



TC06442

Appeal number: TC/2014/06132

Landfill tax – incorporation of shredded waste called “EVP” as a “protection layer” beneath the regulating layer immediately below engineered cap of landfill cell – whether “disposal with the intention of discarding” the material and “disposal made by way of landfill” – s 40 Finance Act 1996 – whether use of material falls within para 3(1)(g) of the Landfill Tax (Prescribed Landfill Site Activities) Order 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BIFFA WASTE SERVICES LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
JOHN AGBOOLA FCCA**

Sitting in public in The Royal Courts of Justice, London on 24 to 29 November 2016

**Roderick Cordara QC and Zizhen Yang, instructed by Ernst & Young for the
Appellant**

**Melanie Hall QC, Brendan McGurk and David Gregory, instructed by the General
Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This appeal follows hard on the heels of an appeal by the appellant and three other waste disposal companies which dealt with the liability to landfill tax of so-called “fluff” (mainly domestic “black bag” waste) which had been deposited at the base, sides and top of landfill cells. The appellants argued that this material had been used for the purpose of protecting the engineered parts of the relevant landfill cells from damage by the general body of waste deposited in the cell; as such, it had not been discarded “as waste” and its deposit should not therefore be subject to landfill tax. The Tribunal’s decision in those appeals (“the Fluff Appeals”, which were heard immediately before this appeal) dismissed them, essentially on the basis that notwithstanding the submitted “use” of the materials in question, the appellants nonetheless had the intention to discard them.

2. This appeal concerns a similar claim in relation to a different material deposited at the top of landfill cells operated by the appellant (above the main body of waste and below the capping liner). The appellants call the material in question “EVP” (standing for “engineered into the void permanently”) and it consists of material, shredded to various sizes but which was otherwise essentially the same as the “fluff” the subject of the Fluff Appeals. More detail about EVP is given below.

The facts

Introduction

3. It was agreed between the parties that the relevant evidence before the Tribunal in the joined appeals of Devon Waste Management Limited, Biffa Waste Services Limited, Veolia ES Landfill Limited and Veolia Cleanaway (UK) Limited, heard between 7 and 21 November 2016 (the Fluff Appeals) should, so far as relevant, be treated as admissible for the purposes of this appeal. This saved a great deal of time and, because of the sensible and pragmatic approach of Mr Cordara and Ms Hall, did not cause any practical problems.

4. In addition to the evidence from the earlier proceedings, we received some further documentation and further witness statements from Jacqueline Ann Doone and John Beaman (on behalf of the appellant) and Richard Hart (on behalf of HMRC). There were also supplemental experts’ reports from Stephen Hodges (on behalf of the appellant) and Daniel Riding (on behalf of HMRC). We were also provided with a video which showed the laying of EVP. All the witnesses also gave oral testimony.

5. We find the following facts.

6. The appellant operates in the waste management and recycling business. It both operates current landfill sites and manages closed landfill sites. During 2016 it operated 14 landfill sites and managed a further 65 closed landfill sites. Each site is made up of a number of individual cells in which landfilled waste is placed. The current appeal

concerns 22 sites (some of which have subsequently closed), and events which took place at those sites from March 2010 to May 2012.

Regulatory background

7. The landfill sites the subject of these appeals (like all landfill sites in England & Wales) are operated under a regulatory regime which has changed quite significantly over the years. Whilst the claims in question relate to various periods when essentially the current regulatory regime was in force, the history of the regulatory regime has some bearing and a brief summary therefore follows. Most or all of the sites involved in this appeal were originally licensed under earlier regimes.

8. Under the Control of Pollution Act 1974, waste disposal licences were granted by local authorities, acting as “Waste Disposal Authorities”; then under the Environmental Protection Act 1990, local authorities granted waste management licences, acting as “Waste Management Authorities”, before that function was centralised with the Environment Agency (“EA”). Then, following the passing of the EU Landfill Directive in 1999, the regime was overhauled again, tracking the UK’s obligations under that Directive. The Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000 introduced “Pollution Prevention and Control Permits” (“PPC Permits”) issued by the EA to replace the previous licensing regime, in conjunction with the Landfill (England & Wales) Regulations 2002. This basic structure remains, though there have been amendments to the relevant legislation (the replacement of the PPC Regulations and the Landfill Regulations by the Environmental Permitting Regulations 2007 and the subsequent partial revocation and replacement of those regulations by the Environmental Permitting Regulations 2010, resulting in the re-naming of PPC Permits as Environmental Permits (“EPs”). Since 1 April 2013, the permitting function in Wales has been devolved and is administered by “Natural Resources Wales”.

9. The regime of PPC Permits/EPs is, on its face, less prescriptive than the previous licensing regime. Instead of the EA laying down detailed requirements as to the construction and operation of landfill sites, the new regime is more focused on specifying the outcomes required and leaving it up to the landfill site operator to provide detailed documentation in support of its application which set out in detail how it will achieve those outcomes. When a permit is finally issued in respect of the application, it is a term of its issue that the operator will comply with all the detailed processes and procedures set out in the application documents; the end result is therefore similar to the previous licensing regime, but the operator is given a greater role in devising the precise means by which it will ensure that the required outcomes are achieved.

10. One of the key objectives of the regulatory regime (in its various forms) has been to minimise the environmental impact of landfill sites and one of the biggest concerns in that area is the risk of contamination of the environment around landfill sites by substances emanating from the landfilled waste, especially landfill gas (a mixture of mostly carbon dioxide and methane, generated from the decomposition of biodegradable waste) and leachate (the highly polluting liquid which is produced as a result of such decomposition, especially in combination with rainwater). As a result, a

landfill site is not simply a dumping ground for waste; it is a carefully managed location in which the design, construction and operation of the site all play a part in reducing its environmental impact.

Landfill site design

11. To that end, a landfill site is developed as a number of separate “cells”, which generally follow a reasonably standard model in terms of their design, construction and operation.

12. Landfill sites are often located in worked-out quarries or mines, which provide a ready made cavity or void into which the cells can be built. Some sites (we understand generally older ones) do not follow this pattern, but instead involve depositing the waste onto land which has not previously been excavated in some way – in the industry, these sites are often called “landraise” or “land rise” rather than “landfill” sites. Many of the techniques applicable to them are similar, but in the absence of some natural side wall, they are built up in mounds which effectively lean against each other.

13. Taking an ordinary modern landfill site as the paradigm, the cells are constructed in a generally similar way. This involves a number of elements:

(1) First, the underlying ground must be prepared. Depending on local groundwater characteristics, it may be necessary to install some subsoil drainage to prevent later damage to the cell from underneath by “heave” caused by pressurised groundwater. It will also generally be necessary to smooth the site for the next element, and some profiling may be required to assist in the collection of leachate. This is done by creating slopes in the floor of the cell which cause the leachate to flow naturally downwards towards a central sump or sumps, from which it can then be pumped out through appropriately designed piping which is sunk into the waste mass as it rises.

(2) Generally it will be necessary to place a lining layer of compacted clay (or similarly impervious material), typically to a depth of 1 meter, in order to provide a barrier for any leachate released through damage to the superposed elements, so as to prevent pollution of any nearby groundwater sources. The seepage rate of pollutants through such a layer is sufficiently low for it to provide adequate protection for minor damage except in particularly sensitive locations (e.g. close to aquifers from which drinking water is abstracted). If the existing geological strata are sufficiently impermeable, this layer may sometimes not be necessary.

(3) Once the compacted clay (or, if applicable, the underlying ground) has been appropriately profiled, flattened and smoothed, it is generally covered with a plastic membrane (known as a geomembrane).¹ This is made of high density

¹ On some occasions, there may instead be a geosynthetic clay liner (a thin layer of clay bonded to a layer or layers of geotextile) or similar material which provides an equivalent degree of protection. In very occasional cases, there is no artificial barrier at all, the underlying clay being considered sufficiently impermeable.

polyethylene approximately 2mm thick, which is brought onto site in large rolls and laid out like a carpet. It is then welded together into a single completely impermeable sheet covering the entire “floor” of the cell and as far up the sides as is necessary and practical. This is an extremely skilled and expensive process, and the integrity of this layer (known as the “liner”) is central to the effectiveness of the entire cell in performing its environmental protection function. The liner for a single cell can cost up to £1.6 million on its own, sometimes more.

(4) Usually (though not, we understand, invariably) the plastic liner is then covered with a layer of a somewhat thicker (but permeable) synthetic material (“geotextile”), generally a non-woven needle-punched polypropylene, the purpose of which is to prevent damage to the plastic liner by the subsequent “drainage layer”.

(5) In order to facilitate the later drainage of leachate, the whole floor surface is then covered by a drainage layer or “blanket” which, in spite of its name, in fact consists largely of gravel or natural stone of mixed diameter in a layer 300mm to 500mm deep; a drainage system is incorporated into this layer, in which perforated drain pipes in a herring bone pattern connect into spine drain pipes leading to the sump or sumps from which the leachate can be pumped out via “leachate wells”.

(6) Up the sides of the cell there comes a point where it is no longer possible to extend the gravel drainage layer (Mr Macphail’s evidence in the Fluff Appeals was that this was often about 2 meters up the side wall); we infer this is because the slope would render such a layer unstable. Instead, a layer of sand or similar material, of between 200mm and 500mm is generally placed on top of the liner.

(7) In some situations, a further thin synthetic filter layer is placed on top of the gravel drainage blanket. This is done when there is concern about fine particles of waste washing into and blocking up the drainage layer (whether because the gravel used in the drainage layer is smaller than the ideal size, or because the main body of waste is expected to yield a particularly large amount of fine particles).²

(8) The first layer of actual waste³ is then laid. This is the layer referred to in the Fluff Appeals as the “base fluff” layer. It commonly comprises ordinary domestic waste, deriving from regular collections direct from householders. As recycling has improved, the volumes of this waste (commonly called “black bag waste”) have declined and operators have on occasion resorted to using other

² There is however some concern that such layers, if they become blocked by fine particles, may themselves stop the free flow of leachate into the drainage layer beneath. This phenomenon is known as “perching”, wherever it occurs in the body of waste.

³ We only use the word “waste” because that is the common parlance. We should not be taken, by using this word, to be prejudging the issue before us.

materials in its place. A key consideration in laying this first layer is to reduce the risk of puncture to the all-important liner. Where black bag waste is used, it is inspected as it is in the process of being laid, to ensure it contains no large, hard, sharp objects (though, by its nature, it is extremely unlikely to do so) or significant amounts of mobile fine particles that might block the drainage blanket; it is spread carefully across the whole base of the cell and “lightly” compacted into a layer of between 1 and 2.5 metres deep – using a low ground pressure bulldozer (in contrast to the later layers of waste, which are compacted much more heavily by a specialised heavy machine). It is also placed against the sides of the cell, in a ring around the main body of waste, and compacted in the same way (in which location it is sometimes referred to as “side fluff”). It is said that this “light” compaction improves its drainage characteristics (allowing leachate to flow through to the drainage blanket without perching), though there is less evidence to support this supposed secondary purpose.

