TC01762

Appeal number TC/2009/15093

Landfill tax – payment where tax not due – claim for repayment or tax credit – Finance Act 1996 ss51, 54 & Sch 5 para 14 – Landfill Tax Regulations 1996 regs. 14, 20 & 21 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACK HARLEY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*landfill tax*) **Respondents**

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mrs Ruth Watts Davies

Sitting in public at 45 Bedford Square, London on 15 August 2011

The Appellant appeared in person

Mr Sarabjit Singh instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1 This is a claim made by a landowner, Mr Jack Harley, on 3 February 2009 for the repayment to him of £168,707.50 and interest in respect of monies paid to the commissioners between October 1996 and October 1997 as landfill tax, which it is agreed now was not in law due as such; the total claim was for £249,901.67 and fully itemised by reference to the tax paid in each month of the period.

2 The issues are: (i) whether the mistake of law under which the payments were made is fatal to the claim; (ii) whether the present claim is out of time; and (iii) whether a letter from the appellant to the commissioners dated 20 May 1998 should have been seen as a repayment or credit claim and dealt with accordingly.

Facts

3 The appellant successfully, after an initial refusal, obtained planning permission in 1990 to raise the base of a valley on his land at Valley Farm, Chitterne, Warminster by using imported subsoil and topsoil to provide an agricultural improvement, the permission specifically excluding the use of "waste, debris and rubble". On 24 December 1991, the appellant was granted a waste disposal licence by Wiltshire County Council, which restricted the disposal allowed to uncontaminated soil and subsoil and other naturally excavated material.

4 Following the introduction of landfill tax on 1 October 1996, on 20 May 1998 the appellant applied to the commissioners for exemption from the tax on the ground that "the infilling that I am attempting is classed as a waste recovery operation and not as a disposal by landfill even though it still has to be licensed under [the Waste Management Licensing Regulations 1994] as it is not an exempt activity". The appellant then unsuccessfully applied to the commissioners to cancel the landfill tax registration as of 1 October 1999 and appealed to the VAT & Duties Tribunal.

5 The case was heard on 2 November 2001 and the appeal was dismissed. The tribunal noted that it was "common ground that under Part III of the Finance Act 1996 as originally enacted Mr Harley became liable to be registered for landfill tax as a person carrying out taxable activities". After an official review of the operation of the tax, the Landfill Tax (Site Restoration and Quarries) Order 1999 exempted from 1 October 1999 disposals which constituted site restoration, in anticipation of which the appellant had made the application the subject of that appeal, contending that what he was doing was indeed restoration of the site. The tribunal held that the site was not being "restored" within the meaning of the legislation and dismissed the appeal.

6 On 29 March 2006, however, the appellant applied to the commissioners for deregistration again, this time on the ground that the site licence for Valley Farm had been amended to permit treatment of waste only and did not authorise disposals to be made; the application was accepted on 12 June and Mr Harley was deregistered. On 3 February 2009, as we have seen, the appellant wrote claiming a repayment of "landfill tax and simple interest which was paid in error September 1996 until October 1997". He said: "I pointed out to HMCE, within the three year period, (letter dated 20 May 1998) that I was receiving material on site and putting it to use. Had HMCE accepted my submissions and correctly interpreted the law, I should have been invited to reclaim all tax paid incorrectly within the three year period. ... I contend that my submissions were a *de facto* claim".

7 The appellant based his claim on the decision in *CRC v Waste Recycling Group Limited* [2009] STC 200, a decision of the Court of Appeal which showed that the activity for which the appellant had been registered was not taxable, and he argued that he ought never therefore to have been registered. Citing the tribunal decision referred to above, the appellant argued that it had been accepted that he had written to the respondents on 20 May 1998 explaining that he was reusing waste and that the incidence of the tax was in fact discouraging him from doing so. The VAT & Duties Tribunal had found in favour of the respondents' interpretation of section 64 of the Finance Act 1996, now effectively overruled by *Waste Recycling Group*.

8 Since the letter of 20 May 1998 is so central to the appellant's case, we will quote it in full. "To Mr G Byrne, H M Customs & Excise:

> Dear Sir
>
> *Re telephone conversation with you today; Landfill Tax Exemptions*
>
> I was glad to have a conversation with you today and felt I would like to write you a letter to confirm what I said.
>
> I reiterated that I had a licensed site under the 1990 regs because of the size of the facility and the need for the E.A. to monitor its activities. I have been subject to Landfill Tax but am now to all intents closed as I cannot compete with the Licence Exempt sites in the locality.
>
> I stated that I had permission for an agricultural improvement on my land, and had gained planning permission by proving the benefits of the scheme, and so under Schedule 3 part 4 No 10 of the Waste Management Licensing Regs 1994 the infilling I am attempting is classed as a Waste Recovery Operation and not as a disposal by landfill even although it still has to be licensed under those regs as it is not an exempt activity.
>
> I understand that I am at present subject to landfill tax, but as you state in the Review of the landfill Tax Report of March 1998 para 3.1 'The tax has two main environmental objectives ... and to promote ... more waste is either reused or ...'. I am in a situation where I am reusing waste, as is environmentally sound and subject to the tax which is supposed to be promoting the activity I am trying to engage in, but is actively preventing me from doing so.
>
> You explained you were looking into all aspects of the proposed exemptions for the lower rate of landfill tax and intimated that there was a desire to get the tax fair in this adjustment of the law, and also on the revenue implications of your adjustments.
>
> I would like to conclude that it would be very unfair if my class of facility was not exempted and also assure you that it will be very unlikely to affect the revenue raised as I can see no way of reopening unless this site is also exempted from the lower rate tax.
>
> I will keep in touch with you as this subject is very important to me and please do not hesitate to contact me if you have any queries.
>
> Yours sincerely"

9 The issue before the Court of Appeal in *CRC v Waste Recycling Group* concerned a claim for repayment of landfill tax paid in respect of inert materials used between 1 October 1996 and 30 September 2002 on the ground that the materials had not been disposed of "as waste" and that there had therefore been no taxable disposals. The facts of the case showed that waste material was deposited at landfill sites on the surface of the land and was covered with a layer of inert material, as required by the site's licence to prevent the waste deposited blowing away or giving off bad odours etc. The inert material had to be acquired by the taxpayer and at times it found itself in competition with golf clubs, farmers and landscapers; it was also used for the construction of roads internal to the sites.

10 The issue relevant to the present appeal turned on the interpretation of section 64(1) of the Finance Act 1996 which provided that –

> (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.

In relation to that, Sir Andrew Morrit C, giving the judgment of the court, said at [33]:

> So the question posed by s64(1) is whether WRG then intended to discard the [inert] 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.

11 It is common ground in the present appeal that the effect of the decision in *CRC v Waste Recycling Group* is that the appellant's activities were never taxable and that the sums paid to the commissioners were not therefore due. We must now set out the legislation relative to refunds of tax which bear on the appellant's claim.

Legislation

12 At the material time, Schedule 5 to the Finance Act 1996 provided, at paragraph 14 –

(1) Where a person has paid an amount to the commissioners by way of tax which was not tax due to them, they shall be liable to repay the amount to him.

(2) The commissioners shall only be liable to repay an amount under this paragraph on a claim being made for the purpose.

(3) It shall be a defence, in relation to a claim under this paragraph, that repayment of an amount would unjustly enrich the claimant.

(4) The commissioners shall not be liable, on a claim made under this paragraph, to repay any amount paid to them more than three years before the making of the claim.

(5) A claim under this paragraph shall be made in such form and manner and shall be supported by such documentary evidence as may be prescribed by regulations.

(6) Except as provided by this paragraph, the commissioners shall not be liable to repay an amount paid to them by way of tax by virtue of the fact that it was not tax due to them.

13 Section 51 of the Act provided –

(1) Regulations may provide that where—

(a) a person has paid or is liable to pay tax, and

(b) prescribed conditions are fulfilled,

the person shall be entitled to credit of such an amount as is found in accordance with prescribed rules.

(2) Regulations may make provision as to the manner in which a person is to benefit from credit, and in particular may make provision—

(a) that a person shall be entitled to credit by reference to accounting periods;

(b) that a person shall be entitled to deduct an amount equal to his total credit for an accounting period from the total amount of tax due from him for the period;

(c) that if no tax is due from a person for an accounting period but he is entitled to credit for the period, the amount of the credit shall be paid to him by the Commissioners;

(d) that if the amount of credit to which a person is entitled for an accounting period exceeds the amount of tax due from him for the period, an amount equal to the excess shall be paid to him by the Commissioners;

(e) for the whole or part of any credit to be held over to be credited for a subsequent accounting period;

(f) as to the manner in which a person who has ceased to be registrable is to benefit from credit.

(3) Regulations under subsection (2)(c) or (d) above may provide that where at the end of an accounting period an amount is due to a person who has failed to submit returns for an earlier period as required by this Part, the Commissioners may withhold payment of the amount until he has complied with that requirement.

(4) Regulations under subsection (2)(e) above may provide for credit to be held over either on the person's application or in accordance with directions given by the Commissioners from time to time; and the regulations may allow directions to be given generally or with regard to particular cases.

