TC02740

Appeal number: TC/2010/09368

AGGREGATES LEVY – aggregate extracted from pit and used in construction of dams and causeway around reservoir – commercial exploitation – whether aggregate "again becomes part of the land at the site from which it was won" (Finance Act 2001, s19(3)(e)) – yes- appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTHUMBRIAN WATER LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JO NEILL

Sitting in public at 45 Bedford Square, London on 24, and 25 October 2012

Rupert Baldry QC and Thomas Chacko, counsel, for the Appellant

Christiaan Zwart, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against HMRC's decision to register the appellant for aggregates levy. The levy is charged on aggregate which is subjected to commercial exploitation but there is an exception available when the aggregate becomes part of the land "at the site from which it was won".

2. The appellant, a regulated water and sewerage company provides water and sewerage services in Northumbria and in Essex and Suffolk. The appeal concerns the construction works involved in raising the level of Abberton reservoir south of Colchester in order to increase its storage capacity.

3. Gravel was needed to enlarge the main reservoir dam, the causeway across the dam and to construct further dams around the edge of the reservoir. This was obtained from a pit some 500m away from the reservoir known as the Rye Borrow Pit. It is not in dispute that the gravel became part of the land by being used in structures (the dams and causeway) which are treated as land. The particular issue for consideration is whether the Rye Borrow Pit, the dams and causeway were all part of a single "site" for the purposes of the exception available for when aggregate become part of the land "at the site from which it was won". The appellant argues the dams, causeway and pit were a single "site". HMRC disagree, they say the sites of the dams and causeway are not the site from which the gravel was won i.e. the site of Rye Borrow Pit.

Evidence

4. On behalf of the appellant we heard oral evidence from Jim Jenkins, a chartered engineer with 31 years experience in the water industry, who worked for the appellant as the programme manager for the scheme of works at Abberton. He had been involved in the scheme for the last 15 years, the last 7 in a full time capacity. Mr Jenkins' evidence covered the background relating to the water supply system, the origin of the scheme to increase the water storage capacity at Abberton, the planning aspects to the scheme, and the construction works. Mr Jenkins was cross-examined by HMRC. On behalf of HMRC we heard oral evidence from HMRC Officers Phillip Hayes and Jim Donnachie. The statements of Mr Hayes and Mr Donnachie related to the correspondence, assessments and reviews which are the subject of the appeal. Mr Hayes' evidence also covered his visit to the surroundings of the reservoir and pit.

5. We had 2 lever arch bundles which contained various photographs and maps, planning permission and planning application documents, and correspondence between the parties.

Law

Aggregates Levy

6. Aggregates levy was introduced by Part 2 of the Finance Act 2001 "FA2001". Under s16(2) of FA2001 the levy is charged whenever a quantity of "taxable aggregate" is subjected to "commercial exploitation" in the United Kingdom.

7. "Aggregate" is defined in s17 as

> "any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it."

8. It is common ground that the material being used in this case is aggregate.

9. Section 17 provides that any aggregate is, in relation to any occasion on which it is subjected to commercial exploitation, "taxable aggregate", subject to a number of exceptions, none of which apply here.

10. The question arising in this case is whether or not the gravel is subjected to "commercial exploitation", as defined by section 19 of FA2001:

> 19 Commercial exploitation
>
> (1) For the purposes of this Part a quantity of aggregate is subjected to exploitation if, and only if -
>
> (a) it is removed from a site falling within subsection (2) below;
>
> (b) it becomes subject to an agreement to supply it to any person;
>
> (c) it is used for construction purposes; or
>
> (d) it is mixed, otherwise than in permitted circumstances, with any material or substance other than water.
>
> (2) The sites which, in relation to any quantity of aggregate, fall within this subsection are –
>
> (a) the originating site of the aggregate;
>
> (b) any site which is not the originating site of the aggregate but is registered under the name of a person under whose name that originating site is also registered;
>
> (c) any site not falling within paragraph (a) or (b) above to which the quantity of aggregate had been removed for the purpose of having an exempt process applied to it on that site but at which no such process has been applied to it.
>
> (3) For the purposes of this Part the exploitation to which a quantity of aggregate is subjected shall be taken to be commercial exploitation if, and only if –
>
> (a) it is subjected to exploitation in the course or furtherance of a business carried on by the person, or one of the persons, responsible for subjecting it to exploitation;

(b) the exploitation to which it is subjected does not consist in its removal from one registered site to another in a case where both sites are registered under the name of the same person;

(c) the exploitation to which it is subjected does not consist in or require its removal to a registered site for the purpose of having an exempt process applied to it on that site;

(d) the exploitation to which it is subjected does not consist in or require its removal to any premises for the purpose of having china clay or ball clay extracted or otherwise separated from it on that site; and…

(e) the exploitation to which it is subjected is not such that, as a result and without its being subjected to any process involving its being mixed with any other substance or material (apart from water), it again becomes part of the land at the site from which it was won.

11. Section 48(1) provides that "originating site" shall be construed in accordance with section 20.

12. Section 20 provides that references in FA2001 to the "originating site" in relation to any aggregate are (at least for the purposes of the present case) references to "the site from which the aggregate was won".

13. Section 48(1) provides that "construction purposes" shall be construed in accordance with s48(2) which provides as follows:

(2) References in this Part to the use of anything for construction purposes are references to either of the following, except in so far as it consists in the application to it of an exempt process, that is to say—

(a) using it as material or support in the construction or improvement of any structure;

(b) mixing it with anything as part of the process of producing mortar, concrete, tarmacadam, coated roadstone or any similar construction material.

14. Section 48(3) provides that:

(3) References in this Part to winning any aggregate are references to winning it—

(a) by quarrying, dredging, mining or collecting it from any land or area of the seabed; or

(b) by separating it in any other manner from any land or area of the seabed in which it is comprised.

15. Section 30 enables the Commissioners to make provision by regulations in relation to entitlement to tax credit on the levy after a charge to a levy has arisen. It provides where relevant:

> 30 Credit for aggregates levy
>
> (1) The Commissioners may, in accordance with the following provisions of this section, by regulations make provision in relation to cases where, after a charge to aggregates levy has arisen on any quantity of aggregate—
>
> …
>
> (d) any of that aggregate is disposed of (by dumping or otherwise) in such manner not constituting its use for construction purposes as may be prescribed; or
>
> …

16. Regulation 13 of the Aggregates Levy (General) Regulations 2002 provides:

> 13—
>
> (1) This regulation applies to a person who has commercially exploited taxable aggregate and who has accounted for the [aggregates levy] chargeable on that commercial exploitation.
>
> (2) Such a person is entitled to a tax credit in respect of any [aggregates levy] accounted for in respect of that commercial exploitation where the taxable aggregate in question—
>
> …
>
> (d) is disposed of (by dumping or otherwise) in any of the following ways:
>
> (i) it is returned without further processing to its originating site or any site which is not its originating site but is registered under the same name;
>
> …

17. Section 5 of the Interpretation Act 1978 provides that "in any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to the Act are to be construed according to that Schedule".

18. Schedule 1 of the Interpretation Act 1978 provides:

> "Land" includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.

Cases referred to

19. *Hochtief Ltd v Revenue and Customs Commissioners* [2009] UKFTT 321(TC)

20. *Customs and Excise Commissioners v East Midlands Aggregates Ltd* [2004] EWHC 856 (Ch)

Facts

21. In setting out our findings of fact we have drawn extensively from a number of facts which were agreed between the parties. Some of the facts on the appellant's statement were not agreed by HMRC as at the beginning of the hearing, however having considered the evidence before us and in particular Mr Jenkins' adoption of the appellant's statement of facts in giving his evidence, we were able to make further findings of facts suggested by the appellant's statement of facts. All the witnesses were credible. Mr Jenkins was a particularly impressive and helpful witness. He was able to recall a vast amount of detail and was patient in explaining technical terms in terms the Tribunal could understand. He gave his answers carefully and precisely.

22. Where we have found facts on the basis of our own inferences from examination of maps we make this clear.

Background to appellant and the water supply system

23. The appellant is one of the ten regulated water and sewerage businesses in England and Wales. It operates in the north east of England where it trades as Northumbrian Water, and in the south east of England where it trades as Essex & Suffolk Water ("ESW"). Northumbrian Water currently provides water and sewerage services to 2.7 million people and ESW provides water services to 1.8 million people in a combined area of over 12,260 square kilometres.

24. ESW supplies two separate areas, the "Essex Supply Area" and the "Suffolk Supply Area". The geographical physical area of the Essex Supply Area is 593.8 square miles. The Essex Supply Area covers around half of the county of Essex, stretching from around Braintree to the Thames and including the London Boroughs of Redbridge, Barking and Havering. The Essex Supply Area is fed by an integrated water network in that water from the five treatment works feeds in to a common system of pipework so that each water treatment works ("WTWs") supplies its own locality and can be used to serve other parts of the supply area. The appellant manages the treatment works. These five WTWs are fed by: the Rivers Stour, Chelmer and Blackwater by water pumped from the Lea Valley Reservoir to Chigwell Treatment Works or in the case of Layer WTW by Abberton Reservoir.

25. The Layer WTW is the second largest in the Essex supply area. It consists of the Abberton Reservoir and the Layer Treatment Works. Abberton is a pumped storage reservoir meaning rather than water flowing naturally into it is filled from water extracted by pumps from the River Stour. Additional water is pumped into the River Stour from the Ely Ouse in Norfolk by transfer through the Ely Ouse to the Essex Transfer Scheme.