(9) Once the first layer of waste has been laid, the cell is ready to receive more heterogenous waste of all types (though waste that is deemed hazardous is generally disposed of in special facilities). This waste is tipped and compacted in layers, using heavy compactor vehicles with toothed wheels which are designed to break up and compress the waste as it is laid so as to utilise the expensive void efficiently, maximise the stability of the waste body and make it as homogenous as possible. At the end of each day’s operations, there is a regulatory requirement for “daily cover” (usually of inert soil-like material) to be laid over the freshly deposited waste.⁴ As the level of waste rises, the wells for the extraction of leachate are set into it, so that in due course the leachate which settles to the bottom of the cell can be pumped away, treated and safely disposed of.

(10) The sides of a cell are also engineered to minimise leakage, though less elaborately than the base. There may not be a plastic membrane or geosynthetic clay liner extending all the way up the side walls, compacted clay instead providing the required degree of impermeability. Some protection is provided for the side walls by the layer of lightly compacted black bag waste referred to above.

(11) When the level of waste in the cell is nearing its final required height and profile (due allowance being made for settlement over time), consideration is given to “capping” it in order to insulate the restored earth surface above from contamination by the waste below, in order to minimise the flow of rainwater into the main body of waste (which would increase the amount of leachate generated by it which is then required to be drained away and treated) and to impede the escape of landfill gas (which is often captured and used for electricity generation).

⁴ This is required in order to minimise the amount of windblown waste and to reduce smells and vermin. For more explanation of the details of “daily cover”, see *Waste Recycling Group Ltd v HMRC*, referred to below.

(12) Commonly between one and two metres of fully compacted black bag waste⁵ are placed on top of the final layer of general waste and smoothed flat, before a 300mm “regulating layer” of “fines” is generally placed on top.

(13) This latter layer is sometimes called the “regulation layer”, though this does not refer to any particular legal regulation. It is generally required as a condition of the relevant permit. “Fines” consist of a soil-like material which acts to fill cavities and even out irregularities in the surface below and provide a smooth top surface to receive the next element in the capping system.

(14) This next element is often a further plastic membrane, though it can be a geosynthetic clay liner, or even a compacted layer of clay (if in plentiful local supply). Depending on the specific site and the other elements of the capping system, there may be other layers of protection above it, involving further geotextiles, geocomposites or fine soils.

(15) Finally, the top surface is restored with subsoil (or subsoil-like materials) and topsoil in accordance with the approvals relating to the site. This will include some kind of drainage management system for surface water. Wells for extraction of leachate and landfill gas will be accessed from the surface.

(16) As time goes by, notwithstanding the heavy compaction that is applied to the main body of waste as it is deposited, the contents of each landfill cell will settle, generally by 25% to 30%. Although the waste is laid and compacted carefully, invariably the settlement that occurs is differential, so that some parts of the cell settle more than others. This creates obvious strains on the capping system, but can also result in large hard sharp objects effectively starting to protrude as other waste around them sinks, and even rupture the capping system altogether.

The development of industry practice

14. Industry practice and expertise on the design, construction and operation of landfill sites has developed over the years. The most significant early document to which we were referred was the Department of the Environment’s “Waste Management Paper No 26 – Landfilling Wastes”, published in 1986 (“WMP26”). This paper ran to 236 pages and drew together the legislative framework and contemporaneous best practice into detailed guidance on the design, construction and operation of landfill sites. It was widely regarded in the industry as the “go to” document for authoritative advice on all the areas it covered.

15. The use of artificial liners for landfill cells was much less advanced at the time, but some of the risks were obvious, even then. As paragraph 4.66 of WMP26 said:

“During the early phase of operation, particular care must be taken to ensure that traffic does not damage the liner.... Particular care should be

⁵ But see section entitled “Use, origin and nature of EVP” below.

taken in placing the first lift of refuse, and build up of water and leachate should also be controlled...”

16. Paragraph 5.56 of WMP26 then went on to say this:

“No bulky items, even after crushing, should be present in the first lift of refuse deposited in a site lined with a polymeric membrane due to the risk of damaging the liner (see paragraph 4.64⁶). Similarly, bulky items should not be present in the final lift of waste in sites that are to be capped with a low permeability material since settlement of the refuse may result in large items piercing the cap. After-use of the land may also be adversely affected.”

17. Finally, it said this about protection of the capping system in paragraph 6.26:

“To assist in maintaining its integrity a cap should be protected on both its upper and lower surfaces. Accordingly, before a cap is emplaced the surface of deposited waste should be graded and any irregular objects should be removed. In providing a firm base to allow compaction of the cap and to minimise damage from below, a buffer layer should be installed. Where a synthetic material is to be used for capping, a buffer layer at least 0.5m thick is usually required. Inert material, which does not react with the waste or the cap, may be used as a buffer provided that it is free from large stones and lumps. At the same time it should not be so fine that it can permeate into the waste. Coarse or a mixture of coarse and fine gravel may be suitable.”

18. As experience and expertise developed, it was felt appropriate to update WMP26 and accordingly a revised version “Waste Management Paper 26B – Landfill Design, Construction and Operational Practice” (“WMP26B”) was developed in conjunction with the industry and released by the Department of the Environment in 1995.

19. WMP26B included the following passages:

“7.47 Following the successful installation of the liner system there is a risk that damage will occur to the liner by a number of routes, such as

- accidental damage...

...

7.48 *Accidental damage* may arise where bulky difficult waste, for example, lighting columns or concrete lumps, is tipped carelessly onto the drainage or protection layer, and is able to puncture and damage a liner system, especially a flexible membrane...

...

⁶ This cross reference appears to have been an error, and should be to 4.66.

7.52 The designer should consider all possible causes of damage for the proposed site, and in conjunction with the operator ensure that appropriate measures are taken to avoid them. Precautionary measures may include

- CQA⁷ procedures for the initial waste infilling to minimise the risk of damage caused by waste

...”

20. So far as protection of the cell capping system from damage by underlying waste was concerned, WMP26B contained nothing specific, only a general reference to the fact that “construction methods, materials specifications, testing and CQA procedures are essentially the same as those used for construction of the landfill liner (see Chapter 7).”

21. Part of the old licensing regime was a requirement to create a “Working Plan”, referred to in WMP26 as “the central document for planning and disposal licence applications and also the blueprint for eventual operation of the site”. This document was developed in consultation between the operator and the licensing authority, individually in relation to each site but based on common guidance and a library of standard clauses. Strict compliance with the agreed working plan was a condition of the relevant licence. Whilst the working plan could be changed (indeed, it was described as a “living document” which would need to be updated as circumstances changed), no change to it could be implemented until the licensing authority had consented.

22. The general guidance given in WMP26 and WMP26B was therefore fleshed out a great deal for individual sites, both in the site licence and in the underlying working plan.

Site licence and working plan requirements

23. The appellant’s working plan for its Skelton Grange landfill site near Leeds dated January 1999 included in section 2.360, headed “Installation, Maintenance and Protection of Final Capping” (after setting out details of the engineered cap, subsoil and topsoil):

“The final layer of wastes will be free from bulky items or other materials likely to give rise to damage to the capping layer.”

24. The appellant’s working plan for its Poplars landfill site dated January 2004 contained the following text:

⁷ “CQA” stands for “Construction Quality Assurance”, i.e. quality assurance procedures applicable to construction operations, to ensure they are carried out to the planned standard. It is common for a supervising engineer to oversee the operation of CQA procedures, either as an employee of the operator or as an independent contractor.

“The engineered cap at the site will comprise the following materials:

- Engineered cap – geosynthetic clay liner, or other suitable engineered solution with a permeability equivalent to 1m of cohesive soil placed to achieve a permeability of not less than 1×10^{-9} m/s, over a regulating layer approximately 300mm in depth.

The final layer of wastes will be free from bulky items or other materials likely to give rise to damage to the capping layer...”

PPC Permit provisions

25. In 2003-2006, a major exercise was undertaken in which all landfill sites with licences under the old regimes were required to obtain PPC Permits or cease operation. This required operators to make formal applications, which included answers to specific questions, including the following:

“Are waste deposit and emplacement procedures in place for the installation, which ensure the following?

The first layers of waste in a new cell are selected and inspected during placement to ensure that these do not cause damage to the installed barriers and liners.

...

The final layers of waste are selected and inspected during placement to ensure that these do not cause damage to the final capping...”

26. We were not referred to any application in which the appellant (or indeed any of the other appellants in the Fluff Appeals) had answered “no” to these questions⁸, and we infer they always answered “yes”, unless there were special circumstances. On the Skelton Grange application, for example, it certainly did so.

Operational documentation

27. The appellant had its own internal Quality Procedure document QP65, referred to in more detail at [48] below. This document covered its operations across all its sites.

28. The extent of the care taken in preparing for capping work is also illustrated by the “Construction Quality Assurance Method Statement and Quality Plan” prepared by the appellant in relation to capping works at its Skelton Grange site in 2011. This document set out the detailed procedures to be followed in such works, which were to be supervised and controlled by Stratus Environmental Limited as independent third

⁸ With the exception of Veolia’s sites at Rainham and Pitsea, where special circumstances applied

party consulting engineer. That document, under the heading “4. Regulating and Cap Bedding Layer” required Stratus to:

“(i) ensure that the regulating and cap bedding layer is a thickness (to suit the final waste surface) of between **150mm** and **300mm** of suitable regulating and cap bedding material above the existing final waste surface...