(5) Regulations may provide that—

(a) no benefit shall be conferred in respect of credit except on a claim made in such manner and at such time as may be determined by or under regulations;

(b) payment in respect of credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances;

(c) deduction in respect of credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to the payment to the Commissioners, in specified circumstances, of an amount representing the whole or part of the amount deducted.

(6) Regulations may require a claim by a person to be made in a return required by provision made under section 49 above.

(7) Nothing in section 52 or 53 below shall be taken to derogate from the power to make regulations under this section (whether with regard to bad debts, the environment or any other matter).

14 Section 54 of the Act (appeals) provided that-

(1) Subject to section 55, an appeal shall lie to an appeal tribunal from any person who is or will be affected by any of the following decisions –

. . .

(c) a decision as to whether a person is entitled to credit by virtue of regulations under section 51 above or as to how much credit a person is entitled to or as to the manner in which he is to benefit from credit;

. . .

(i) a decision as to a claim for repayment of an amount under paragraph 14 of Schedule 5 to this Act;

15 In regard to claims for overpaid tax, regulation 14 of the Landfill Tax Regulations 1996 provided:

> 14 Except where the amount to which the claim relates has been entered in a return in accordance with regulation 13 or is included in an amount so entered, any claim under paragraph 14 of Schedule 5 to the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated.

16 Regulations 20 and 21 provided for entitlement to credit and payment:

> 20(1) Subject to paragraph (5) below, where the total credit claimed by a registrable person in accordance with this Part exceeds the total of the tax due from him for the accounting period, the Commissioners shall pay to him an amount equal to the excess.
>
> (2) Where the Commissioners have cancelled the registration of a person in accordance with section 47(6) of the Act, and he is not a registrable person, he shall make any claim in respect of credit to which this Part applies by making an application in writing.
>
> (3) A person making an application under paragraph (2) above shall furnish to the Commissioners full particulars in relation to the credit claimed, including (but not restricted to)—
>
> (a) except in the case of an entitlement to credit arising under Part VII of these Regulations, the return in which the relevant tax was accounted for;
>
> (b) except in the case of an entitlement to credit arising under Part VII of these Regulations, the amount of the tax and the date and manner of its payment;

(c) the events by virtue of which the entitlement to credit arose.

(4) Subject to paragraph (5) below, where the Commissioners are satisfied that a person who has made a claim in accordance with paragraphs (2) and (3) above is entitled to credit, and that he has not previously had the benefit of that credit, they shall pay to him an amount equal to the credit.

(5) The Commissioners shall not be liable to make any payment under this regulation unless and until the person has made all the returns which he was required to make.

21(1) An entitlement to credit arises under this Part where-

(a) a registered person has accounted for an amount of tax and, except where the removal by virtue of which sub-paragraph (b) below is satisfied takes place in the accounting period in which credit arising under this Part is claimed in accordance with Part IV of these Regulations, he has paid that tax; and

(b) in relation to the disposal on which that tax was charged, either-

(i) the reuse condition has been satisfied; or

(ii) the enforced removal condition has been satisfied.

(2) The reuse condition is satisfied where—

(a) the disposal has been made with the intention that the material comprised in it—

(i) would be recycled or incinerated, or

(ii) removed for use (other than by way of a further disposal) at a place other than a relevant site; [“or

(iii) removed for use in restoration of a relevant site and the material involved has previously been used to create or maintain temporary hard standing, to create or maintain a temporary screening bund or to create or maintain a temporary haul road;]

(b) that material, or some of it, has been recycled, incinerated or permanently removed from the landfill site, as the case may be, in accordance with that intention;

(c) that recycling, incineration or removal—

(i) has taken place no later than one year after the date of the disposal; or

> (ii) where water had been added to the material in order to facilitate its disposal, has taken place no later than five years after the date of the disposal; and
>
> (d) the registered person has, before the disposal, notified the Commissioners in writing that he intends to make one or more removals of material in relation to which sub-paragraphs (a) to (c) above will be satisfied.
>
> (6) The amount of the credit arising under this Part shall be equal to the tax that was charged on the disposal; except that where only some of the material comprised in that disposal is removed, the amount of the credit shall be such proportion of that tax as the material removed forms of the total of the material.

Submissions

17 At the hearing of the appeal, it appeared to us that the review of the appellant's appeal by HMRC had not clearly taken on board the argument that his letter of 20 May 1998, by reference to which his application of 3 February 2009 was made, was a claim for a tax credit pursuant to section 51 of the 1996 Act. We therefore requested written submissions on the appellant's argument that his letter of 20 May 1998 should have been accepted as a claim for credit pursuant to section 51 of the Finance Act 1996 and regulation 21 of the Landfill Tax Regulations 1996, that his letter of 3 February 2009 was in pursuit of that claim, that the respondents' review decision of 21 September 2009 did not address the appellant's claim on that basis (the refusal of the claim made on 20 May 1998 being stated to be the ground of this appeal).