26. Layer WTW is fed by Abberton Reservoir. It operates to produce drinking water as a single system with the reservoir, the Layer Pits and the network of pipes and machinery that connect them. Water is collected by pumps in the Abberton Reservoir then pumped to Layer WTW which produces drinking water and waste water; the

drinking water is supplied to the public of South Essex as far as the Thames, the waste water is pumped to the Layer Pits in which it settles before the clean water runs back to the reservoir. The Layer Pits were originally dug to source gravel for the construction of the Abberton Reservoir in the 1930s. The overflow water from the Layer Pits passes over a weir and returns to Abberton reservoir by a pipe. There is a constant circuit of water from the reservoir to the Treatment works to the Layer Pits and back to the reservoir. The length of the circuit is approximately 3000m.

The reservoir-raising project

27. The appellant began planning improvements to the water infrastructure in Essex in 1993 due to the Essex Supply Areas being frequently in deficit of supply to demand.

28. In 1998 after considering various options, the appellant decided to raise the level of the Abberton Reservoir by 3.2 metres so as to retain more water from winter rain and from surplus years.

29. The appellant was aware that suitable material in the form of gravel was available on land it already owned in the vicinity of the reservoir. It did not need to procure that material from a site owned by a third party.

30. The Abberton Reservoir Raising Project is one of four related and interconnected projects which serve to increase the storage capacity of Abberton Reservoir and to increase the network capacity of supplying Abberton Reservoir with water.

31. The other projects were to increase the capacity of Kennet Pumping Station so more water can be sent to Abberton via the Ely Ouse transfer scheme, building a new pumping station at Wormingford on the Stour from where water will be pumped into the River Stour, and a transfer enhancement scheme consisting of two new sections of 16km pipeline.

32. The Abberton Scheme will increase water storage capacity approximately 60% from 25.8 million megalitres to 40.8 million megalitres.

Ramsar Convention designation / wildlife sanctuary

33. The Abberton Reservoir is a recognised bird sanctuary being a Site of Special Scientific Interest under the Wildlife and Countryside Act 1981, a wetland of international importance under the Ramsar convention and a Special Protection Area under the Birds Directive 2009/147. This meant that the works conducted had to be approved under the Conservation (Natural Habitats &c.) Regulations 1994, which required the appellant to satisfy Natural England that there would be “no significant effect during or after construction” on the bird sanctuary. The documents accompanying the planning application explain the environmental matters relating to Abberton Reservoir.

34. The designation under the Ramsar convention was specifically in respect of the water body of the reservoir.

Geographical description of area

35. Abberton reservoir is located in a rural location 4 miles to the southwest of Colchester. It is surrounded by agricultural land and dispersed properties and farmsteads. Access to the vicinity of the reservoir from the A12 and A133 is gained via a network of rural lanes.

Reservoir

36. The following is our description of the reservoir from looking at various maps which we were referred to (which were themselves based on Ordnance Survey maps). One of those maps is annexed to this decision for reference. The reservoir is an irregular shaped body of water longer than it is wide. The rough length of the whole reservoir is 5.2km. It stretches roughly diagonally from a south west point to a north east point. From information contained in an explanatory booklet (produced for the public) about Abberton reservoir and its history we accepted that the perimeter of the reservoir is roughly 11 miles (which equates to 17.7km).

37. The reservoir is divided into 3 sections, the smallest being the western section which is bound by a causeway with a small road over the layer Breton CP causeway to the east, a larger central section which is bound by two causeways, the layer Breton CP causeway to the west and the B1026 causeway to the east, and a much larger main section on the other (eastern) side of the B1026 causeway. The rough length of this section is 3.4km. The width at its widest in this part of the section is 1.6km and at its narrowest is 0.4km.

Dams

38. The main dam is on the North-eastern corner of the reservoir. It is roughly 0.5km long and runs roughly along an east /west axis. The B1026 causeway is roughly 0.4km long.

39. The various "col" dams where gravel was also used are located on the southern perimeter of the main section of the reservoir. The term "col" dam refers to dams which prevent the reservoir flooding low-lying farmland in various places around its edge.

Rye Borrow Pit

40. Rye Borrow pit is to the northwest of the rough midpoint of the northern bank of the main section of the reservoir. It is roughly rectangular shaped and has a surface area of 3.2 hectares. The distance from its closest edge to the closest point of the reservoir is roughly 0.5km.

Layer Pits

41. These are located to the west of Rye Borrow Pit and to the east of the Layer WTW, on the eastern side of the B1026.

Blind Knights Pit

42. About three quarters of the way up the main section of the reservoir heading south-west to north-east, close to the North shore of the reservoir is the Blind Knights pit from which clay has been dug.

Processing plant

43. The processing plant at which the gravel was sorted and washed is also close to the North shore of the main section of the reservoir, approximately 100m to the west of Blind Knights Pit and approximately 600m down a track from Rye Borrow Pit.

Extraction

44. Prior to extraction of gravel the topsoil on the site of Rye Borrow Pit was removed to make bunds (earth embankments) around the edges of the Rye Borrow Pit.

45. Excavation began in March 2010. The gravel was excavated by long-reach excavators operating within the pit. The gravel was loaded into large dumper trucks.

Screening

46. Gravel was taken from the pit 600m along a track to a washing and screening plant closer to the reservoir. The track was temporary and was constructed specifically for the purpose of allowing movement of the gravel. The gravel was not treated but washed and sorted before being moved to other parts of site. Processing of granular material consists of passing it through a series of sieves to grade it for size and in some cases washing out fine material.

47. The plant was in active use until the end of 2011. Granular material had to be taken 2km in dumper trucks from the screening plant to the main dam which was being worked on from January 2011 to August 2012 and to other areas around the reservoir.

Use of gravel in structures

48. The gravel is tipped out into the position where it was to be used. Bulldozers levelled the gravel dumped in that location to produce a 150mm layer of gravel. A thicker layer of clay was put on top of it. Another similar layer of gravel was then poured out and spread.

49. Gravel from Rye Borrow Pit was to be used for the following structures: the Main Dam (upstream slope, filters, drains and parts of downstream slope) 100,000m^3,

the Glebe Col Dam filters and drains 10,000 m³, the Moulsham Col Dam filters and drains 10,000 m³, the Billets Col Dam filters and drains 10,000 m³, the Causeway shoulders 21,000 m³, the Peldon Col Dam drains 5000 m³, and for miscellaneous drainage for headlands and other structures approx 5000 m³.

50. Gravel is used in these constructions to produce drainage layers, as a layer of gravel is water-permeable. The presence of a drainage layer prevents water pressure building up on the downstream slope (i.e. opposite to the reservoir) of the dam.

51. In total between 160,000 and 200,000 m³ of granular material were used in the construction process.

Filling in Rye Borrow Pit

52. A dewatering process was carried out in Rye Borrow Bit into the Layer Pits in order to allow the Rye Borrow Pit to be dug and refilled dry.

53. As at the hearing the bunds around Rye Borrow Pit were still there. The last activity will be to push the topsoil back.

State of progress as at hearing / Future plans

54. In the summer of 2011 Rye Borrow Pit began to be refilled with clay material surplus to other works around the site so as to be returned to agricultural use after the contract completion.

55. Construction is due to be completed February 2013. There had been a couple of extensions of time due to weather conditions and contractual completion was running slightly behind. Physical completion of all the works is expected by August 2013.

56. As at the date of the hearing the main dam had been completed to full height as well as the col dams. There was still work to do on the causeway and structural work to do at the pumping station.

57. Rye Borrow Pit will be backfilled with materials comprising clays and soil from around the construction site in August 2011. As at the date of the hearing it had been 90% refilled. It is to be left to settle and will have topsoil added by the spring of 2013.

58. After the Rye Borrow Pit has been returned to a suitable physical condition, it will be let to potential tenants subject to occupancy conditions (to be agreed) appropriate to protection the operation of the water works and the nature reserve. The appellant needs to be able to restrict the operations of its farming tenants because where land is within the catchment area of the reservoir, chemicals used by farmers are likely to enter the water supply. The needs of the bird sanctuary also require that the appellant exercises some control over the land it owns close to the reservoir, for example to create and preserve wildlife habitats on the farmland and to prohibit shooting.

Distances from Rye Borrow Pit to various locations where gravel used

59. We were shown a map that was attached to the appellant's planning application, which showed the reservoir, Rye Borrow Pit, and all the locations where gravel had been used in structures relevant to this appeal namely the main dam, the causeway and the various col dams. The map was stated to be based on the Ordnance Survey's 1:10 000 map of 2002. The map had a scale marking showing 1000m approximated to 3.7cm on the copy we were shown. Using that scale marking we calculated the following approximate distances (as the crow flies). The distances of actual routes would be longer because of the need to travel around the perimeter of the reservoir.

60. The following are approximate distances from the centre of Rye Borrow Pit to the various points where the gravel was used:

(1) To the nearest point of the main dam, 1.2km, the furthest point of the main dam, 1.75km.

(2) To the nearest point of the causeway 2km, to the furthest, 2.4 km.

(3) To Glebe col dam, 2.7km, to Peldon col dam, 2.4 km, to Moulsham col dam, 3 km, and to Billets col dam, 2.9 km.