(ii) ensure that the immediate surface upon which the geomembrane is to be installed shall be smooth, with a particle sizes no greater than **~20mm** (rounded) or **~10mm** (angular) visible at the surface, and be free of all rocks, stones, roots, sharp objects, or debris of any kind at the surface;

(iii) ensure that the surface of the regulating and bedding layer provides a firm foundation for the geomembrane with no sudden, sharp, or abrupt changes in grade. No standing water, or excessive moisture, shall be allowed;”

29. In the associated Specification for the same capping works, the following provisions appeared:

“PART C REGULATING AND CAP BEDDING LAYER

| | | |
|-----|--|--|
| C.1 | The subgrade upon which the geosynthetic capping membrane is to be installed shall be prepared such that a uniform surface is achieved. The surface shall be as planar as possible and significant changes of gradient shall be re-graded. The Contractor shall place additional material and re-grade the slopes as necessary to achieve a satisfactory surface. The prepared slopes shall be free of any objects that may puncture the geosynthetic capping materials. | Regulating & Cap Bedding Layer - General |
| C.2 | Where necessary, additional regulating material shall comprise suitable imported material, excavated material from existing stockpiles of suitable material, or re-graded existing cover material, and shall have a maximum particle size of 125mm . <u>For the upper surface of the regulating and bedding layer (proposed to in direct contact with the geomembrane capping material) the maximum particle shall be no greater than 20mm (rounded) or 10mm (angular) visible at the surface of the regulating and</u> | Bedding Layer – Upper Surface |

| | | |
|-----|---|-------------------------------|
| | <u>bedding layer. Stone picking may be required to achieve the required surface.</u> | |
| C.3 | The Contractor shall clear all unsuitable materials from the existing intermediate/daily cover prior to any installation works commencing to the satisfaction of the CQA Engineer, including any vegetation on the slopes and areas where anchor trenches are to be formed. | Cap Bedding Layer Preparation |
| C.4 | Any material used shall be free from any deleterious materials, which shall be removed and disposed of, as appropriate. Unsuitable materials shall include, but not be limited to, the following: <ul style="list-style-type: none"> • Materials with dimensions greater than 125mm; or • Any material with the potential to damage the geomembrane. | Unsuitable materials |
| C.5 | ... | |
| C.6 | The regulating and bedding layer shall achieve a thickness of between 150mm and 300mm above the existing final waste surface, to suit the existing final waste surface. The thickness shall be physically verified using trial holes on a 25m alphanumeric grid basis . Any areas that fail to meet the above thickness requirements shall be remedied by the Contractor to the satisfaction of the CQA Engineer...” | Thickness |

Procedures actually followed in laying material below the geomembrane cap

30. We are satisfied that the appellant, in line with what it understood to be standard industry practice, followed reasonably strict procedures over the relevant period in laying material at the top of the body of landfilled waste, immediately below the regulating layer (as it did in relation to the regulating layer itself). Its concern was with ensuring a smooth and consistent base layer to accept the regulating layer above, and ultimately to ensure the geomembrane could be installed on top of the regulating layer

with the minimum risk of it being damaged, either during the course of installation or as a result of later differential settlement of the waste beneath.

Use, nature and origin of EVP

31. This appeal is concerned with that particular stage of operations, namely the period running up to the capping of a cell after the bulk of the landfilled waste has been deposited in it (see [13(12)] above).

32. In the cases relevant for this appeal, the appellant substituted EVP for some or all of the black bag waste referred to at [13(12)] above, as follows:

(1) During the period from March 2010 to November 2010, a layer of 700mm of EVP, shredded to dimensions not exceeding 75mm, was placed immediately below the regulating layer⁹;

(2) During the period from November 2010 to May 2012, a layer of 1700mm of EVP, shredded to dimensions not exceeding 100mm, was placed immediately below the regulating layer and immediately on top of the general body of waste.

33. For the entire period from March 2010 to May 2012, the appellant used EVP, shredded to a maximum dimension of 20mm, as the 300mm regulating layer immediately above the coarser EVP layers referred to above and immediately below the top lining of the cell. As stated at [68] below, this appeal is not concerned with this layer of material.

34. The appellant's associated company Biffa Leicester Limited ("Biffa") was party to a 25 year contract with Leicester City Council, signed in May 2003. Pursuant to that contract, described as a "public private partnering arrangement", significant quantities of a material called "floc" fell to be disposed of by the appellant. This became known within the business as "Leicester Floc". The material was defined in the contract as:

"(a) refuse derived fuel (recognised by the waste management industry as RDF), and comprises materials recovered from household waste that have medium-high calorific value; and

(b) are mechanically processed and screened so that the lighter fractions of paper, cardboard, plastics, textiles and wood fractions can be homogenised and prepared for onward transport; and

(c) for information purposes a typical specification of the material is as follows:

...

⁹ As the evidence of Mr Beaman was that the overall depth of what he referred to as the "upper protection layer" was always 2 meters, made up of the 300mm regulating/regulation layer and the 1.7 meters immediately below it, we infer that this layer of EVP was placed on top of 1 meter of unshredded black bag waste.

Typical floc particle size: 5mm to 80mm Pre densification and loading on transport”

35. Under the contract, Biffa was required to use a certain amount of the material it dealt with in a way which did not incur landfill tax, or incur penalties equivalent to the landfill tax. This was in order to discourage Biffa from simply sending the material to landfill as waste. The appellant used some of this material as daily cover, thus putting it to a non-taxable use on the basis of the Court of Appeal decision in *Waste Recycling Group v HMRC*¹⁰. When the Landfill Tax (Prescribed Landfill Site Activities) Order 2009 (“the PAO”) became law on 21 July 2009, it became apparent to the appellant (according to Mr Beaman’s witness statement) that “there was a significant quantity of Leicester Floc that would now be subject to tax on the basis of the PAO which would trigger the penalty clause in the contract”. The appellant considered Leicester Floc to be suitable also for use as the “regulating layer” immediately below the artificial cap and Ms Doone approached HMRC in August 2009 for clarification of the effect of the new legislation, in its application to the regulating layer, by reference to forthcoming capping/restoration work at the appellant’s North Herts landfill site.

36. In her letter, no mention was made of EVP. It referred to the fact that there was an Environment Agency approved CQA document in place for the site, which included “site restoration requirements”; amongst those requirements she said that “a minimum 300mm thick regulation layer above the waste (below the geo-membrane cap) is required by the EA to form a part of the restoration works”. She enclosed some short extracts from the CQA Plan and Specification for the “Capping Works” in question, which included the following:

“5.0 REGULATION LAYER

5.1 Materials

The 300mm thick regulation layer to be placed and compacted over the final waste surface shall comprise the materials noted in clause 5.2 of the Specification.

...

Materials which are deemed to be unsuitable due to oversize particles may be included in the works if it can be demonstrated to the CQA Engineer that ‘stone picking’ or removal of the oversize particles will result in the materials being compliant with the Specification.

The CQA Engineer shall ensure that all materials with a particle size greater than 100mm in any direction are removed from the regulation layer prior to the installation of the protector geotextile.

...

¹⁰ [2008] EWCA Civ 849, [2009] STC 200

[Specification]

5.0 REGULATION LAYER

5.1 General

5.1.1 The regulating layer shall be placed and compacted over the trimmed final waste surface to a minimum thickness of 300mm.

5.2 Materials

The material to be used for the regulating layer shall be sourced from on site stockpiles as directed by the Site Operator. The material shall be free from any unsuitable material, or any other deleterious materials/objects that may potentially cause damage to the capping system.

Unsuitable material includes:

...

iv) any material with a maximum particle size greater than 100mm in any dimension;

...”

37. It can readily be seen that the plan and specification (which were prepared by the appellant or on its instructions, rather than by the EA or any external body) allowed a great deal of discretion for the operator to choose the material to be used for the regulating layer, and that it was to be placed on top of “the final waste surface”.

38. The effect of this letter, subsequent correspondence and HMRC’s ultimate ruling on the matter by letter dated 28 September 2009 (“the Ruling”) were fully considered in the later judicial review application by the appellant, reported as *R (oao Biffa Waste Services Limited) v HMRC* [2016] EWHC 1444 (Admin) (“the JR”). The upshot of those proceedings was that:

“i) The Ruling was not limited to the North Herts site. It was generally applicable to other sites where Biffa deployed a regulation layer, in accordance with the EA requirements at such sites;

ii) The Ruling was clear, unambiguous and devoid of any relevant condition; and it did not require the deployment of soil and soil only for the regulation layer at Biffa landfill sites; and

iii) There was no material non-disclosure by Biffa such that Biffa could not legitimately rely upon the Ruling.”

39. Sir Kenneth Parker J in his judicial review decision at [137] said this:

“Biffa did, in about March 2010, introduce an EVP layer, and did not account for LFT in respect of that layer. Whether or not Biffa, at the time of the Ruling, had an intention to introduce such a layer is a question of

fact and, given the way in which HMRC had presented its defence in the Detailed Grounds of Response, as set out above, Biffa naturally had not filed evidence on this particular matter....

138. In any event, Mr Beal QC was able at relatively short notice to take instructions on this issue, and it appears that it was only following further meetings with officers from HMRC in early 2010 that Biffa introduced an EVP layer, and that Biffa did not have such an EVP layer in contemplation at the time of the Ruling.”

40. Thus there was no actual evidence before the High Court about the appellant’s intentions as to the use of EVP in September 2009, but counsel’s assurances (on instructions) that there were no such intentions were accepted (albeit that the Court did not appear to consider the matter to be central to its decision on the application as formally defended by HMRC). The matter was not explored in detail before us, but the evidence of Mr Beaman made it clear that the prospective use of Leicester Floc in the regulating layer was the impetus for the appellant’s approach to HMRC in Ms Doone’s letter dated 28 August 2009:

“We knew that Leicester Floc was consistent and fine enough such that it would be suitable for use in the regulation layer of a cell. It was fine and homogenous and could be compressed into a smooth and even surface upon which the cap could be laid. We were therefore of the view that, provided the regulation layer came within the definition of restoration works, that this material could be used for tax exempt restoration works. Therefore Biffa wrote to HMRC on 28 August 2009 to seek their approval that the intended use of a restoration layer fell within the definition of restoration works and was therefore exempt from Landfill Tax.”

41. As Mr Beaman also made clear in his witness statement that Leicester Floc and “similar shredded material” were “known together as EVP”, this tends to suggest strongly that EVP was indeed in the appellant’s contemplation when making its application in August 2009, albeit that the scope of the material subsequently encompassed under that acronym was perhaps not fully anticipated at the time. The matter is complicated by the fact that, according to the evidence of Ms Doone, the acronym “EVP” had been incorporated into the appellant’s computer systems in response to the PAO in order to identify material (typically inert) brought onto site for the purpose of constructing haul roads that would be left permanently in the landfill cells; the use of that code was subsequently extended, as a matter of convenience, to include the material referred to as EVP in this appeal.

42. Be that as it may, HMRC’s ruling in their letter dated 28 September 2009 was reasonably specific:

“I can confirm that the installation of a regulation layer under the construction of a cap at South Herts landfill site is outside the scope of landfill tax, (assuming here that Biffa have no intention to discard this material, but to put it to a use), however it is not considered to be part of the site restoration. Indeed all the evidence provided relates to capping.

Environment Agency letter dated 24th June 2009 refers to ‘the above proposed capping works’, the CQA plan relates to phase 3B and part phase 3A capping works’

Restoration specifically excludes any works relating to capping, under paragraph 1(B)(1)(a) of Part 1 to Schedule 5 of the Finance Act 1996.”

43. By the terms of this ruling, it is clear HMRC accepted that the installation of the 300mm regulating layer immediately under the artificial cap was outside the scope of landfill tax, not because it was part of the “restoration works”, but because they implicitly accepted it was being used and not discarded as waste.

