertiary legislation (ie the terms of the direction provided in the pre December 2015 editions of LFT1).

Does the word "incidental" assist HMRC?

50. HMRC point to the wording in the pre-December 2015 editions of LFT1 (emphasis added): "… you may ignore the presence of an *incidental* amount of standard rated waste in a mainly lower rated load, and treat the whole load as taxable at the lower rate." They argue that the quality (and, in particular, whether it has the quality of hazardous properties), as well as the quantity, of the standard rated waste is relevant to deciding whether it is "incidental".

51. However, I have concluded that several matters go against HMRC's contention. First, the ordinary and natural meaning of the words is simply that the standard rated material should be an incident of the lower rated load, rather than arising from some other factor. That is well explained in the December 2015 edition of LFT1 (at paragraph 7.3(i), emphasis added): "*This means that* it must not have been deliberately or artificially blended or added to the qualifying material(s) after or in connection with removal from its originating site." Secondly, the examples given in the pre December 2015 editions of LFT1 (in the bullet points in paragraph 3.3) of incidental amounts that are acceptable to HMRC include items which have (in the context of landfill material) hazardous properties: wood, grass and tarmac. Thirdly, paragraph 3.2 of the pre December 2015 editions of LFT1 contradicts HMRC's contention: "the only determining factor as to whether waste is lower rated is whether it is listed in the Landfill Tax (Qualifying Material) Order 2011. Whether or not waste is considered to be inert for environmental protection purposes is not relevant to matters of tax liability. Equally, the fact that waste is listed in the Landfill Tax (Qualifying Material) Order 2011 does not mean that the waste is inert for environmental protection purposes."

52. Accordingly, I conclude that the use of the word "incidental" in LFT1 does not support an interpretation which expands the tertiary legislation (pre-December 2015) to incorporate consideration of the possible hazardous properties of the standard rated waste.

Do the Treasury criteria assist HMRC?

53. HMRC contend that the tertiary legislation must be read in the context of the Treasury criteria (see [36 - 39] above) to be given a purposive interpretation. I do not agree with that point. The limited role of the Treasury criteria is set out in s 42: "The Treasury must … set criteria to be considered in determining from time to time what material is to be listed [ie in the QMO as qualifying material] … In determining from time to time what material is to be listed, the Treasury must have regard to (a) the criteria (or revised criteria) published under subsection (5), and (b) any other factors they consider relevant." It is a constraint on what materials can be listed as qualifying materials in the QMO, but still a permissive one; having "considered" and "had regard" to its own criteria, the Treasury could still list a hazardous material as

qualifying material in the QMO; the Treasury could then be held to account (eg through administrative law action) to explain and justify that listing. In fact, that appears to be what has occurred with several examples to which I was directed in the QMO – for example, Group 5 in the Appendix to the QMO stipulates certain specified forms of ash (a hazardous material in the context of landfill material) as being qualifying material, per Notes 7 & 8:

> "(7) Subject to Note (8), Group 5 comprises—
>
> (a) bottom ash and fly ash produced only from the combustion of wood, of waste or of both;
>
> (b) bottom ash and fly ash from the combustion of coal, of petroleum coke or of both, deposited in a cell containing the product of that combustion alone; and
>
> (c) bottom ash and fly ash from the combustion of coal, of petroleum coke or of both, burnt together with biomass and deposited in a cell containing the product of that combustion and burning alone.
>
> (8) Group 5 does not include fly ash from sewage sludge, municipal, clinical and hazardous waste incinerators."

54. Moreover, I do not consider it was ever Parliament's intention that taxpayers should be required or expected to go beyond the legislation (primary, secondary, and tertiary) in self-assessing their landfill tax liabilities and obligations. The position is fairly stated in paragraph 3.2 of the pre December 2015 editions of LFT1, as quoted at [51] above.

55. Furthermore, s 42 requires the Treasury when listing qualifying materials to have regard not only to the Treasury criteria but also to "any other factors [the Treasury] consider relevant." How should taxpayers be fixed with knowledge or appreciation of such other factors?

56. Finally, prior to 2011 there was no requirement for the publication of the Treasury criteria, yet the tertiary legislation in LFT1 after 2011 remained unchanged from the tertiary legislation before 2011. That suggests the pre 2011 tertiary legislation (in, say, paragraph 3.3 of the September 2009 edition of LFT1) was composed independent of the (then non-existent) Treasury criteria, which criteria so must be irrelevant to the interpretation of that tertiary legislation.

57. Accordingly, I conclude that the role of the Treasury criteria is confined to determining what material is to be listed in the QMO as qualifying material, and does not extend to any more general application to the interpretation of the tertiary legislation (pre-December 2015).

Did the proposed LFT1 revisions on which HMRC consulted the industry reflect the earlier position?

58. I consider it is fair to pose the question: would a knowledgeable reader of LFT1 in its March 2015 and December 2015 editions have considered there to have been a change in the tertiary legislation? The wording of the relevant (contentious) part certainly changed; the words "If the amount of non-qualifying material in a load of mainly qualifying material is such as to classify the load as hazardous, the amount of the non-qualifying material can never be regarded as small and the total load is taxable at the standard rate" do not appear in the March 2015 edition. It is instructive to consider the consultation exercises conducted by HMRC with "key industry stakeholders" (see [26 - 35] above).

59. The September 2013 exercise stated:

> (1) (paragraph 1.2) "We aim to finalise and implement revised guidance by 11 November 2013. In the meantime, the existing guidance remains extant."

(2) (paragraph 4) "Guidance on mixed loads is provided in paragraph 3.3 of Notice LFT 1 *A general guide to landfill tax*. This guidance provides further advice on mixed loads."