Construction contract

61. The works at Abberton Reservoir (being the construction of the enlarged reservoir by means of raising the main dam, the col dams and the B1026 causeway, the diversions of the B1026 and the extractions from the Rye and Blind Knight's Borrow Pits) are operated as one site under a construction contract under the control of Carillion who are carrying out the works.

62. The construction contract was tendered for through a notice in the Official Journal of the European Union. It took the form of a particular NEC (the New Engineering Contract) ("Option C") contract which comes from a suite of standardised suite of contracts. The contract itself was not before tribunal but we accepted Mr Jenkins was familiar with it. We accepted his evidence on its terms and operation. It had a target price of £45 million.

63. We were shown a map (Figure 410/002962-04/01/329/1336 A – a copy of which is annexed to this decision for reference) which showed the boundary of the construction site as set out in the construction contract as a thick black dotted line. We accept this was the construction boundary stipulated in the Carillion contract.

64. Anything earthworks related on the construction site was handed over to the control of Carillion Civil Engineering for the duration of the works. Carillion subcontracted physical excavation to Lancasters. Carillion control site access from two entrances, one for the north compound and one for the south compound, although the whole of the construction site can be accessed from either of the compounds. Personnel needed a pass to be in the construction area. If the appellant required access to repair or maintain the pumping station the appellant needed Carillion's permission. Most heavy vehicles do not leave the area within the construction boundary once on it

except some will cross the existing B1026 as there are works being done on the other side (west) of it.

65. The contract price is for work on all of the construction site. There is not a separate budget for the works and Rye Borrow Pit and the works are covered by the same insurance policy.

66. As part of the contract the haulage road between Rye Borrow Pit and the processing plant will be restored. It is therefore temporary.

What construction activities looked like

67. The construction boundary follows the perimeter of the reservoir except that rather than going all the way round it is co-extensive with the causeway (so the south western corner of the reservoir is not within the boundary). The construction boundary is within the planning application site boundary. It extends beyond the reservoir further than the proposed perimeter road. To the northwest, there is an offshoot of the boundary that otherwise tracks around the reservoir to follow an area on either side of the temporary road up to and around Rye Borrow Pit. The temporary road is 8 m wide The construction contract boundary is on either side of the road and is described as a "28m working corridor". The road follows a dogleg route towards the processing plant which is near the reservoir rather than following a straight line.

68. We looked at a number of photographs taken from various viewpoints between the reservoir, the processing plant and along the haul road from the processing plant to Rye Borrow Pit. The photographs were taken by Mr Jenkins in April 2011. The locations of the viewpoints from where the photographs were taken were indicated to us on a separate map. The haul road is a wide sandy looking track with fencing on either side. At points the photos show us it is wide enough for two large dump trucks to pass each other. The fencing consists of wooden posts with wires in between. There are no internal gates on the area enclosed by the construction boundary although there were structures described as "goal posts" whose purpose was to stop vehicles which were too high entering areas where there was a risk of hitting power lines.

69. The wire fence went all around the construction boundary including where the boundary followed the causeway

70. We looked at an aerial photograph of the reservoir area from which we could identify the dam, Blind Knights Pit, the causeway and Rye Borrow Pit.

71. Erecting the fence was one of the first jobs to be done in January 2010. One of the last things to be done will be to take it down when the works are completed.

72. Around Rye Borrow Pit there is a combination of bunds, solid fencing and shrub screening around the perimeter of the pit which is used to limit the disruption to local residents.

Water Supply System – Layer WTW

73. Between the Borrow Pit and the reservoir work was also to be undertaken on the pipe that runs from the weir at the Layer Pits to the reservoir. It was intended to lay a third pipe (there are two) but it was decided that cleaning the pipes was sufficient to provide the required capacity.

Planning

74. Due to the geographical spread of the wider scheme (the construction of two pipelines and associated structures, and enhancement of the reservoir) planning permission needed to be sought from four planning authorities.

75. The raising of Abberton reservoir was included within the description of development detailed in planning permission which was sought from Colchester Borough Council in an application dated 14 December 2007.

76. Extraction of gravel brings into play specific planning permission requirements that apply to extraction of minerals. Planning permission for the extraction was required from the Minerals Planning Authority, in this case Essex County Council.

77. On 29 May 2008 Essex County Council wrote to Colchester Borough Council to ask the that the Rye Borrow pit be withdrawn from the application to form a separate scheme to be dealt with by Essex County Council as the minerals planning authority. Following correspondence from the appellant's solicitor the County Council in 18 September 2008 conceded they were satisfied the matter was a local and not a county matter being in the nature of an engineering operation forming part of the larger planning application. On 9 October 2008 Colchester Borough Council accepted the excavation formed an integral part of the larger planning application.

78. On 6 April 2009, the appellant, Colchester Borough Council and Essex County Council entered into an agreement under s106 of the Town and Country Planning Act 1990 in relation to "Abberton Reservoir Raising and the Wormingford to Abberton Pipeline." The agreement defined the appellant's application for planning permission by reference to permission to develop the "Application Site" which was defined by reference to "land edged red on planning application drawings PA(B)001 to 056".

79. On 9 April 2009 Colchester Borough Council granted planning permission for the proposed development subject to conditions. The proposed development was "construction of new Wormingford Pumping Station (WPS), new pipeline from WPS to Abberton Reservoir, expansion of Abberton Reservoir Works to B1026".

80. There were 123 conditions divided into Parts: 1) General, 2) WPS, 3) The Pipeline, 4) Wormingford Break Tank; 5) Abberton Reservoir Raising General; 6) Perimeter Road, 7) Main Dam and Col Dams and Flood Bunds; 8) Raising the B1026 Causeway and Diversion of the B1026; 9) Essex Wildlife Trust Visitor Centre and Nature Reserve; 10) Buildings and Above Ground Structures; 11) Rye Borrow Pit and Gravel Processing Plant; 12) Landscape Works.

81. The conditions in relation to Part 11 included the following.

82. Condition 104 states:

> "Prior to the commencement of any work in connection with the Rye Borrow Pit a 5 year restoration and after scheme for the Borrow Pit to agricultural use following completion and extraction shall be submitted to and approved in writing…
>
> Reason: To provide for the completion and progressive restoration of the site with the approved timescale and in the interests of local amenity"

83. Conditions 105 states:

> "No Material to be Exported – Material extracted from the Rye Borrow Pit shall only be used for the purposes of constructing the raised reservoir and shall not be exported from the site for any other purpose.
>
> Reason – the extraction is contrary to the provisions of the adopted Essex Mineral Plan and permission has only be granted in view of the particular circumstances of the development."

84. Condition 106 states:

> "No Import of Aggregates – No aggregates to replace those that would otherwise be extracted from Rye Borrow Pit shall be brought onto any part of the application site."
>
> [Reason same as above]

85. Condition 107 restricted processing of aggregates

86. Condition 110 stated:

> "Temporary Permission for Mineral Extraction
>
> Mineral extraction from Rye Borrow Pit shall cease prior to the Raised Reservoir being completed or January 1st 2013 whichever is the sooner. All buildings shall be removed from the site in accordance with details agreed in discharge of conditions 5 and 6.
>
> Reason
>
> To provide for the completion and progressive restoration of the site within the approved timescale in the interests of local amenity."
>
> (condition 5 required submission of a construction management plan, and condition 6 required submission of a Traffic Management Plan – both referred to demolition / removal of buildings).

87. Condition 114 stated:

> "Top and Subsoil and Plant Details
>
> Prior to the commencement of any work in connection with Rye Borrow Pit a scheme for the removal and storage of top and sub-soil

from the site of the Borrow Pit and the siting of the mineral processing plant shall be submitted to and approved in writing by the local planning authority, in consultation with Essex County Council Mineral Authority.

Reason

To protect the amenities of local residents and to ensure a satisfactory form of development."

88. It was a planning condition that a traffic management plan minimising traffic movements through the village and over a specified route had to be prepared.

Ownership

89. The appellant owns the freehold to all of the land in which the Abberton Scheme is taking place, being an area of around 3000 acres. It has a number of tenant farmers. Some of these are permitted to use the perimeter road around the Abberton Reservoir.

90. Prior to the works at Abberton, Rye Borrow Pit was part of the land let to an individual for agricultural purposes.

91. The haulage road is over land belonging to the appellant.

92. The land within the perimeter road is under the appellant's exclusive control. Beyond that the farmland is tenanted but the appellant places restrictions on their activities.

93. As part of the Abberton Reservoir Raising Project the appellant had to acquire more land around the perimeter of the reservoir. The appellant also bought some more land adjacent to the Rye Borrrow Pit by compulsory purchase.

94. There are no public highways between the Rye Borrow Pit and the reservoir at Abberton. The B1026 runs between the Layer WTW and the Layer Pits and crosses the western end of the reservoir. There is a private road dividing the Rye Borrow Pit and the Layer Pits which is owned by the appellant and along which tenant farmers have permissive rights.

The Aggregates Levy dispute / Procedural History

95. This is an appeal against HMRC's decision of 9 September 2010 that the aggregate used in the reservoir enhancement did not again become part of the land at the site at which the aggregate was won. On 18 April 2011 HMRC confirmed they were registering the Appellant for aggregates levy. The registration was backdated to 8 January 2010.

Discussion

Tribunal's jurisdiction – not supervisory

96. A preliminary question arose as to the nature of the Tribunal's jurisdiction in the appeal given the inclusion within the statutory powers given to the Tribunal of a power to direct a further review of the original decision where the Tribunal allowed the appeal on the grounds the Commissioner could not reasonably have arrived at the decision.