44. The appellant took the view, without consulting HMRC on the matter, that this ruling could be regarded as applying equally to the 1.7 meter layer immediately below the regulating layer (the “protection layer”), which they regarded as “used” to protect the geo-membrane cap just as much as the regulating layer itself. They considered that Leicester Floc may well be suitable for use in the protection layer, because its shredded nature meant that there was more certainty it would be free of large, sharp or bulky items (which had to be removed individually from ordinary black bag waste used in the protection layer by inspection, which was subject to human error), and because they expected its homogeneity to provide a more stable base for the ultimate capping works.

45. They therefore ran a trial at their Skelton Grange landfill site in late 2009, using Leicester Floc for the protection layer (as well as the regulating layer). The Environment Agency were invited to inspect the material and confirmed they considered it suitable for the regulating layer (they do not appear to have been consulted about its use for the protection layer). The appellants considered the trial to be successful on the basis that it obviated the need for any inspection to remove large, sharp or bulky items, they considered it provided a more stable base for the cap, and they considered it had the benefit of a favourable landfill tax treatment.

46. As there was insufficient Leicester Floc to provide a regulating layer and a protection layer at all their sites, they decided to obtain or produce other material with similar characteristics. The key requirement was that the material should be “suitable waste” that was shredded to an appropriate maximum particle size. The shredded material was initially obtained from the appellant’s own transfer stations (where it carried out the shredding itself); there were teething problems as the available equipment could not reliably shred the material to a small enough size, but these were overcome. From July 2010, as greater volumes were required, the appellant also obtained shredded material direct from customers. In either case, the original material was mostly municipal black bag waste. On occasion, the appellant hired mobile shredders to perform the shredding operation adjacent to the cell, but this was an unsatisfactory method for various reasons, not least the tendency for it to create wind-blown debris.

47. The appellant had, in late 2009, turned its attention to the necessary documentation for its proposals. As summarised above, the permitting regime transferred much of the responsibility for laying down and documenting detailed operational procedures on the landfill site operator. Initially the appellant considered

it might be necessary to amend the CQA specification individually for each of its sites to accommodate the proposed changes and satisfy HMRC, but at a meeting with Mr Hart of HMRC on 12 January 2010 (in which the appellant's base and side fluff claims were the main topic of discussion, HMRC being in principle prepared at that time to pay such claims) Mr Beaman established that HMRC would regard inclusion of the proposed specification of works in the appellant's business-wide quality procedure document QP65 as sufficient to establish it as being required under the appellant's permits for all relevant sites (on the basis of Mr Beaman's assurance that the QP65 document was part of the appellant's approved management system and accordingly compliance with its requirements was part of the appellant's regulatory obligations under its permits).

48. The appellant's quality procedure QP65 (entitled "Waste Discharge and Emplacement") had, since at least October 2004, contained the following requirement:

"The first and final layers of waste placed over engineered parts of the site will be selected and inspected by site personnel to ensure that it does not contain large or bulky items in order to protect the integrity of the basal liner, capping or leachate collection system. Domestic, commercial waste or other similar generally homogeneous waste types free from bulky items will be used in the first lift placed over engineered parts of the site. Waste containing large or bulky items will not be placed within 2m of the top of the basal liner, engineered cap or within 2m of the engineered works."

49. From March 2010, an extra section was added to QP65, as follows:

"Prior to the installation of the mineral, BES or Geomembrane cap a Capping Regulation Layer of minimum vertical dimension of 1m is to be emplaced as part of the engineered cap.

The first 700mm of the Capping Regulation Layer will consist of material with a particle size no greater than 75mm and may consist of either shredded or processed waste.

The top 300mm of this layer will consist of materials with a particle size no greater than 20mm and shall provide a uniform surface upon which the liner will be placed.

Material specification and placement requirements for the upper 300mm will be included in the CQA plan and validation report requirements."

50. From that time, the top 700mm of the protection layer and the 300mm regulating layer above it were laid at all the appellant's sites, using EVP.

51. Initially, one metre of "top fluff" was placed immediately below the EVP protection and regulating layers (comprising mainly municipal black bag waste, as referred to in the decision on the Fluff Appeals). The combined depth of 2 metres satisfied the continuing requirement referred to at [48] above.

52. In October/November 2010, the appellants took the decision to extend the 1 metre depth of EVP to 2 metres, replacing the 1 metre layer of “fluff” with EVP. In consequence, they amended the relevant section of QP65 (as set out at [49] above) in November 2010 to read as follows:

“Prior to the installation of the mineral, BES or Geomembrane cap a Capping protection and regulation Layer is to be emplaced as part of the engineered cap.

The Cap Protection Layer will consist of a material that has been through a mechanical process which is rated at 100mm or less and be placed to a depth up to a maximum of 1700 mm. This material may consist of shredded or processed waste.

An additional final top 300mm layer will consist of material with a particle size no greater than 20mm placed over the capping protection layer and shall provide a uniform surface upon which the liner will be placed.

Material specification and placement requirements for the upper 300mm will be included in the CQA plan and validation report requirements.”

53. In consequence of the change, instead of a maximum 75mm particle size being specified for the protection layer, it was required to have been subjected to “a mechanical process which is rated at 100mm or less”. Mr Beaman referred to some difficulties in achieving the required particle size (indeed, “a lot of material was being shredded twice to meet specification”), and effectively said this relaxation was in response to those difficulties, whilst still providing a sufficiently fine surface to lay the regulating layer above it.

54. From November 2010, therefore, the appellant followed the revised procedure, thus placing 1.7 metres of EVP shredded to a coarser specification than before above the main body of landfilled waste, with the more finely shredded EVP laid above it as the regulating layer immediately beneath the capping membrane.

55. The appellant did not charge landfill tax to the customers from whom it acquired pre-shredded EVP, and the tipping fee they charged was typically below the standard rate of landfill tax applicable at the time. This afforded them a significant competitive advantage over other landfill site operators, even if they continued to charge landfill tax on unshredded waste (which they would then shred themselves and deposit as EVP without accounting for landfill tax). It appears complaints were made to HMRC about the matter by other operators in late 2010/early 2011. Mr Hart sought further information, at an audit of the appellant’s landfill site at Colnbrook on 14 June 2011. It was at that meeting that he was first provided with detail about the appellant’s use of EVP. He expressed the view that he regarded it as all subject to landfill tax, based on the PAO, but said that he would obtain advice from his policy colleagues before a formal decision was issued. He followed up with a letter dated 23 June 2011, in which he requested “copies of the CQA cap design documentation in which I believe this material [*i.e.* EVP] is mentioned”.

56. Mr Hart chased by letter dated 20 July 2011 for a response to this request. In the absence of the requested documentation, he raised the matter at a meeting with the appellant's technical sales team on 12 September 2011, when some aspects of the appellant's IT system were being audited. At that meeting, he was informed that the appellant had obtained legal advice that the EVP layer was "not covered by current LFT law".

57. After some further correspondence and activity (not relevant for present purposes), Mr Hart issued a letter dated 31 May 2012, giving HMRC's formal ruling that in their view the material in question was all subject to landfill tax at the standard rate, both as regards the protection layer (which they considered to have been disposed of with the intention to discard it, rather than to have been used) and the regulating layer (which they considered to be chargeable to tax under the PAO). This letter was followed up with two assessments dated 29 May 2013 for the landfill tax which HMRC considered to be due, in the total amount of a little over £81.5 million.

58. Discussions had been taking place between the parties, as a result of which formal enforcement of HMRC's decision had effectively been placed in suspense. No satisfactory conclusions to those discussions having been reached, Mr Hart wrote on behalf of HMRC to the appellant on 20 October 2014 to "formally re-instate the decisions contained in my letter dated 31st May 2012".

59. The decision contained in this letter was the subject of judicial review proceedings, culminating in the judgment referred to at [38] – [39] above. Following the outcome of those proceedings, HMRC reduced their assessments to take out of account the "regulating layer" element of the claim, resulting in a revised figure of approximately £63 million. This revised amount is the subject of this appeal. As in the Fluff Appeals, we are being asked to determine in principle the liability of the appellant to landfill tax in respect of the deposits of EVP referred to above; questions of quantum (if necessary) are to be dealt with at a later stage.

The legislation

60. The legislative provision at the heart of this appeal, as in the case of the Fluff Appeals, is subsection 40(2) Finance Act 1996 ("FA96"), which defines what is a "taxable disposal" for the purposes of landfill tax as follows:

"A disposal is a taxable disposal if –

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

61. Section 64 goes on to provide some assistance in interpreting subsection 40(2)(a) (one of the pivotal subsections in these appeals) as follows:

“64 Disposal of material as waste

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

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

(3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) above the person on whose behalf the disposal is made shall be treated as making the disposal.

(4) The references in subsection (3) above to a disposal on behalf of another person includes reference to a disposal –

(a) at the request of another person;

(b) in pursuance of a contract with another person.”

62. Section 65 carries out a similar function in relation to subsection 40(2)(b):

“65 Disposal by way of landfill

(1) There is a disposal of material by way of landfill if –

(a) it is deposited on the surface of land or on a structure set into the surface, or

(b) it is deposited under the surface of land.

(2) Subsection (1) above applies whether or not the material is placed in a container before it is deposited.

(3) Subsection (1)(b) above applies whether the material –

(a) is covered with earth after it is deposited, or

(b) is deposited in a cavity (such as a cavern or mine).

(4) If material is deposited on the surface of land (or on a structure set into the surface) with a view to it being covered with earth the disposal must be treated as made when the material is deposited and not when it is covered.

...

(8) In this section “earth” includes similar matter (such as sand or rocks).

63. In addition, section 65A FA96 (which came into force on 21 July 2009), provides as follows:

“65A – Prescribed landfill site activities to be treated as disposals

(1) An order may prescribe a landfill site activity for the purposes of this section.

(2) If a prescribed landfill site activity is carried out at a landfill site, the activity is to be treated –

(a) as a disposal at the landfill site of the material involved in the activity,

(b) as a disposal of that material as waste, and

(c) as a disposal of that material made by way of landfill.

...

(9) In this section –

...

‘landfill site activity’ means any of the following descriptions of activity, or an activity that falls within any of the following descriptions –

(a) using or otherwise dealing with material at a landfill site;

(b) storing or otherwise having material at a landfill site.’

64. Pursuant to s 65A, the Landfill Tax (Prescribed Landfill Site Activities) Order 2009 (“the 2009 Order”) was made, coming into effect on 1 September 2009. Paragraph 3(1) of that Order designated as a “prescribed landfill site activity” for the purposes of s 65A, amongst other things:

“(a) the use of material to cover the disposal area during a short term cessation in landfill disposal activity;

...

(g) the use of material placed against the drainage layer or liner of the disposal area to prevent damage to that layer or liner;”

The issues

65. As in the Fluff Appeals, it is agreed that if the various deposits of EVP the subject of this appeal are “taxable disposals” within the meaning of that phrase in subsection 40(2) FA96, then the appeal must be dismissed. It is also agreed that the deposits all fall within subsections 40(2)(c) and (d) and therefore the only dispute between the parties is whether those deposits fall within subsection 40(2)(a) and (b) (interpreted by reference to sections 64 and 65 respectively).