(3) (paragraph 4.3) "It is the responsibility of the landfill operator to decide whether a particular disposal at its site contains only a small quantity of standard rated waste, but it must apply the guidance set out below. … (iii) The standard rated materials in a load of mainly qualifying material must not be of an amount to classify the load as hazardous. You should always consult relevant guidance from your environmental regulator when assessing hazardous properties of waste."

60. I appreciate that the document was written to be user-friendly but it is important to note that the description of the relevant content as "guidance" is not wholly accurate; paragraph 3.3 of LFT1 was not merely guidance, it was (or was intended to be) the tertiary legislation pursuant to s 63(2) FA 96. In any event, the significance was not lost on the Environmental Services Association who stated in their response (see [29] above): "As far as we are aware a distinction between hazardous and non-hazardous material, in terms of landfill tax rates, has not previously been made in the Landfill Tax legislation and in this respect the draft guidance is setting a precedent." The same point was made by the Appellants in their response (see [30] above): "A distinction between hazardous and non-hazardous material is not made in the Landfill Tax legislation. Indeed current guidance paragraph 3.2 of LFT1 specifically does not determine tax status based on environmental classification or protection purposes. In terms of the tax there has always been parity between non-hazardous and hazardous materials and in this respect the draft guidance is setting a precedent …".

61. So, in Autumn 2013 HMRC were aware that their landfill tax customers were firmly of the opinion that the proposed revision would be "setting a precedent", which I take to mean introducing a new rule. The anticipated November 2013 publication was not made; instead the July 2013 edition of LFT1 was replaced in March 2015 – see [22 - 23] above. As already stated, the March 2015 edition did not explicitly identify paragraph 3.3 as having the force of law; indeed, it identified other paragraphs (4.4 to 4.11) as having the force of law but made no mention of paragraph 3.3 in that context. The text of paragraph 3.3 was unchanged from earlier editions (except for a reference to separate provisions relating to qualifying fines). Thus the new edition of LFT1, some 18 months after the industry consultees expressed their surprise at what they saw as HMRC introducing a new rule, was silent as to the mixed waste proposal and repeated the same "guidance" as before.

62. Moving forward to the July 2015 consultation (see [31] above) HMRC clearly stated that (i) the revised wording would have the force of law; and (ii) the revised wording was a clarification of existing HMRC policy: "The main revisions include … detailed guidance on the liability of mixed loads - which includes section 7.3 having the force of law. This section clarifies HMRC's position on the liability of hazardous waste … These revisions clarify existing HMRC policy." The Environmental Services Association stated in their response (see [33] above):

> "… you highlight the 'main revisions' in the draft guidance including section 7.3 but go on to state that 'these revisions clarify existing HMRC policy.' ESA considers that Section 7.3 represents a significant change in stance by HMRC to the treatment of mixed loads for the purposes of section 63(2) of the Finance Act 1996. It is noted that HMRC has explicitly referred to this draft guidance as a direction under section 63(2). ESA considers it is clear that this draft guidance represents proposed new policy to replace the current policy in existing LFT1. …

> As far as we are aware a specific distinction between hazardous and non-hazardous material, in terms of landfill tax rates, has not previously been made in the Landfill Tax legislation and guidance, apart from the recent regulations relating specifically to waste 'fines' and in this respect the draft guidance could have significant implications. The section of the Finance Act 1996 which deals with Landfill Tax refers only to qualifying and non-qualifying material, the former being subject to lower rate tax and the latter, subject to standard rate tax. The Act does not make a distinction between hazardous and non-hazardous wastes in landfill tax terms."

63. Having carefully considered the above, and the other relevant materials in the hearing bundle, I come to the same view as the Environmental Services Association. HMRC may well have considered that the (then draft) paragraph 7.3 "clarifies HMRC's position on the liability of hazardous waste" and "These revisions clarify existing HMRC policy." However, that position and policy are internal matters for HMRC; what binds taxpayers is what is stated in the legislation, and what HMRC may put in the tertiary legislation is stated in terms by s 63(2) FA 96: "The Commissioners may direct that where material is disposed of it must be treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material; and whether a quantity of non-qualifying material is small must be determined in accordance with the terms of the direction." A conscientious taxpayer attempting to comply fully with the relevant legislative provisions would have correctly viewed the s 63(2) direction as having changed in December 2015. In terms of the tertiary legislation, paragraph 7.3 did introduce a new rule.

64. Accordingly, I conclude that although HMRC may have considered that the new paragraph 7.3 reflected their pre-existing policy and so was only a clarification, that is not sufficient in terms of what the tertiary legislation actually stated; the tertiary legislation was changed by the introduction of the December 2015 edition of LFT1.

CONCLUSION

65. For the reasons stated at [47 – 64] above, I conclude that the introduction of the December 2015 edition of LFT1, in particular paragraph 7.3 thereof, amended the tertiary legislation pursuant to s 63(2) FA 96. Prior to that amendment disposals of mixed leads properly classified as hazardous waste could still come within the terms of the (then) s 63(2) direction, and so be eligible for the lower rate of landfill tax pursuant to s 42 FA 96.

DECISION

66. The Preliminary Issue is determined in the following terms: Prior to 16 December 2015 it was possible for disposals of Hazardous Mixed Loads (as defined in the June Decision) to be taxed at the lower rate set out in s.42 FA 96. The addition of the direction at paragraphs 7.3 and 7.4 of LFT1, concerning the inclusion of small quantities of non-qualifying materials, did change the law on Hazardous Mixed Loads; it did not only make explicit that which had previously been implicit in the legislation, including LFT1.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

JUDGE PETER KEMPSTER
TRIBUNAL JUDGE

Release date: 22 June 2021