18 Submissions were duly made on 16 November and 16 December 2011, both parties confirming that they were content that the matter should now be determined by the tribunal without a further hearing.

19 The appellant had originally argued that landfill tax was imposed in the United Kingdom as an obligation in the implementation of Directive 75/442 on waste and that, consequently, the decisions of the Court of Justice relating to time limits on claims for repayment of overpaid tax were in point. This point was not pursued, however, in the light of the very categorical ruling of the Court of Appeal in *CEC v*

Parkwood Landfill Ltd [2002] STC 1536, at [9] that "Landfill tax was introduced from 1 October 1996 by the Financed Act 1996. The tax is a creature of domestic statute in that it is not a tax requited by any provisions of Community law." Although the appellant considers this decision wrongly made, he accepted that the tribunal is bound by it and can take the matter no further. A cognate argument that the three year limit had been wrongly introduced by Business Brief 58/08 issued after *Waste Recycling Group,* and that it had not been applied against the taxpayer in that case, was put but not strongly pursued.

20 Given this position, and the prospect of the time limit in paragraph 14 defeating his claim, the principal argument then adopted by the appellant was that the activity he carried out at his premises was exactly covered by the finding in *Waste Recycling Group* and that he was - and still is – entitled to credit under section 51. (The respondents concede that there is no time limit applicable to credit claims under section 51, and indeed that such a claim could be made even now.)

21 The appellant's contention that section 51 applies to his case is based on the findings of fact in his previous tribunal appeal which we refer to above. Thus, all the material deposited at his site was used in site engineering, consistently with the then current planning permission for agricultural improvement; it was not deposited as waste. The *Waste Recycling Group* case having decided that that activity did not fall within the scope of the tax, the appellant thus found himself squarely within the ambit of regulation 21(1)(a), (1)(b)(i), (2)(a)(i), (2)(b), (2)(c)(i). Regulation 21(2)(d) was not, the appellant contends, applicable since the commissioners already knew what his activities consisted of. In other words, the argument is that the "reuse condition" was satisfied, that a credit was therefore due and should have been paid pursuant to section 51(2)(c); regulation 20 was complied with by the letter of 3 February 2009.

22 As has been indicated, the respondents had not seen that letter as a credit claim. They argued that the matter was simply barred by the time limit in paragraph 14: that the letter of 20 May 1998 was not in its terms a claim for repayment of any sort, and that the letter of 3 February 2009 was of course a long way out of time; in *Waste*

Recycling Group the three year time limit had been applied to the taxpayer's successful appeal there and there was no inconsistency of treatment.

23 The respondents submit that section 51 deals with cases in which tax has undoubtedly been paid correctly and does not duplicate, or overlap, paragraph 14. The very arguments used by the appellant to show that he was never liable to landfill tax demonstrated that what he had paid was not tax, and therefore not within the scope of section 51 at all. The decision in *Waste Recycling Group* had, as was usual, declared the law as it always had been and there was thus no question but that the payments had not been of tax due.

Conclusions

24 It is impossible to see the appellant's letter of 20 May 1998 as a repayment claim under paragraph 14, or as a claim for credit under section 51. It is a request that a proposed exemption then in contemplation should cover the appellant's situation, and a promise that *he* would "keep in touch" with HMRC in view of the importance of the matter to him, no more.

25 The time limits imposed by paragraph 14 are clearly not affected by Community law considerations, because the landfill tax is an entirely national construct for which the ultimate authority remains in parliamentary legislation. The only way in which the claim can therefore succeed is by coming within the scope of section 51, as a claim for credit, for which it is accepted that there is no time limit. No argument was put to us that the appellant's letter of 3 February 2009 was not a valid claim for credit, and it may well satisfy the requirements of the legislation as such a claim, though there is a question mark over compliance with regulation 21(2)(d).

26 However that may be, we see force in the respondents' argument that to come within section 51 a payment must indisputably be of tax that was in the first instance due and paid, which the appellant's tax was not (i.e. in so far as it was not due). Paragraph 14 refers explicitly to "an amount [paid] to the commissioners by way of tax which was not tax due to them", whereas section 51 refers merely to "tax" without any qualifying words.

27 Where, as here, the legislature employs different terms to describe similar events, it must be assumed that a difference in meaning is intended, with the result that paragraph 14 enables a case of a payment made under a mistake of law to escape the usual consequences of such a mistake - that the money is irrecoverable - whereas section 51 does not have that effect.

28 The appeal must therefore be dismissed.

Appeal rights

29 This document contains the 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 no 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 20 January 2012