97. This was an appeal under s40 FA 2001. The particular subsections which are relevant are 40(1)(c) or according to HMRC s40(1)(a). Section 40(1) specifies:

> "..an appeal shall lie to an appeal tribunal from any person who is or will be affected by any decision of HMRC with respect to any of the following matters-
>
> (a)… whether or not a person is charged in any case with an amount of aggregates levy
>
> (c) the registration of any person or premises for the purpose of aggregates levy…"

98. Section 42(Determinations on appeal) sets out at paragraph (2):

> "On an appeal under section 40 above, the powers of the appeal tribunal in relation to any decision of the Commissioners shall include a power, where the tribunal allow an appeal on the ground the Commissioners could not reasonably have arrived at the decision, either-
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct; or
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal a review or a further review of the original decision as appropriate"

99. The parties were in agreement that the Tribunal had full appellate jurisdiction rather than a supervisory jurisdiction concerned with looking at whether HMRC's decision had not been arrived at unreasonably. The case concerned the question of whether the various locations where gravel was used together with the pit were a "site" within the meaning of s19(3)(e) and this was to be determined on the basis of the evidence put before the Tribunal and the facts found by it.

100. That conclusion is supported by the fact s40 deals with a number of matters. One of those matters, for example, that set out in s40(1)(e) "the imposition of a requirement on any person to give security" is clearly a matter where there is discretion on the part of the Commissioners. Section 26 which is headed "Security for levy" states:

> "*Where it appears* to the Commissioners necessary to do so or the protection of the revenue they may require any person who is or is required to be registered to give security, or further security for the payment of aggregates levy…"[emphasis added].

101. This is to be contrasted with s24 which sets out "It shall be a duty of the Commissioners to establish and maintain a register of persons who are required to be registered for the purposes of aggregates levy" and then in s24(2) sets out the conditions which give rise to a person being required to be registered.

102. It is therefore understandable that s42 needs to cover directions in relation to decisions that have been reached unreasonably where matters of discretion are involved and therefore where a supervisory approach by the Tribunal might be justified. But, it is also clear that applying a supervisory approach is not required in all cases, and that it would not be appropriate to the determination of the issue in this case which is about applying statutory construction to a given set of facts and evidence rather than looking at the exercise of a discretion by HMRC .

103. The issue of whether the Tribunal's role was to look at matters afresh or whether to look at how HMRC had made its decision was relevant to our approach to assessing the value of HMRC's evidence. Where that evidence sought to explain how HMRC had approached its decision making this was something which we thought was not directly on point. On the other hand evidence, for instance from Mr Hayes, which described his perceptions of Rye Borrow Pit and its location in relation to Abberton reservoir, given he had visited those places, was of more relevance to the task before us.

Interpretation of law to be applied – Section 19(3)(e)

104. The levy is charged when taxable aggregate is subjected to "commercial exploitation". Section 19(1) sets out an exhaustive definition of "exploitation". Section 19(3) sets out further exhaustive conditions which must be satisfied in order for the exploitation to be "commercial exploitation".

Appellant's arguments on statutory construction

105. The appellant argues s19(3)(e) is a relief and is plainly intended for the case where aggregates are being used for construction purposes, construction being defined in s48(a) as "using it as a material or support in the construction or improvement of any structure".

106. It argues the exploitation by way of removal from the site (s19(1)(a)) and becoming the subject of a supply agreement (s19(1)(b)) in themselves would not result in the aggregate becoming part of the land even if later events result in that being the case. Mixing with other substances within s19(1)(d) is excluded by the terms of 19(1)(e). It says the word "site" should be given a sensible and workable meaning to suit its context. It argues that the word site naturally covers the construction site at which the particular works involving the aggregates in question

are taking place and that the decision of the First-tier Tribunal in *Hochtief* and the decision of the High Court in *East Midlands Aggregates* support this.

107. Interpreting s19(3)(e) in this way, the appellant says, enables the subsection to provide relief in the typical civil engineering project where aggregates are simply moved from one part of the construction site to another for use say to provide foundations or landscaping. Aggregates levy is an environmental tax and the relief serves to encourage the use of aggregate sourced within a construction site so as to minimise the environmental impact of transportation. Confining 19(3)(e) to situations where the aggregate is returned to the exact spot where it was extracted (which is how the appellant sees HMRC's argument) would render 19(3)(e) otiose in practice and is an unnaturally restrictive construction.

HMRC's arguments on statutory construction

108. HMRC argue the appellant has mischaracterised HMRC's argument as too narrow in that they do not say the aggregate must be returned to exact spot where it was extracted.

109. They say the wording of s19(3)(e) needs to be construed as a composite phrase and attention needs to be given to the way it is constructed. The term "site" in s19(3)(e) is conditioned by the subsequent historic term "won". Since s48(3) defines references to "winning" as being separating aggregate "from any land", when s19(3)(e) refers to "part of the land at the site from which [the aggregate] was won", this incorporates winning "from any land".

110. When the phrase is rewritten in long hand: "part of the land at the site from which [the aggregate] was won [from any land]", the formulation points strongly to the phrase "part of the land" being a direct reference to the "land" referred subsequent to the term "site" i.e. the land within the site from which the aggregate was actually won. HMRC argue the reference in s19(3)(e) to "part of the land" cannot sensibly be said to be broader than the subsequent ss3(e) "site" which cannot be broader than a place for a specified purpose, the purpose here being "winning".

111. HMRC also refer to the wording of s19(2)(a) which refers to "originating site of the aggregate". The term "originating site" is defined in s20(1)(d) as the site "from which the aggregate was won…". Section 48(3)(b) amplifies criteria for that site - by providing at s48(3)(b) that references in Part 2 FA2001 to winning aggregate are references to winning it – b) by separating it in any other manner from any land or area of the seabed *in which it is comprised* [emphasis added].

112. HMRC disagree that the purpose of s19(3)(e) is to encourage local use of aggregate but say the levy is aimed at discouraging "first use" of aggregate (i.e. extraction of aggregate when alternative materials are already available).

113. HMRC also took us to definitions of "site" in the Shorter Oxford English Dictionary. This defines "site" as:

> "the place occupied by something; position; more widely, any area set apart for a specified purpose; where some activity is or has been conducted".

114. It defines "place" as:

> "a particular part or portion of space or of a surface whether occupied or not."

115. Further it defines "particular" as meaning:

> "belonging to or affecting a part, not the whole of something; not universal."

116. HMRC say "originating site" refers to the land in which aggregate is comprised which is the particular place where it is comprised. This is the Rye Borrow Pit, not the construction site.

117. HMRC do not agree s19(3)(e) is directed towards construction purposes as the appellant suggests. They say s19(1)(b) is also relevant. They give the following scenario of where a person sells aggregate, it leaves the site, levy is accounted for but then the customer returns the aggregate unused and it is dumped back in the ground it came from. It is then considered to be again part of the land it came from even where the aggregate was not used in construction. Section 19(3)(e) could therefore deal with the situation where gravel is dumped back in the pit. There is therefore no reason to view "site" as being the construction site.

118. According to HMRC although the types of exploitation in s19(1) listed in a) to d) are to be read disjunctively, exploitation under a) (i.e. removal) will always be antecedent to construction i.e. before aggregate can be exploited for construction purposes it has to first be removed. If we have understood their argument on the point correctly, if exploitation in the form of "removal" was antecedent to use for construction purposes this would go against the appellant's argument that the relief in s19(3)(e) was directed towards aggregate again becoming part of the land through construction purposes and not through some other means.

Discussion: Tribunal's views on statutory construction

119. Our starting point is to construe s19(3)(e) purposively. As part of that it is relevant to look at what kinds of exploitation are likely to fall into s19(3)(e) in the first place. We think the appellant is correct in highlighting that the exploitation which is most likely to be of relevance to s19(3)(e) is exploitation in the form of use for construction purposes (s19(1)(c)). We do not think this is undermined by HMRC's argument that other forms of exploitation such as removal, and supply under an agreement, may give rise to scenarios where the aggregate again becomes part of the land at which the aggregate was won. We do not rule out those other scenarios but think they are far less likely than aggregate becoming part of the land through construction purposes. It must also we think be recognised that the other heads of exploitation in s19(1) (removal, agreement to supply, mixing) do not by themselves give rise to aggregate becoming part of the land. Some other step would need to take

place and that other step is most likely to be an activity falling within the definition of use for construction purposes and in particular use of the aggregate as a material or support in the construction or improvement of any structure.

120. We also take note of the appellant's point that the scenario whereby aggregate is returned is covered elsewhere in the legislation through a system of entitlements to tax credits. In particular Regulation 13 of the Aggregates Levy (General) Regulations 2002 provides for a tax credit where aggregate is returned without further processing to its original site. The enabling provision for the regulation (s 30 FA 2001) refers specifically at sub paragraph d) to disposal of aggregate (by dumping or otherwise) "in such manner not constituting its use for construction purposes…". That the scheme of legislation expressly provides for entitlement to tax credit when aggregate is returned to the originating site when it is *not* used for construction purposes lends support, we think, to the relief in s19(3)(e) having the function of dealing with situations where the aggregate *is* used for construction purposes.