66. The main questions for determination by the Tribunal are therefore:

(1) Was the placement of EVP a “disposal of material as waste”?

(2) Was the placement of EVP “made by way of landfill”?

67. If the Tribunal found in favour of the appellant on either of these two questions (such that the deposits in question did not, in terms of the primary legislation, amount to “taxable disposals”), then the further issue arose as to whether Regulation 3(1)(g) of the 2009 Order took effect so as to bring the relevant deposits into charge to tax.

68. As mentioned above, one matter that was not in issue before the Tribunal was whether the deposits of EVP as the regulating (or regulation) layer of 300 mm immediately below the capping membrane was subject to landfill tax. Although the appeal had originally extended to that issue, it became unnecessary for the Tribunal to adjudicate upon it because of the outcome of the judicial review proceedings. HMRC have expressly reserved their right to argue the point on any other appeals in which it may come up as an issue.

69. The question of whose “intention” was relevant in deciding whether an “intention to discard” existed for the purposes of sub-s 64(1) FA96 had initially been an issue before us in the Fluff Appeals, but was put to one side on an agreed basis as set out in our decision on those Appeals. In the present case, no such issue was raised and it was agreed that the relevant intention was that of the appellant.

The arguments in outline

70. Much of the argument before us followed along the same lines as the argument in the Fluff Appeals.

Appellant’s outline arguments

71. In relation to the question of whether the EVP had been deposited “with the intention of discarding” it and “by way of landfill”, Mr Cordara argued, in outline:

(1) there is clear and binding authority that there is no disposal of material “as waste” if it is “used” (see *Waste Recycling Group Limited v HMRC* [2008] EWCA Civ 849, [2009] STC 200);

(2) The material comprising the EVP layers was “used” and therefore was not disposed of “as waste”. The condition in section 40(2)(a) was therefore not satisfied. This was because the material formed an integral part of the landfill containment and barrier system, and was specifically selected, processed, inspected, and its placement supervised, for that purpose. The EVP, like the fluff in the Fluff Appeals, was indistinguishable, from a legal point of view, from the daily cover in respect of which the Court of Appeal in *WRG* had found there to have been no disposal “as waste”.

(3) As the EVP was deposited for a useful purpose (again, equivalent to the material used for road construction and daily cover in *WRG*), it was not “disposed of by way of landfill”. The condition in section 40(2)(b) was therefore not satisfied either.

72. Mr Cordara also argued, in summary, that the case in relation to EVP was even stronger than that in relation to fluff, because the shredding process made the material even more suitable for the use to which he maintained it was put, thus negating even more strongly the suggestion that it was being discarded as waste. The three ways in which he submitted this to be the case were as follows:

- (1) the shredding process reduced the risk of inadvertently leaving large, sharp or bulky items in the material as it was laid (and the need to spend time and effort setting such items to one side);
- (2) the smaller and more homogenous particles in EVP were very effective at buffering the differential settlement of the waste below, thereby providing a more stable base for the cap; and
- (3) it was easier to install and compact EVP using standard mobile plant.

73. In summary, the use of EVP “represented the deliberate manipulation and processing of selected materials to fulfil a defined function and to serve a useful purpose”. The appellant had, in the words of Rose J in *Patersons of Greenoakhill Limited v HMRC* [2014] UKFTT 334 (TC) at [45] taken “some action to harness the properties of an item and direct them towards a purpose of the user” (that being “the concept of intending to use something”).

74. As to the effect of the 2009 Order, he again argued that since the EVP which took the place of the “top fluff” layer was not “placed against the liner” (being separated from it by the regulating layer, and having been put in place before either that layer or the capping liner), the wording of the 2009 Order simply did not encompass it.

Outline arguments for HRMC

75. Essentially, Ms Hall argued that there was nothing significant to distinguish the appellant’s deposits of EVP from the deposits of fluff in the Fluff Appeals (which she had submitted amounted to “nothing more than the careful management of material...deploying waste deposit and emplacement procedures which are appropriate for waste being deposited and emplaced at that stage of the landfilling process. Those procedures minimise the risk of damaging the containment system, which in turn minimises the risk of harming human health and the environment. In that regard, the procedures are materially indistinguishable from those that apply to all landfilled waste.”) During the hearing of the Fluff Appeals, Ms Hall had expressed the argument very concisely when she said:

“The mere fact that you can deposit and emplace waste in a manner which serves a useful function does not lead to the conclusion that you do not intend to abandon it.”

76. In response to the three main limbs of the appellant’s arguments she argued, in outline, that:

(1) by asking whether the EVP had been “used”, the appellant was posing the wrong question. Effectively it was imposing an unwarranted gloss on the statutory phrase “disposal... with the intention of discarding the material”.

(2) in any event, the EVP had not been “used” in any relevant sense, nor did the “use” which the appellant sought to rely on negate its intention to discard the material. Rather than simply focusing on the question of “use”, the Chancellor in *WRG* had specifically used the phrase “retention and use”, which clearly had some wider meaning than simply “used”.

(3) viewed in the wider context of the EU and UK waste legislation, the deposits of EVP in this case were clearly “made by way of landfill” and “as waste”.

77. In response to Mr Cordara’s submissions as to the three respects in which the appellant’s case for EVP was even stronger than its case for top fluff in the Fluff Appeals (see [72] above), the broad thrust of her submissions was that:

(1) there was nothing magical about the shredding process; it simply represented a different way of ensuring that the waste did not contain any objects that might threaten the capping liner. This was simply a matter of operational convenience for the appellant, along with any corresponding simplifications in the process of emplacing the material; and

(2) there was disagreement between the experts as to whether the EVP provided a better outcome (in terms of reducing the risk of damage to the liner), but even if it did, that did not assist in deciding the crucial issue of intention to discard.

78. As to the argument on the 2009 Order, Ms Hall’s response was that paragraph 3(g) was concerned with the function of the relevant material, namely protection of the liner; the word “against” must therefore be construed with that purpose in mind; that whilst the EVP in the protection layer might not be immediately adjacent to the liner, its purpose was clearly to protect the liner in the same way as an overcoat might protect the skin from cold, even though not directly adjacent to it; and in any event the liner and the regulating layer should be seen for these purposes as a single entity, which the EVP was intended to protect.

Discussion and decision

Introduction

79. There are two main questions to be decided in this case. The first is whether, in the circumstances described above, the EVP was disposed of “as waste”, in particular whether the disposal was made “with the intention of discarding” it. The second is whether the disposals were “by way of landfill”.

80. The Chancellor in *WRG* at [29] gave a strong reminder that each case must be determined on the basis of its own facts by reference to the legislation, and not by seeking to apply past judgements to the facts of the current case:

“Whether or not there is a liability to landfill tax in respect of the materials to which this appeal relates depends on the proper interpretation and application of the provisions of Part III of the 1996 Act. We are bound by the decision of this court in *Customs and Excise Comrs v Parkwood Landfill Ltd*¹¹ in respect of the aspects of interpretation with which it dealt. But we are not concerned with the applicability to the facts of this case of the judgement of this court in the *Parkwood* case or of Moses J in *Customs and Excise Comrs v Darfish Ltd*. In my view the decisions of both the tribunal and Barling J are open to the criticism that too much time was taken up with the application of those judgements to the 11 categories which I have mentioned and not enough to the application of the legislation to the facts of this case.”

81. That said, the above passage also highlights that we must derive such general guidance as is possible from the earlier cases in seeking to interpret the words of the legislation in applying them to the present case.

82. It is clear (see the Court of Appeal in *Parkwood* at [22], confirmed by the Court of Appeal in *WRG* at [30] and noted by the Court of Appeal in *Patersons of Greenoakhill v HMRC*¹² at [17] and [19]) that all four conditions for liability specified in subsection 40(2) FA 96 must be satisfied at the same time and that that time must be when the last of them is satisfied, which is likely to be the moment when the material is actually disposed of. Neither side disagreed with this as a general proposition, or argued that we should apply the statutory test at any time other than the moment of deposit of the EVP in the landfill cells.

The relevance of policy and of EU law in interpreting the legislation

83. One preliminary point of interpretation is the extent to which we should have regard to the apparent policy behind the legislation or the various EU law provisions to which we were directed when applying this piece of UK legislation to the facts of these appeals.

84. In *Parkwood*, the Court of Appeal set out its view of the policy underlying the legislation:

“[9] landfill tax was introduced as from 1 October 1996 by the Finance Act 1996. The tax is a creature of domestic statute in that it is not a tax required under any provisions of Community law. However the United Kingdom does have obligations in Community law to take appropriate steps to encourage the prevention, recycling and processing of waste under EC Council Directive 75/442 of 15 July 1975 on waste (OJ L194

¹¹ [2002] EWCA Civ 1707, [2002] STC 1536

¹² [2016] EWCA Civ 1250, [2017] STC 225

25.07.75 p 39). The Environmental Protection Act 1990 is the key piece of domestic legislation enacted to meet this obligation. Landfill tax can therefore be seen as a separate domestic initiative aimed at protecting the environment and securing the ambitions of the directive.

[10] A government White Paper of December 1995 entitled *Making Waste Work* (CM3040) preceded the imposition of landfill tax. It examined the strategies to be adopted to reduce the environmental impact of waste disposal. So far as landfill was concerned, three main objectives were set out. First, to reduce the amount of waste, second to reduce the amount of material going to landfill and third to place the cost of landfill on the person disposing of the waste. In that way waste producers would become aware of the cost of their activities. The central purpose of the landfill tax was stated (at para 1.68) to be –

‘... to ensure that landfill costs reflect environmental impact thereby encouraging business and consumers, in a cost effective and non-regulatory manner, to produce less waste; to recover value from more of the waste that is produced; and to dispose of less waste in landfill sites.’”

85. In *Patersons*, the Upper Tribunal¹³ said that the policy was of little weight in the interpretation of legislation. Arden LJ in the Court of Appeal agreed “in principle”, but also said that as the ‘central purpose’ described above included the production of less waste, it was “open to the UT to hold that activities which encourage the supply of waste to the LSO [*i.e. landfill site operator*] did not further the purpose of the legislation, and to say that remained so even if by-products from the deposited material were later recycled.”

86. Ms Hall argued that if the appellant succeeded in its appeal, the effect would be to encourage the landfilling of domestic waste (albeit in shredded form), making it commercially attractive not to divert waste from landfill. This, she submitted, was clearly contrary to the stated policy. The appellant on the other hand argued that some kind of protection layer was required for the cell liner and it was preferable, in line with the stated policy, to “recruit” material that was already on its way to landfill to fulfil that function, rather than to use virgin material, thereby increasing the overall amount of material going to landfill.

87. To us, these arguments illustrate graphically the extremely limited usefulness of applying “policy” in attempting to interpret this legislation in the present context. We therefore give it little or no weight in our consideration. We note, however, that Mr Cordara’s argument on the matter proceeded on the premise that the material in question was destined for landfill in any event.

88. So far as EU law is concerned, Ms Hall sought to persuade us that there were three core reasons why we should consider EU law in interpreting the UK legislation:

¹³ [2014] UKUT 225 (TCC), [2014] STC 2178

- (1) One of the policy aims of landfill tax is to achieve EU law targets in the reduction of waste sent to landfill.
- (2) EU law imposes a general obligation to interpret national law as a whole to achieve the aims of EU law, such as the Landfill Directive.
- (3) Where domestic law incorporates concepts of EU law, regard must be had to the EU law interpretation of those concepts “to ensure a uniform interpretation of domestic and EU legal instruments”. In the present case, “waste”, “disposal by way of landfill” and “at a landfill site” were all concepts derived from the EU Waste Framework and Landfill directives.

89. Mr Cordara argued that even if Ms Hall were right, it would not advance HMRC’s case; and in any event she was wrong. In the *Fluff Appeals* it had been observed that the Court of Appeal in *Patersons* had stated at the outset that they did not wish to hear any EU law submissions, and none were made. Whilst we simply do not know whether this was the case, none of the judgements of the Court of Appeal contain any reference to it. Nor did it feature materially in any of the earlier decisions.

90. Whether or not landfill tax is a response to the U.K.’s obligations under the EU directives mentioned above, it is clear that they do not require the imposition of a landfill tax (indeed Ms Hall did not dispute the appellant’s assertion that 11 EU member states have no such tax), still less can they be regarded as having anything meaningful to say about the interpretation of what is an entirely domestic tax. Ms Hall referred us to *Pontina Ambiente SRL v Regione Lazio* [2010] 3 CMLR 1, in which the CJEU found that if a member state chose to introduce a landfill levy (as Italy had in that case), the levy had to comply with the requirements of Article 10 of the Landfill Directive 1999/31, which included the following text:

“Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site.”

91. In that case, the Italian landfill site operator was obliged to account to the regional authority for a landfill levy on waste disposed of at its sites. Its customers, local councils, were obliged to pay the operator for disposing of their waste, including the cost of the levy. There were many problems with late payment (and possibly even non-payment) of fees by the councils, as a result of which the operator was unable to pay the levy on time and was accordingly penalised. It appealed against the enforcement of the levy and the penalties, and its appeal became the subject of a reference to the CJEU, to resolve the question of whether the Italian legislation requiring payment of the levy and penalties for late payment, irrespective of the failure of the councils to pay the operator, was incompatible with the above provision.

92. The CJEU held that it could be (the actual decision being one for the national court):

“In the light of the foregoing, the answer to the first question must be that Article 10 of Directive 1999/31 must be interpreted as meaning that it does not preclude a national provision, such as that at issue in the main proceedings, which makes the operator of a landfill site subject to a levy to be reimbursed by the local authority depositing the waste and which provides for financial penalties to be imposed on that operator for late payment of the levy, on condition that those rules are accompanied by measures to ensure that the levy is actually reimbursed within a short time and that all the costs of recovery, and in particular, the costs resulting from late payment of amounts which that authority owes to the site operator on that account, including costs incurred in order to avoid any financial penalty which might be imposed on the site operator, are passed on in the price to be paid by the authority to that operator. It is for the national court to ascertain whether those conditions have been satisfied.”

93. In other words, the CJEU found that the imposition of a landfill levy was an acceptable way of achieving (wholly or partly) compliance with Article 10, but as that levy was part of the costs of the operator, it would only be permissible if its terms were such that the cost of paying the levy and any associated penalties fell on the local authorities (as the entities actually responsible for sending the waste to landfill and meeting the full costs of landfilling under the “polluter pays” principle).

94. We do not consider this decision advances Ms Hall’s argument in any way, and we find nothing of any relevance to the dispute before us in the various EU law provisions or cases to which she referred us. It may well be the case that FA 96 borrows the language of waste management used in the EU provisions, but we do not see how that logically leads on to the argument that FA 96 should be interpreted so as to bring EVP within the scope of landfill tax for the purposes of this appeal.

Was the EVP disposed of as waste?

Whose “intention” is relevant for the purposes of sub-s 64(1) FA 96?

95. As mentioned above, there was no dispute on this point: both parties agreed that the relevant intention was that of the appellant.

What was the intention of the appellants when the EVP was deposited?

96. So when the EVP was deposited, did the appellant have the intention of discarding it?

97. *Parkwood* does not really assist us in answering that question, because in that case HMRC did not dispute *Parkwood*’s claim that it did not intend to discard the relevant material (see [13] – [14]), where Aldous LJ said this:

“...they [*i.e. Parkwood*] submitted that the condition in subsection (2)(a) of section 40 was not satisfied as the disposal was not “as waste”. As the

definition of waste in section 64(1) makes clear, material used for roads and the like is not waste as the person making the disposal, Parkwood, did not intend to discard the material.

[14] The Commissioners accept the submission of Parkwood in so far as it goes, but they submitted that Parkwood's submission concentrated upon the wrong disposal. Upon the facts as found, the city council disposed of the material."

98. In *Parkwood*, the appellant company operated the landfill site and its subsidiary company, Parkwood Recycling Limited ("Recycling"), carried on the business of recycling waste. The material in question in that case was mainly derived from waste from highway works carried out by the local authority, though some other waste was mixed in with it. The VAT & Duties Tribunal¹⁴ (at [22]) described the process applied to the material as follows:

"For present purposes, the materials deposited at the recycling plant are first divided into waste and recyclable material. Those in the latter category are recycled into aggregates and fines. Aggregates are concrete and other materials sorted, crushed and mixed so as to form mixed aggregate in pieces of 70 mm, or less, in diameter. Fines are a soil like material produced by sorting and mixing suitable materials to form a product which has the appearance and many of the characteristics of soil, including the ability to support the growth of plants, and consists of pieces of material of 12 mm, or less, in diameter. (That diameter has now been increased to 25 mm or less)."

99. The tribunal went on to give more detail of the materials involved and what happened to them. The material received from the local authority was "loads consisting entirely, or almost entirely, of concrete, brick, tarmac and soil." When received by Recycling:

"...it is first sorted by hand to ensure that true waste materials such as plastic, wood and paper are removed from it. They are dispatched to landfill. Brick and tarmac are also removed by hand as they too are unsuitable for recycling purposes. (Crushed brick is however suitable as a base for informal footpaths, and crushed tarmac (planings) is predominantly used for under surfaces of footpaths. Consequently, there is a market for both materials of which Recycling takes advantage). The remaining material is then subjected to primary screening over the first screening station. That which is too big to pass through the screen is passed through the primary crusher, and is then fit for use as a coarse road sub-base. The material which has passed through the screen is separated into aggregates and fines..."

100. These aggregates and fines were then passed on to Parkwood and used by it for landscaping (the tribunal referred specifically to "intermediate blinding" and "final site restoration work") and road making.

¹⁴ [2001] Decision L00011

101. *Parkwood* was mainly concerned with whether the person making the relevant disposal of material was Parkwood or the city council, and whether the presumed intention of the city council to discard the material at an earlier point in time could satisfy condition (a) in sub-s 40(2) FA 96 whilst leaving conditions (b), (c) and (d) to be satisfied when the material was later deposited at Parkwood’s landfill site. In holding that all four conditions had to be satisfied at the same time in relation to the same disposal, the Court of Appeal held (at [31]) that:

“The tribunal were correct to concentrate upon the disposal at Parkwood’s landfill site because it was that disposal which was made by way of landfill. They rightly held that that was not a disposal as waste.
15”

102. So, having identified that the relevant disposal was made when the material was actually deposited by Parkwood, it was Parkwood’s intention that was determinative. HMRC had not disputed Parkwood’s assertion that “material used for roads and the like is not waste as the person making the disposal, Parkwood, did not intend to discard the material”; but even if they had, the above passage shows that the Court was clearly of the same view. So the Court of Appeal must have agreed that use for “road making and landscaping purposes” by Parkwood showed it had no “intention of discarding” the material in question.

103. The other conclusion that can clearly be drawn from *Parkwood* is that there is no rule that once material has been discarded as waste by somebody, it remains “waste” for the purposes of any subsequent disposals (this was described by Mr Cordara before us as “the once waste, always waste heresy”, echoing the comment of the Chancellor in *WRG* referred to at [107] below). As Aldous LJ said (at [27]):

“The commissioners also submitted that there was nothing in the statute which suggested that material which had been discarded as waste ceased to be waste because it had been successfully recycled. That submission is contrary to common sense. Take material which is thrown away. That is waste. Melt it down and mould it into a spare part for a machine and it is not waste. There need be no change in chemical substance to convert waste into a useful product. It is the act of recycling which is important.”

104. This was summed up by the statement (at [28]) that “The purpose of the legislation was to tax waste material deposited at landfill sites and not to tax deposits at landfill sites of useful material produced from waste material”, which was in turn reinforced by the decision of the Court of Appeal in *WRG* (see below).

105. Matters moved on a little in *WRG*, to which we now turn.

106. That case was concerned with the taxability of inert waste used by *WRG* either to provide daily cover for the active waste deposited in its landfill cells (as required by

¹⁵ In fact, the VAT & Duties Tribunal had made no such finding; they held that the relevant disposal was that from Parkwood Recycling Limited to Parkwood Landfill Limited (see [56] and [60] of their decision)

the terms of its licence) or in the construction of roads on its landfill sites¹⁶. The material in question was all sourced by WRG through its own waste transfer stations (to which local authorities and businesses brought their waste) and civic amenity sites which it operated under agreements with local authorities (to which members of the public brought their waste). The VAT and Duties Tribunal found that some of the material used for site engineering and daily cover was “accepted by WRG mixed with other inert material, and WRG itself extracts the material suitable for the purposes identified, while putting the remainder into the site as taxable landfill”. In other words, WRG had, by a process of separation, created material that was useful to it out of waste.

107. By the time the material was deposited at its landfill sites, ownership of it had passed to WRG. The Chancellor (in a judgement with which Arden LJ and Smith LJ agreed) held as follows (at [33] – [34]):

“[33] In those circumstances, in my view, it is clear that, assuming there to have been a disposal at all, the disposal relevant for the purposes of s 40(2)(a) was made by WRG on its own behalf. So the question posed by s 64(1) is whether WRG then intended to discard the materials. The word ‘discard’ appears to me to be used in its ordinary meaning of ‘cast aside’, ‘reject’ or ‘abandon’ and does not comprehend the retention and use of the material for the purposes of the owner of it. I agree with counsel for WRG that s 64(2) does not apply in such circumstances because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material.