121. We also do not think HMRC's view that exploitation in the form of removal is always antecedent to the other forms of exploitation in s19(1) can be correct. Section 19(3)(e) excludes situations where the aggregate is mixed with a substance or material other than water and becomes part of the land. This exclusion must, we think, be taken to imply that such a situation, would, but for the exclusion be possible and would amount to "commercial exploitation". Given the definition of "winning any aggregate" in s48(3) (i.e. quarrying, dredging, mining, collecting, separating it) removal from a site for the purposes of s19(1)(a) must mean something more than any of those things. Mixing with a material or substance other than water must be possible without "removal" for the purposes of s19(1)(a).

122. We agree with the appellant that interpreting "site" in the context in which it is used so as to only cover use of the aggregate in construction at the particular footprint of the quarry or pit where the aggregate is extracted is too narrow. It is difficult to see when the relief would apply.

123. We do not understand it to be in dispute that certain environmental objectives underpin the introduction of the levy. Although we were not referred to it by the parties there is some mention of the environmental aspects of the levy in the case of *R(oao)British Aggregates Associates and others* [2002] EWHC 926 (Admin). This was a permission application for judicial review concerning the introduction of the levy where Moses J (as he then was) recounted the following background to the levy as put forward by government witnesses :

> "[3] Aggregates are used in engineering and building. The Government by the imposition of the levy seek to incorporate within the market price paid for such aggregate the environmental costs of securing aggregate from natural rock. In so doing the legislation distinguishes aggregate from such a source (called by Government witnesses "primary" or "virgin" aggregate) from other material which may be used as aggregate such as certain mineral and industrial waste ("secondary" or "recycled" aggregate). Such material is exempt from

> the levy. By exempting such material the Government hopes to promote its use as aggregate “)
>
> …
>
> [108] The purpose of the levy, as described by Government witnesses (particularly Mr Knight in his second statement at paragraphs 6-9, and Mr Maxwell) is to see that the costs of aggregate reflect not just market costs but the cost to the environment. This is what they describe, in an expression calculated to make the mouth water of even the most jaded judge, as "internalising the externalities". This it seeks to achieve by taxing virgin aggregate (an expression used in the Budget Statement of 2000 but not in the statute) and thereby shifting demand to the use of alternative materials such as industrial waste. This is designed to promote the efficient use of virgin aggregate and reduction of piles of waste material which may otherwise be used as landfill. The exemptions increase the incentives to use waste material, which is not subject to the levy, as aggregate .”

124. HMRC dispute the underlying policy is about encouraging gravel to be sourced locally at the site where it is to be used to avoid the environmental costs of transporting gravel from other sites. But, the policy they put forward, namely discouraging extraction of “first use” or “virgin” aggregate, while apparent from the general scheme of the levy (and consistent with excerpts above), does not explain the purpose of the relief in s19(3)(e) because the aggregate will already have been won (and the environmental costs that involves would already have been incurred) by the time the relief applies.

125. On the contrary, the appellant’s explanation of the purpose of s19(3)(e) seems far more plausible in the context of a levy which has an underlying environmental purpose.

126. HMRC’s arguments in relation to the reference to the definition of winning aggregate in s48(3) and their argument that the words “in which it is comprised” tie the site at which the aggregate is won to the particular place of extraction do not persuade us that a narrow construction of the word “site” should be taken. Section 48(3) seeks in our view to elaborate on what is meant by the activity of “winning”. It refers to quarrying, dredging, mining or collecting from land, terms which arguably contain within them the notion of what is being done in relation to the land. The wording “in which it is comprised” refers in particular to the residual activity of “separating in any other manner from any land, or area of the seabed” and serve in our view to explain what land the separating is done from.

127. We have considered HMRC’s references to dictionary definitions but in our view, to the extent these are relevant, they cannot be looked at in isolation but in the context of the provision. The dictionary definition refers to “any area set apart for a specified purpose; a place where some activity is or has been conducted”. Saying the specified purpose was winning of aggregate would in our view be too narrow because it would mean s19(3)(e) would rarely if ever be applied. It would fail to give due

recognition to the activity that takes place resulting in the aggregate again becoming part of the land will be its use for construction purposes.

128. We also are wary of looking at dictionary definitions of words within dictionary definitions. It is apparent from the conflicts between them when they are read in a "nested" way that they were not written with that purpose in mind. We are therefore cautious about reaching interpretations on the basis that they are. For example "site" is defined as the place occupied by something, but then "place" refers to "a particular part or portion of space or of a surface whether occupied or not".

129. HMRC's written submissions referred us to s24(6). This provision empowers the Commissioners to register "premises" as a registered site where it appears to them that any person is operating or using the premises or intends to operate or use premises for various matters including at a) "for winning any aggregate". They argue the range of matters in s24(6) reinforces there being a wider range of purpose to s19(3)(e) to dealing with construction purposes. We fail to see how the section demonstrates that. If anything the reference to "premises" as distinct from "site" suggests "site" in relation to winning of aggregate is capable of bearing a wider meaning than the immediate place where aggregate is won.

130. The above does not inevitably lead to the conclusion that the "site" in question is the construction site because that is not what the words of the provision say. They refer to the "site from which [the aggregate] was won". It does indicate to us though that given that s19(3)(e) is primarily concerned with exploitation in the form of use of gravel in construction purposes such purposes will need to be borne in mind when construing the meaning of "site" in the provision.

131. We move on now to consider the parties' submissions on how the case law affects the interpretation of the relevant statutory provisions.

Case law: Hochtief and East Midland Aggregates

132. Both the appellant and the Respondents referred to the First-tier Tribunal decision of *Hochtief Ltd v Revenue and Customs Commissioners* [2009] UKFTT 321(TC) and the High Court decision in *CEC v East Midlands Aggregates Ltd* [2004] EWHC 856 (Ch).

133. The appellant invited us to apply the approach taken in both those cases. HMRC say *Hochtief* was correctly decided on its facts but the facts are different here.

Summary of Hochtief

134. In *Hochtief* the First-tier Tribunal considered the meaning of the phrase "at the site from which it was won" in s19(3)(e) and applied it to the facts. The case concerned, a large hydro-electric dam at Glendoe, Inverness-shire which was built using rock that was extracted from a quarry a short distance from the place where the dam was to be built. The rock was removed from the quarry and taken by dumper truck to the footprint of the dam where it was used to build up the dam. HMRC

argued that the site was the footprint of the dam and this was different from the footprint of the quarry so that there were two sites. The taxpayer argued that the "site" in the sense of section 19 was the construction site, and that "rock was simply moved from one part of the site to another" ([56]).

135. The Tribunal held that the works area around the dam and reservoir (described by the parties as the "General Site Layout: Dam Operations") was the originating site for the purposes of section 19, being the place where the construction work for the reservoir took place: [65]. On that basis, the quarry and the dams, although clearly physically separate, were all part of the same site and aggregates levy was not chargeable on the construction of the dam.

136. In reaching its decision, the Tribunal essentially followed the guidance on the meaning of 'site' given by the High Court in *East Midlands Aggregates Ltd.*.

137. The Tribunal in *Hochtief* also applied only part of the Interpretation Act definition of "land" so as to include "buildings and other structures, land covered with water" but omitting the references to incorporeal interests i.e. the words "any estate, interest, easement, servitude, or right in or over land".

Summary of East Midlands Aggregate Ltd

138. This case concerned the interpretation of section 17(3)(b) of the Act, which provides for exemption where aggregate is "removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out – (i) in connection with the modification or erection of the building; and (ii) exclusively for the purpose of laying foundations or of laying any pipe or cable…".

139. A warehouse adjacent to an existing warehouse was to be built and a lorry loading and manoeuvring area (lorry park) was to be built to the south of the new warehouse. In order to lay the foundations for the lorry park and the drainage system serving the new warehouse aggregate co-extensive with the footprint of the lorry part had to be removed. The issue before the High Court (at [21]) was whether the Tribunal Chairman was in error in interpreting "the site of…[the] proposed building" as meaning the building site encompassing the whole area (including the site of the lorry park) on which the work of constructing the building was to be undertaken. Rimer J agreed with the Chairman's view that the phrase "the site of …[the] proposed building" ([23]) :

> "must be given a sensible workable meaning and is one that corresponds to what would ordinarily be regarded as "the building site" for the proposed works, that is the entire area on which the builders would be working for the purpose of constructing the building and laying any services serving it".

140. Earlier at [23] Rimer J rejected a construction of HMRC's counsel that the relevant site was the footprint of the building plus the lines of any pipes or cables laid outside the footprint but laid for the purposes of serving the building as being an impossible one. He said:

> "If ten people were to be lined up outside an area of land on which a detached house was to be built and on which pipes were to be laid linking the house to mains services, and they were asked to identify "the site of…[the] proposed building", I do not believe any of them would suggest that it was the footprint of the proposed house plus the routes to be followed by the pipes."

141. The Tribunal in *Hochtief* applied such a test to the facts before it and considered that people would not consider the footprint of the dam as one site and the footprint of the quarry as another. In their submissions both the parties referred to the test terming it "the bystander test". We discuss our views on the test further below at [156] and [157].

142. The appellant invited us to adopt the same approach as that taken by the Tribunal in *Hochtief* by considering the "bystander test", and the distances and scale of the project involved.

143. HMRC say *Hochtief* was correctly decided but seek to distinguish it for various reasons.

144. They say that the Tribunal there found it particularly persuasive that when the reservoir was completed the water in the reservoir was to cover both the dam and the quarry. This body of water was a necessary nexus.

145. They also contrast the fact that the document called the "General Site Layout: Dam Operations" was agreed between the parties and highlight that the definition of winning in s48(3) FA2001 was not considered by the Tribunal.

146. In relation to *East Midlands Aggregates* they say it is important to recognise this was a case about s17(3)(b) and there was no mention at all of s19(3)(e). They say the decision must be read in the particular statutory context of s17 which refers to the particular words "in connection with" and "for the purpose of" in s17 which are not relevant to s19. It was the fact that the degree of connection was in issue which gave the court latitude to make the decision it did. That latitude is not available here.

147. To the extent the appellant relies on the boundary of the site being the construction boundary they say this is not enough as *East Midlands Aggregate* requires both "temporal constructional activity and an actual permanent coincidence".

Discussion: Tribunal views on EMA and Hochtief

148. We note that the following paragraphs in *Hochtief* are supportive of HMRC's argument that the decision hinged on the water body of a reservoir connecting both the quarry and the dam:

149. At [58] and [59] the decision stated:

> "**[58]** The area of the site agreed by the parties being 'General Site Layout: Dam Area' represented approximately 10% of the site for the whole project but was where the bulk of the construction work took

> place and included the area of the dam and the reservoir. The area of the reservoir contained the quarry and where the rock was removed from the quarry to form the dam, the quarry was then filled with soil and till and rock and when the reservoir filled with water was covered with water and became part of the reservoir. This latter point was particularly persuasive to the tribunal.
>
> **[59]** The footprint of the quarry was not on an area of land several kilometres away from the footprint of the dam. It was on land that became part of the reservoir which was created when the dam was built and the water captured."

150. However, in our view the following paragraphs of the Tribunal's decision are also relevant in explaining how the Tribunal reached its decision:

> **[61]** Rimer J at para [23] of his judgment suggested that the test could be applied by asking ten people lined up to identify a site. The tribunal was persuaded that such people would not consider the footprint of the dam as one site and the footprint of the quarry as another.
>
> **[62]** The tribunal considered the distance of the quarry from the dam but found that this in itself (because it was only an average of 500m) was no more persuasive than if it had been 2km as long as all were within the, sensible workable meaning of the word, 'site'.
>
> **[63]** Lastly, in consideration of the definition of 'site', the tribunal took account of the scale of the project which was a major civil engineering project and within this the size of the area that was required for the dam and reservoir.
>
> **[64]** The tribunal noted that the Commissioners have under ss 24(6) and (7) of the 2001 Act the authority to set the boundaries of a site 'as appear to the Commissioners best to secure that avoidance of [the] levy is not facilitated by the registration of any part of any premises that is not used' in, amongst other things, 'winning any aggregate.'
>
> **[65]** The word 'site' is nowhere defined in the 2001 Act and is used in different contexts. The tribunal determined 'the site' to mean the 'General Site: Dam Construction' as agreed by the parties and consequently that the footprint of the quarry and the footprint of the dam were within the same site.
>
> **…**
>
> **[69]** The tribunal found that the conditions of s 19(3)(e) had been met and that the aggregate had not been commercially exploited. The tribunal felt that a sensible working meaning of 'site' meant that the footprint of the dam and the footprint of the quarry were one site; there was no distinction, it was the construction site and the site for the purposes of s 19(3)(e). The aggregate was not mixed with anything other than water and in its natural state was moved from one area of the site to another…."

151. Although it is correct to say the Tribunal stated that the fact water was to cover both the dam and the quarry was a persuasive factor, looking at the totality of their decision we do not think it was a decisive factor. The Tribunal's focus was on the

ordinary meaning of "site" and while the water coverage may have been a factor in the Tribunal's reasoning there is nothing to indicate to us the Tribunal would have come to a different conclusion if the quarry had been 100m away but on land outside the footprint of the water body of the reservoir. To the extent water coverage connecting both the locations was a factor which was relevant to the perception of the ordinary meaning of "site" we do not think this can be elevated in any way to a broader principle requiring a "water nexus" to be present before two locations can be considered to be a site.

152. While we noted the Interpretation Act definition of "land" contains a reference to the definition including "land covered by water" we do not think this is relevant. It just establishes that land covered by water is still land even though it has water on top of it. It does not suggest that one piece of land submerged under water and another piece of land covered by water are the same "site".

153. HMRC seeks to distinguish the application of *Hochtief* on the basis that the area of the site was agreed between the parties and that was not the case here. We were referred to [58] which stated "the area of the site agreed by the parties being 'General Site Layout Dam Area" represented 10% of the site…". However what was agreed, (at [25]) was that a particular drawing ("General Site Layout: Dam Area") was a materially true and accurate representation of the general site layout. It was not agreed that that was a "site" for s19(3)(e) purposes. That remained an issue as it does in this case. The fact there is not an equivalent drawing which is agreed does not matter, the Tribunal will have to reach its own view on the extent to which drawings and plans are reflective of the reality of what was on the site.

154. We also disagree with HMRC as to the relevance of the s48(3) definition of winning aggregate not being referred to in the Tribunal's decision. As discussed above our view is that the Tribunal focussed on ordinary meaning of "site". There is nothing to suggest that an examination of the detailed definition of "winning" would have changed their approach. There was no dispute that aggregate, in that case rock, was removed from the quarry, and that the Tribunal did not have that location in mind as the place where the quarrying and therefore the winning of the aggregate took place. The reasons why we are not persuaded that the reference in s48(3) to "in which it is comprised" ties the meaning of "site" to the specific place where the aggregate is won for the purposes of s19(3)(e) are set out at [126] above.

155. In relation to *East Midlands Aggregates Ltd* it is correct that the Tribunal and subsequently the High Court on appeal had the different wording of s17 to consider. The decision is not binding on the interpretation of the word "site" for s19(3)(e) purposes and we did not understand the appellant to be relying on it being so. In our view the relevance of *East Midlands Aggregates Ltd* lies in it providing an example of recourse being made to the ordinary meaning of "site" and of a narrow construction being rejected which was not in line with the ordinary meaning.

156. It is in that light i.e. a riposte to a narrow interpretation not in line with ordinary meaning that we see Rimer J's reference to what the parties termed the by-stander test (what would 10 persons lined up say was the site?). HMRC's submissions suggested

variously that the notional by-stander would have to be situated on the ground at a particular place, could not be assumed to be able to take a 360 degree view, would not be able to view the area from above, and further that where the area was not public would need recourse to planning permission documentation instead.

157. We disagree Rimer J's decision is to be read in such a way and that our task is apply a bystander test in such a literal way. To do so raises all sorts of issues as to what qualities or attributes the by-standers have. Where and how would you position them without pre-judging the issue to be determined? What visual or other inspection aids if any would they have at their disposal? That is not what we think Rimer J had in mind. Rather, his reference to "ten people…lined up" was a convenient way of reflecting that in ascertaining the ordinary meaning of "site" it is helpful to consider what an ordinary person would understand by the word site. That is not to say that the issue of what can physically be seen around the area under consideration is irrelevant, rather that it is an aid to a person's understanding and that it should not be applied over-literally.

158. We also disagree with HMRC's suggestion that *East Midlands Aggregate Ltd* requires what they termed as "temporal constructional activity and an actual permanent coincidence" in order link two putative locations into one site. To the extent this argument refers to building going on at the same time, and there being a lasting link between the two locations we do not rule out that either of these things could be indicators which might weigh in the ordinary meaning of "site" but they are not requirements in their own right. To the extent the judgment in *East Midland Aggregates* referred to a "clear functional link between the proposed warehouse and the lorry park" and the excavations of aggregate being carried out at the same time (at [30]) these points were made in relation to whether the lorry park was "in connection with the…erection of the building.".

Conclusion on value of Hochtief and approach to s19(3)(e) "site"

159. While *Hochtief* as a First-tier Tribunal decision is only of persuasive authority we find the approach set out there to be a helpful one. That means we ought to consider a "sensible working meaning" of the word "site". In doing so we should also take into account what ordinary people would consider to be a site, distances involved between locations and the scale of the project. We do not regard the issue of distance and scale as tests in themselves but as matters that would be considered as part of determining a sensible meaning of site in this context.

160. Although the Tribunal in *Hochtief* came to the conclusion the relevant site was the construction site, it is not to be read, we think, as saying that the construction site will be determinative of what the site is, rather that the construction site is something to be taken account of in ascertaining what the site is for s19(3)(e) purposes.

161. We also take into account our earlier discussion in relation to the need to consider the exploitation to which the relief in s19(3)(e) is directed and our view that it is primarily directed towards exploitation in the form of use of aggregate for

construction purposes. That suggests to us that, while not conclusive, the issue of what is the construction site is a significant factor to take into account.

162. This is also consistent with how we think an ordinary person would approach the meaning of "site". The person would we think ask "site for what?". HMRC say the legislation answers this by the words "site at which [the aggregate] was won" but we have discussed above why we think this interpretation is too narrow. The notion of site in this context ought, in our view, to acknowledge that the relief applies primarily to exploitation in the form of use for construction purposes. The activity given in answer to the question "site for what?" has to, we think, bear some relation to something other than aggregate winning in order to give 19(3)(e) some purpose.

Was there s19(3)(e) exploitation at the processing plant?