[34] It follows from this conclusion that the relevant intention may well not be that of the original producer of the materials. There is no principle that material once labelled as ‘waste’ is always ‘waste’ just because the original producer of it threw it away. That is not the relevant time at which the satisfaction of the condition imposed by s 40(2) is to be considered. Recycling may indicate a change in the relevant intention but it is not an essential prerequisite; re-use by the owner of the material for the time being may do likewise.”

108. The precise wording of paragraph [33] of the Chancellor’s decision, in particular his comments about the meaning of the word “discard” and his related comments about “retention and use” was the subject of extensive debate before us, indeed in many ways the appeal revolved (as the Fluff Appeals had) largely around that paragraph.

109. In summary, Mr Cordara sought to persuade us that “use” was the antonym of “discard” (largely on the basis of that paragraph); that the evidence showed the appellant quite clearly “used” the EVP for the purpose of protecting the cell liner and cap (indeed, Ms Hall conceded as much); and that accordingly such “use” necessarily

¹⁶ The VAT & Duties Tribunal had referred at [3] to “site engineering purposes, particularly the construction of roads within the site which lorries may use in order to reach the point at which their loads are to be discharged.” This suggested that some further, unspecified, “site engineering purposes” might have been mentioned to it. The Chancellor in the Court of Appeal however (at [1]) referred only to “daily cover... or... the construction of roads”, without mentioning anything else to indicate that other “site engineering” uses were also in contemplation.

negated any suggestion that the appellant had “the intention of discarding” the EVP. He pointed to the fact that the daily cover in *WRG*, which ended up in the cell, was held not to have been put there with the intention of discarding it.

110. Ms Hall sought to persuade us that when considered in context, the Chancellor’s decision in *WRG* was not intended to lay down any general test of “use” as the means by which to assess whether there was an “intention to discard”; he had in any event referred to “retention and use”, rather than “use” alone; the EVP was not “used” in any relevant sense (being itself part of the biodegradable waste that the cells were intended to contain); and in any event the purported “use” that the appellant sought to rely on did not negate the otherwise clear intention to discard. In effect, the “use” argued for by the appellant was no more than the careful management and emplacement of waste material.

111. It is clearly appropriate to interpret what the Chancellor said in *WRG* about “disposal with the intention of discarding” and “use” in its proper context. He was considering whether the use of inert material “for daily cover... or in the construction of roads” could amount to a “disposal... with the intention of discarding the material”. He recited the VAT and Duties Tribunal’s finding that:

“One [*licence*] condition which, I understood, applies in every case is that the operator must keep sufficient stocks of inert material or suitable substitutes for use as daily cover...”

Thus it must clearly have been in the Chancellor’s mind that material intended for use as daily cover would generally be stockpiled (though of course there might be occasions when incoming waste would be used as daily cover without first being stockpiled).

112. In the nature of site engineering, particularly the construction of roads, this is likely to be an activity involving times of great activity (e.g. the construction of a new cell or laying of new haul roads) and times of little or no activity. Thus it is to be expected that materials to be used for such purposes, if sourced out of incoming waste streams, are also likely to be stockpiled pending later use.

113. So whether considering site engineering or daily cover, he clearly contemplated the relevant material generally being in some way held back or set aside before it was actually used (or re-used) for its intended purpose. In that context, the significance of his comment (at [33]) that

“the word ‘discard’ appears to me to be used in its ordinary meaning of ‘cast aside’, ‘reject’ or ‘abandon’ and does not comprehend the retention and use of the material for the purposes of the owner of it”

becomes clearer. It does not in our view establish (or even support) the proposition, as the appellant argues, that “use” is the antonym of “discard”; it merely emphasises that “retention and use” of material in the manner under consideration in *WRG* does not amount to “discarding” such material.

114. Further light is cast on the Chancellor’s thinking by the fact that he was quite clearly in doubt as to whether WRG’s actions amounted to a “disposal” at all, let alone a disposal with the intention of discarding (as he explicitly phrased his reason for disregarding s 64(2) as being “because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material.” [*Emphasis added*])

115. We note that in *Patersons* (considered further below), Rose J in the Upper Tribunal said this at [42]:

“I do not read the Court of Appeal’s decision in *WRG* as requiring that some act of ‘retention’ or separation out of a part from the rest of the whole must be identified before an operator can be said not to be discarding the waste for the purposes of s 64.”

116. We are urged to regard this passage as making it clear that no separate “act of retention” was required in order to demonstrate an intention not to discard the relevant material. At this point in her decision, Rose J was considering whether the fact that the biomass was not segregated in any way from the inert waste should be seen as implying that the biomass was simply “discarded” as part of the whole load of mixed waste. HMRC had sought to argue that because the biomass had not been so segregated, it had clearly not been “retained and used” (as referred to by the Chancellor in *WRG*) and therefore must have been disposed of as waste. All that Rose J was saying in the above passage was that she did not consider the Court of Appeal to have laid down a specific requirement in *WRG* that some identifiable act of retention or separation was required before part of a larger body of waste could be regarded as “used” rather than “discarded”. Nonetheless, she went on to say that she regarded the lack of segregation or retention as “an indicator” (but no more) that there was no intention to use the relevant part of the overall material, only to discard it.

117. The above discussion brings into sharp focus the Chancellor’s warning (at [29]) that the task before us is to consider “the application of the legislation to the facts of this case”.

118. We now turn to consider *Patersons* in more detail. At the time of the hearing, the Court of Appeal decision in that case was awaited. After it was issued, we took written submissions from the parties on its significance to this appeal.

119. It will be recalled that the context in *Patersons* was different again. The appeal was concerned with the applicability of landfill tax to some proportion of biodegradable waste that was disposed of by way of landfill. The argument was that because the taxpayer intended to use the landfill gas generated by the waste it had deposited in producing electricity, “at least one of the criteria under section 40(2) Finance Act 1996 is not fulfilled and no tax is due.”¹⁷

120. The Upper Tribunal (Rose J) in *Patersons* held at [45] as follows:

¹⁷ As recited at [6] and supplemented at [8] in the decision of the FTT.

“In my judgement, the concept of intending to use something, as the antithesis of intending to cast it aside or abandon it, involves some action to harness the properties of an item and direct them towards a purpose of the user.”

Mr Cordara, of course, seizes on this passage and points to the particular properties of EVP, and the appellant’s supposed harnessing of those properties in order to protect the liner from damage.

121. Rose J then went on to say that the biomass had not been “used”,

“because all that happens is that the biomass decomposes in the normal course and generates the gas.... I therefore hold that the biomass is not ‘used’ to make methane because the methane production is an inevitable consequence of tipping biomass into the landfill site and will occur whether the methane is collected or not and whether it is flared or not.”

122. The Court of Appeal saw things somewhat differently. So far as Arden LJ was concerned (at [51]), the appeal fell to be decided “on the meaning of ‘material’... rather than on the basis of ‘use’...”. By this, she meant that the “material” which had been disposed of was the biomass, and Patersons could not be said to have any intention to use that material; its intention was to use “all that that may become” (at [43]). The “material” referred to in the legislation was the material which was deposited, and Patersons had no intention to use that material, only the gas that was ultimately derived from it. To summarise (as Black LJ put it at [69]), “the material was the biomass and the biomass, as such, was discarded”.

123. As she considered the appeal should be decided on this basis, Arden LJ did not need to address arguments about “use”.

124. King LJ agreed with Arden LJ, but also said this:

“In so agreeing I would not however wish it to be thought that I do not recognise that a consideration of ‘use’ may in some circumstances be a valuable point in determining whether, per s 64(1), a disposal has been made ‘with the intention of discarding it’. *WRG* is an example of the importance of this.”

125. Black LJ was less certain than Arden LJ that “use” could be disregarded. Mr Cordara had offered an example of a seed, which was not in his submission discarded when it was placed in the ground, but used in order to derive benefit later when it grows. In effect, the seed was being “used” to produce a later harvest. Black LJ said this (at [72]):

“Although the question is certainly not without difficulty, I would, on balance, conclude that Patersons cannot be said to use the material, the biomass, by virtue of harvesting methane produced in the course of its decomposition. As I see it, Patersons was intending to get rid of the material by way of landfill and the methane came naturally, and

inevitably, as a later by-product of that activity. To revert to the seed example, they were not planting the seed but dumping it.”

126. Mr Cordara submitted that the Court of Appeal’s “key reasoning” was of no application in the present appeal. In his submission, however, it was noteworthy that the decision contained no consideration of EU law (indeed it repeated the earlier statement in *Parkwood* that landfill tax is a domestic tax that is not a tax required under EU law), and that there was no indication of “retention” being a relevant consideration alongside “use”.

127. Ms Hall for HMRC submitted that there was nothing in the Court of Appeal’s decision which undermined the arguments she was putting forward in relation to EVP, indeed the key point coming out of it was that it endorsed her central submission that “use” of the EVP was not sufficient to negate an intention to discard.

128. We consider that the *ratio* of the Court of Appeal’s decision in *Patersons* is only of marginal relevance to the present appeals. In focusing on the difference between the “material” that was deposited and the “material” that was intended to be used, they were comparing two very different things: the bulk of the biomass at the moment of deposit when it had not started to decompose to any material extent; and the landfill gas that would eventually emanate from the biomass as a result of prolonged chemical reactions.

129. But the Court of Appeal’s comments about “use”, such as they are, make it clear that use is “only an indicator” (albeit a potentially valuable one), and not determinative. (See King LJ’s comment at [124] above.) This makes it clear that not everything that could be characterised as “use” is sufficient to negate an intention to discard. It is appropriate to look at the wider economic and other circumstances to reach a view. As Barling J said in the High Court in *WRG*¹⁸ at [50] (in a passage tacitly approved by the Court of Appeal in *WRG* at [35]):

“No factors which serve to indicate as a matter of fact whether material is being discarded by the person concerned should be excluded from consideration unless such an interpretation of the provision is unavoidable.”

130. We also note that sub-s 64(2) FA 96 provides that “the fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant” to the question of whether the material in question is disposed of as waste. In the Court of Appeal in *WRG* at [33], the Chancellor said sub-s 64(2) FA 96 “does not apply” in a case where there has been “retention and use of the material for the purposes of the owner of it... because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material”. These comments were made (and must be understood and interpreted) in the context of the facts of that case, as summarised at [111] above. In saying this, he was not disagreeing with what had been said by Barling J in the High Court (at [38] and [50]), to the effect that a finding of material being discarded as waste renders irrelevant any question of its potential

¹⁸ [2007] EWHC 3014 (Ch), [2008] STC 1037

future usefulness. The underlying question remains as to whether the material in question, when it was finally emplaced, was the subject of a disposal with the intention of discarding it.