163. The remainder of our discussion considers the application of the various factors discussed above and other issues raised to the facts in this case. Before moving onto that we deal with an argument raised by HMRC in the course of the hearing relating to when exploitation under s19(1)(c) first took place. HMRC drew attention to evidence of Mr Jenkins which suggested that when the gravel was dug out the pit it comprised both gravel and sand. They say that what is exploitation for construction purposes is dependent on the facts of what it is that is being used and that by processing the mixture of sand and gravel in readiness for application at the various sites this itself amounted to "use for construction purposes".

164. We do not agree. "Use for construction purposes" is given a specific and exhaustive definition in s48(2)(a) and (b). The sorting and washing of the gravel and sand falls into neither of those subsections. There was no use or improvement to a structure until the material was applied at the dams and causeway. There was no mixing to form the construction materials caught by subsection b).

Discussion: application of s19(3)(e) to facts

Distance, scale and size of project

165. The distances between the locations where the gravel was used for construction purposes and Rye Borrow Pit are set out at [60] above. That there are distances of in the order of several or more kilometres between the locations does not suggest the locations constitute one site. But, equally we must take into account the scale and size of the project in order to reach a view on whether the distances are inconsistent with the locations being on one site.

166. The alterations of the dam, causeway and construction of the col dams were all carried out with the common purpose of enabling the level of Abberton reservoir to be raised. By any accounts this project was a large scale project. The volumes of aggregate used the size of the dams and causeway, the target contract price of £45 million all go to show this. From a budgetary point of view and in relation to insurance we accepted the works to enhance the reservoir at Abberton constituted a discrete project which itself sat within an even larger programme of works to improve

the water supply in a wider region. It is in this context that we take account of the distances. We have considered both the straight line distances and, although we do not have the precise routes, the fact that distances on the ground would be longer because of the need to go around the perimeter of the reservoir. Looking at what is a large scale civil engineering project the distances between the construction locations and the pit are not in our view inconsistent with them being on one site.

Planning applications and permission

167. Both parties took us to various aspects of the planning application, permission and planning application site boundaries. We did not understand either to be arguing that references to a planning site or use of that term in the planning documentation was determinative of what a site was for the purposes of s19(3)(e), rather that it was something we ought to take into account.

168. The appellant drew our attention to the fact that the consent for minerals extraction, which would in the normal course have been dealt with separately by Essex Council was instead delegated to Colchester on the basis this formed part of a wider planning application. From a planning perspective they say there was a large application site which encompassed the gravel locations and the pit – "the application site". We were referred to the planning conditions and in particular to condition 105 which requires that material extracted from Rye Borrow Pit should only be used for the purposes of constructing the raised reservoir and should not be "exported from the site". By implication gravel being used at the dams and causeway would not be considered to be exported from the site because it was on the same site for the purposes of the planning condition.

169. HMRC also referred us to references within various planning conditions including condition 105 which referred to the site of Rye Borrow Pit which they say indicated the pit was viewed as a specific site from a planning point of view. They also pointed out that the planning application site boundary encompassed the Wormingford to Abberton pipeline. This stretched a distance of many kilometres to the Northwest of the reservoir.

170. In our view the fact that the mineral application was considered together with the wider planning application, and the fact the application site encompassed the various dam locations and Rye Borrow Pit is supportive of the extraction of gravel there and the various reservoir raising activities being viewed as part and parcel of the same project. That is also supported we think by the fact that the Environment Statement that needed to be produced for the Abberton Scheme is sub-divided into separate parts one of which is the Abberton Reservoir Enhancement. Rye Borrow Pit is not dealt with as a separate part. But, this does not of itself indicate whether it is more or less likely to be the case that the pit was a separate site for s19(3)(e) purposes. If the minerals consent had been dealt with separately because of the operation of specific legislation dealing with mineral extraction we do not think that would affect the meaning of what an ordinary person would consider to be a site.

171. The fact it was being dealt with within the same planning application suggests there is some common link, in terms of development, as between the pit and the reservoir raising. Again it tells us the pit and reservoir raising are part of the same development project but it does not assist a great deal with the issue of what is the site for s19(3)(e) purposes. We may also draw something from the fact the pit and dam locations are within one planning application site rather than multiple application sites but it is not something we place any significant weight on given the application sites are determined for planning purposes. A planning authority will be acting according to particular statutory responsibilities. Its conception of what a site is and its use of the term in its documents does not necessarily correspond to the ordinary meaning of the term although equally it may be there is some overlap between the two.

172. In relation to the reference to "site" in the planning conditions it is clear to us they are being used to refer to either the wider application sites or particular sites within the application site. It is not surprising that within a large planning area such as the one here there might be multiple sites which require identification; this does not stop the larger area also being a "site". The reference to Rye Borrow Pit as a "site" tells us the planning authority thought it was possible to describe that place as a site but it is not in contention that that is possible as a matter of ordinary application of language. The question though is whether the construction locations and pit constituted a "site" for the purpose of 19(3)(e). That Rye Borrow pit can also be described as a site does not preclude a wider area being a s19(3)(e) site.

173. HMRC submitted that as a public notice potentially relied on by third parties, the express terms of a planning permission are required to be construed objectively within its four corners (*R(oao Shepway) v Ashford Borough Council* [1998] EWHC Admin 488 at [27(1)], and by an objective approach whereby the subjective intentions of the applicant and the local planning authority are irrelevant (*Carter Commercial Developments Limited v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994 at [27] to [28]*).* Extrinsic documents may be included by their express incorporation by words e.g. "in accordance with" per *Ashford Borough Council* at [27(3)].

174. We note both these cases are about construction of planning documents in the context of planning disputes. Their relevance to the issue before us is limited because we do not understand either party to be suggesting that "site" for s19(3)(e) purposes is determined by the way the term is used in the planning application / permission. The use of those terms is suggested to be something to take into account. The authorities referred to by HMRC do not require us in our view to elevate the planning references to "site" to some higher status.

175. To the extent "site" in the planning documents is something we take into account, HMRC's point about only being able to look objectively and within the four corners of the planning application does not in our view take the matter further. The appellant's arguments in relation to the relevance of "site" do not rely on subjective intentions. Looking at the use of the term "site" within the four corners of the document it is clear that "site" is used in different contexts, sometimes in relation to the whole application site, sometimes to smaller sites within that site.

176. While we take account of the fact the construction locations and Rye Borrow pit are all contained within the same application site for planning purposes and that this is not inconsistent with the construction locations and the pit being on the same "site" this factor is not something we attribute significant weight to.

Relevance of "hydraulic link" in the form of pipes and connected water system between reservoir and pit area

177. HMRC argued that to the extent the appellant was seeking to place any store by there being a continuous circuit of water between the Layer pits adjacent to the Rye Borrow pit and the reservoir this was misconceived. Although we have accepted as a finding of fact that there was such a continuous circuit, it is not a feature the appellant sought to rely on at hearing and is not something that in any event we think is relevant given the anticipated works on a third pipeline connecting with the reservoir did not prove to be necessary.

Construction contract and boundary

178. The appellant argues the "site" for s19(1)(e) purposes was that as demarcated by the construction boundary on the plan referred to at [63] and annexed to this decision.

179. HMRC's primary argument is this is not the particular site from which the aggregate was won. We have discussed above why we think that is too narrow an interpretation.

180. We consider that while the construction site is not necessarily determinative of what is the site for s19(3)(e) purposes it is a significant factor to take into account because that is the primary form of exploitation we think the relief in s19(3)(e) is directed towards.

181. The question of what is the construction site is, we think, to be approached in a similar way to the question of what is a "site" i.e. in a way which recognises the ordinary and sensible meaning of the term. As such it is not a matter which is prone to a legal definition but one of fact and impression. It is therefore not enough to simply point to the boundary stipulated in the construction contract although the fact there is one discrete area bounded there is something that ought to be taken account of.

182. In this case we accepted evidence that the boundary has a physical manifestation in the form of a fence which has been erected all the way around the boundary. HMRC point out that within the bounded area there are two designated compounds and also drew attention to the fencing and bunds surrounding Rye Borrow Pit. We must consider whether the whole area can really be described as the construction site or whether it is an area where multiple and disparate construction activities are going on such that there are multiple sites.

183. We consider the bounded area is one construction site for the following reasons. The area is bound by one continuous fence specifically erected for the project. We do not think that because there are two compounds providing facilities for the workers

this means there are two sites. There is no fence separating the two, no internal gateways in the bounded area and workers with a pass once within the site may move freely within the site between the two.

184. Further, we do not think Rye Borrow Pit can be described as separate site. It does not have its own construction compound, workers would use the north compound and could also have access to the south compound. The bund around Rye Borrow pit is created because the top soil is removed and needs to be stored so it can be replaced. It would be strange to move it a distance from the Rye Borrow Pit given that it is being returned to that position at the end of the extraction. The fencing around the Rye Borrow Pit appears to be the same kind as used elsewhere in the project.

185. This was a large scale project including construction of a new perimeter road within the construction boundary. We examined an aerial photograph of the reservoir area. Although on the plan the pit is presented as an "offshoot" from the main area our impression was that taking into account the scale of the project it was on the same construction site. We saw a number of photos taken along the route from Rye Borrow Pit to the processing plant. These were taken at the time of construction. We heard from Mr Jenkins, who as project manager was familiar with the site, and from Mr Hayes who had been taken in a Land Rover along the temporary haul road past a farm area to Rye Borrow Pit. His impression was that the pit was a distinct separate area. He formed this impression because of the distance from the reservoir and because of what he described as a buffer zone of agricultural land between the reservoir and Rye Borrow Pit.