131. In one sense, it is clear that the material (typically shredded black bag waste) is “used” to protect the lining system – indeed Ms Hall accepted this was the case. But as we have identified above, that is not the end of the matter. It is clear that all the material was destined for landfill in any event, in the main body of landfilled waste if not as EVP. During the hearing of the Fluff Appeals, we raised the example of someone who had some waste bubble wrap and a broken glass and wrapped the glass in the bubble wrap before throwing it away, in order to avoid the glass cutting through the bin liner. When asked whether the bubble wrap should be regarded as “discarded” in this situation, Mr Grodzinski had said this:

“It is not discarded because if you didn't have the bubble wrap, you would nonetheless have to find some other material with which to wrap the broken glass and protect whoever picks up the bin bag from the bin from cutting themselves on the side of the glass. So you are not discarding it and you are using it.”

132. This example was of course concerned with a specific item of waste (the broken glass) which offered a quite clear and specific threat of damage to the bin liner in which it was to be placed. The position in this appeal is somewhat different. It is known that in general the overall body of waste to be placed in a cell will almost inevitably contain items which offer a threat of damage to the liner or capping system. In order to minimise the risk of such damage, the overall process of disposal into a cell is required to be managed so that such items are placed a safe distance from the vulnerable liner and cap. In practice, operators have found that an effective means of achieving this is to deposit domestic (or sometimes commercial, and occasionally other) waste streams as the first and last layers of waste; such streams are, in effect, pre-sorted by reason of their source so that they almost never contain items which represent a risk to the liner or cap and any residual risk is (hopefully) eliminated by the visual inspection to which they are subjected as they are laid. This appellant has simply gone one step further, and arranged for the material to be shredded before it is deposited, affording (it says) the advantages identified at [72] above. Going back to the domestic bin analogy (which is of course inexact, as this appeal is concerned with EVP placed at the top of the cell), it is as if the householder appreciates that he or she may well be putting sharp objects into the bin which could cut the bin liner, and is therefore careful to ensure that when filling the bin he or she first lines it with waste paper (or something similar) as “padding” to prevent any sharp objects later disposed of from doing so.

133. As with fluff in the Fluff Appeals, the appellant planned its tipping operations around the use of EVP, so that an intention to deposit it in a protection layer below the cap was formed, in reasonably specific terms, well in advance of its actual arrival on site; this might be seen as reinforcing the argument that the appellant had formed an intention to “use” as opposed to “discard” the material. Whatever semantic arguments there may be around what is actually meant by “use” of the material, we do not consider “use” to be the antonym of “discard” as the appellant submitted, for the reasons set out

above, and therefore we consider this submission to be based on a false premise. “Use” is an indicator to be taken into account, but no more than that. The statutory question remains: when the appellant made the disposals in question, did it do so with the intention of discarding the material disposed of? In our view, the answer to this question is it did, and the fact that the material continued to serve a useful function after such disposal does not affect this conclusion. The appellant was simply disposing of the material carefully, as the regulatory regime required it to do.

134. It should not be forgotten that the vast majority of the documents we were referred to, both in terms of industry-wide guidance and those produced by the appellant specifically in relation to its own operations, referred to the material in question in one way or another as “waste” or “refuse”, and its deposit as being the first (or last/final) layer (or lift) of it. See, for example, [17], [23], [28], [29], [36] and [48] above.

135. Mr Cordara would of course accuse us of falling into the “once waste, always waste heresy” by viewing matters in this way. We do not consider such an accusation would be justified. All of the relevant material is being disposed of into the cell, whether or not it is “needed” for “use” in the “protection” layer. There is no physical difference, apart from the shredding, between the material put into the protection layer as EVP and the rest of the similar (but unshredded) material which is simply landfilled along with all other general waste in the cell. The only other difference is the “use” to which it is supposedly put and the different way in which it is accordingly employed. We do not consider that to be sufficient to negate the otherwise obvious intention to discard the material.

Were the disposals made “by way of landfill”?

136. One point that was not in issue in *WRG* was whether the condition in sub-s 40(2)(b) FA96 was satisfied, i.e. that the relevant disposal was “made by way of landfill”; that point had been conceded by *WRG*. The Chancellor however expressed doubts about whether this concession had been correct (at [31]):

“*WRG* concedes that the material with which this appeal is concerned was disposed of by way of landfill as defined in s 65 because the provisions of sub-s (1) were literally complied with. Whether that concession is rightly made I leave to another case. For my part I entertain some doubt because although the definition in sub-s (1) is, in terms, exhaustive and unqualified it is coloured by the qualification introduced into the defined term itself by the words ‘by way of landfill’, see, for example, *Delaney v Staples* [1992] 1 All ER 944 at 947, [1992] 1 AC 687 at 692 and 44(1) *Halsbury’s Laws* (4th edn reissue) para 1389. Indeed sub-s (4), though primarily dealing with timing, might be thought to draw a distinction between the material deposited as waste and the earth or other inert material with which it was covered so as to exclude the latter from being deposited by way of landfill. If that is so then why should material used for daily cover be regarded as disposed of by way of landfill, particularly if so used more than once? Material used in road building might be regarded as more obviously not disposed of by way of landfill notwithstanding that it is necessarily deposited on the surface of the landfill site.”

137. Smith LJ did not comment on this point, whilst agreeing generally with the Chancellor's judgement. Arden LJ specifically expressed "no view on the correctness or otherwise of the concession" by WRG.

138. It is clear therefore, that WRG does not actually decide that the use of inert material for road making and daily cover is not a "disposal by way of landfill". So what of the doubts expressed by the Chancellor, and seized on by the appellant in this case?

139. Both parties are agreed that the above comments were *obiter*, and as such they are not binding on this Tribunal, though of course due consideration must be given to them.

140. The appellant argued, on the strength of the comments made by the Chancellor, that where material is used (rather than simply discarded), it is entirely inapt to regard it as having been disposed of "by way of landfill". Ms Hall argued that the comments made by the Chancellor in relation to the construction of site roads and the laying of daily cover did not apply to the deposit of EVP, any more than it applied to deposits of fluff. The construction of site roads took place entirely outside the cells, and his comments in relation to daily cover were "rooted" in s 65(4) FA 96, which itself appeared to draw a clear distinction between deposited material and the cover that was placed over it.

141. We take a different view of the significance of s 65. On its face, its purpose is to clarify the concept of "landfill" and the time when a disposal by way of landfill takes place. "Landfill" is a composite word, denoting the "filling" of land, thus implying some kind of cavity or depression to be filled. It is true that landfill sites often do take advantage of either natural or man-made cavities and depressions (which will generally be depressions on the surface but can be totally subterranean cavities – s 65 itself refers to "a cavern or mine"); they can however take the form of "land rise" sites, which take advantage of neither. We see s 65 primarily as an interpretation provision which is intended to ensure that disposal into any of these types of facilities will count as a disposal "by way of landfill". To head off any argument that no land has been "filled" with material until the land surface over it has been reinstated by covering that material with earth, sub-s 65(4) then makes it clear that the moment of deposit (rather than the moment of covering) is what generates the tax.

142. For what it is worth, we do not consider that the reference to being "covered with earth" in either sub-s 65(3) or (4) is (or can properly be construed as) a reference to daily cover but to the ultimate covering of the waste mass as a whole; just because as a matter of good practice and statutory regulation all waste in a conventional landfill site must be temporarily covered at the end of each day, that does not in our view mean that each deposit is made "with a view to it being covered" with such daily cover. Additionally, as was made clear in the evidence before us in the Fluff Appeals, a great many different materials may be used for daily cover, only some of which would fall within the definition of "earth" in sub-s 65(8).

143. We do however accept that the simple act of depositing material on the ground anywhere in a landfill site cannot have been intended to constitute a "disposal by way

of landfill”. To take an absurd example, the workman who builds a security hut inside the entrance to the site, cannot reasonably be said to have disposed of the building materials by way of landfill, even though the bare wording of s 65 might be said to have been satisfied. Similarly, the stockpiling of materials of any kind for later use would, in our view, not amount to a disposal by way of landfill, for the reasons expressed by the Chancellor in *WRG*.

144. In our view, in line with the Chancellor’s comments in *WRG*, the qualification inherent in the phrase “by way of landfill” allows a filter of common sense to be applied, to exclude deposits which are clearly not by way of landfill on any sensible interpretation. Landfill sites are designed to accommodate the landfilled material permanently in cells and not elsewhere, and we consider that the deposit of material into a landfill cell is an indicator that the material is being disposed of by way of landfill for the purposes of s 65, deposit outside such a cell being an indicator that there is no such disposal taking place. There will no doubt be some exceptions to this (the infrastructure for capturing landfill gas or pumping away leachate springs to mind), but we do not consider the deposit in a landfill cell of shredded black bag waste which is intended to remain there permanently to be one of those exceptions. Arguments around the purpose for which the material was deposited and the intention associated with such purpose are, in our view, addressed purely by reference to sub-s 40(2)(a) and s 64 and have no place in a consideration of sub-s 40(2)(b) and s 65. Were it otherwise, the arguments as to the applicability of the two sub-sections have a large degree of overlap (as effectively happened in the hearing in the Fluff Appeals before us), which cannot have been the draftsman’s intention.

145. We therefore find that the deposits of EVP were all made by way of landfill within the meaning of s 65 FA 96.

Paragraph 3(g) of the 2009 Order

146. As when interpreting any legislative provision, we must do so in accordance with its purpose. That purpose must generally be discerned from the wording actually used in the relevant context; only if the purpose still remains unclear after doing so is it permissible to look further in order to discern that purpose.

147. We consider that the language of paragraph 3(g) was quite clearly drafted with base fluff and side fluff in mind. It specifically and directly applies in those two cases, as Ms Hall accepted. It expressly contemplates there being an existing “drainage layer or liner” against which the material is placed, not the subsequent placement of a “drainage layer or liner” after the material in question has been deposited, still less the subsequent placement of a liner with a regulating layer interposed (invariably, according to the evidence) before doing so.

148. Also, as the draftsman was sufficiently acquainted with the detailed design of landfill cells to refer specifically to both the liner and the drainage layer, it can be assumed that if the protection layer beneath the regulating layer had been intended to be included, he would have had no difficulty in including appropriate wording to do so.

149. We therefore conclude that if we are wrong in our view that EVP falls within the charge to landfill tax under the general wording of sections 40, 64 and 65 FA96, paragraph 3(g) of the 2009 Order does not take effect to bring it back into the charge to tax.

Summary and conclusion

150. We consider the various deposits of EVP were all made with the intention of discarding it as waste (see [133] above).

151. We consider that those same deposits were all made by way of landfill (see [145] above).

152. If we are wrong on either of those two points, we do not consider that s 65A FA96 and paragraph 3(g) of the 2009 Order bring deposits of EVP back into the charge to landfill tax from 1 September 2009 (see [149] above).

153. Accordingly the appeal is DISMISSED.

154. 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.

**KEVIN POOLE
TRIBUNAL JUDGE**

RELEASE DATE: 11 APRIL 2018