186. Rye Borrow pit had the different activity of aggregate extraction carried out on it. We can see that if you were to be driven along the haulage road looking out from a vehicle as Mr Hayes had been that you might not consider whether the road itself was part of the construction site, but having looked at both the aerial photo and the ground-based photos ourselves, we think it is clear, looking at the matter from these various different perspectives that the haulage road and pit would be viewed by an ordinary person as part of the same construction site, such site being comprised by the area bounded by the erected fencing.

187. HMRC saw it as significant that the haulage road was temporary and the land upon which it ran would be reverted to agricultural use and that this indicated there was not one site. We saw this the opposite way. It was consistent with there being one site, with an internal road on it, which once the construction activity was completed would no longer be needed.

Land ownership / use

188. HMRC drew attention to the fact the Tribunal in *Hochtief* in considering how "land" in s19(3)(e) should be interpreted in the light of the Interpretation Act definition of "land" had applied only part of that definition so as to include "buildings and other structures, land covered with water" but had omitted the references to incorporeal interests i.e. the words "any estate, interest, easement, servitude, or right

in or over land". The correctness of that approach was not in dispute between the parties and appears to us to be consistent with giving "site" an ordinary and sensible meaning in that an ordinary person would not, we think, be preoccupied with the conveyancing intricacies of the locations in question. We did not understand the appellant to be seeking to argue that the pit and construction locations were one site by dint of common property interests.

189. It may be though that property rights around the locations being considered are of indirect relevance in so far as the existence and type of rights over land may impact on what activities take place there and what can be seen at the relevant locations and their surroundings. For instance, if there was a tract of land in between the pit and the construction locations on which something else was going on it might act as a break or buffer and mean it was difficult to say there was one site rather than two sites in close proximity.

190. In this case the appellant's land rights in the land in between Rye Borrow Pit and the reservoir and construction sites meant it was able to build a haulage road connecting the pit and the reservoir area for the duration of construction activity. To the extent there was other usage, in this case agricultural, for that land such that it would be perceived as a buffer area meaning that two locations ought to be regarded as a discrete site we think any such buffer was breached by the existence of the haulage road.

191. We also need to consider at what point in time it is relevant to ask whether the locations in issue constitute a site. The appellant argued the relevant time was the time of exploitation, i.e. when the aggregate was being used for construction purposes. HMRC's submissions and evidence addressed included points directed at taking into account how the area would look, and how it would be used, after the construction activity.

192. Section 19(3)(e) excludes exploitation that would otherwise be "commercial exploitation" from being so and thereby excludes exploitation from liability to aggregates levy. We think that from the point of view of certainty, the s19(3)(e) exclusion must be construed in such a way that a person knows whether their exploitation is commercial exploitation and therefore liable to levy by the point in time at which they carry out the exploitation. It cannot be intended that the issue of liability is left hanging depending on what changes are subsequently made to the locations in issue. We therefore agree with the appellant that it is relevant to consider the site at the time of exploitation.

193. But, we also think, given s19(3)(e) refers to a "site at which [the aggregate] was won" it is relevant to also consider whether and if so what site was in existence at the time the aggregate was won. In this case we note that as at the time the gravel began to be extracted in March 2010 there was a construction site in existence as delineated by the construction boundary and manifested physically by a perimeter fence and that this site continued up to the point of the exploitation in the form of use of gravel for construction purposes.

194. It is convenient to deal at this point with another submission HMRC made which was that when aggregate was transported away from the area of Rye Borrow Pit (being the void area and the immediate surrounding bunds) this amounted to exploitation in the form of removal from the site for the purposes of s19(1)(a). The existence of the bounded construction area at the time the aggregate was won means that in our view it cannot sensibly be said that there was exploitation in the form of removal from the site for the purposes of s19(1)(a) when the aggregate was transported away from Rye Borrow Pit.

Conclusion

195. The question we have had to consider is whether the Rye Borrow Pit location, the main dam, various col dams, and causeway were the "site at which [the aggregate] was won" for the purposes of s19(3)(e). For the reasons set out above, "site" in this context does not mean the particular location where the aggregate is won but must we think bear a wider meaning in order to reflect its purpose. The locations are all within the same planning application site and while we take that into account it is not something we give any significant weight to. In contrast whether the locations are on the same construction site is of significance given s19(3)(e) has construction purposes firmly within its purview.

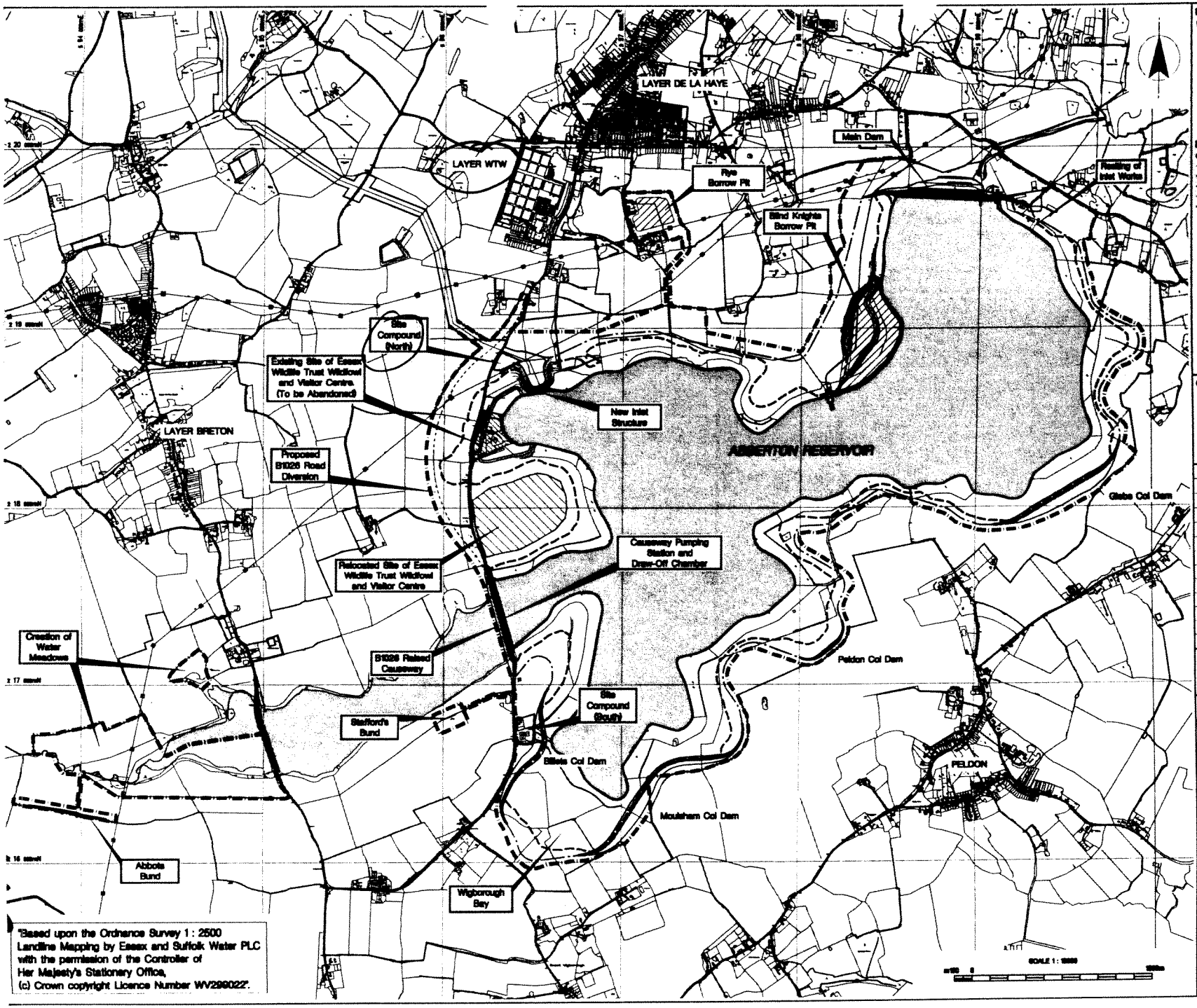
196. Taking into account the size and scale of the construction project we consider the pit and gravel use locations are on the same one construction site which is delineated by a fenced off construction boundary. We think that if the ordinary person were asked whether the locations were on one site, they would in view of the clearly defined construction site say that it was. The construction site containing both the pit and the locations where the gravel was used is a "site" for the purposes of the relief referred to in s19(3)(e) FA2001. That s19(3)(e) applies is in our view consistent with the relief having as a primary purpose the relief from levy where aggregate is sourced and extracted within the construction site rather than being restricted to construction at the particular area of ground where the aggregate was extracted.

197. Accordingly the appellant succeeds and its appeal is allowed.

198. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2013


LAYER DE LA HAYE
LAYER WTW
Main Dam
Rye Borrow Pit
Blind Knights Borrow Pit
Realling of Inlet Works
Site Compound (North)
Existing Site of Essex Wildlife Trust Wildfowl and Visitor Centre (To be Abandoned)
New Inlet Structure
LAYER BRETON
ABBERTON RESERVOIR
Proposed B1026 Road Diversion
Globe Col Dam
Causeway Pumping Station and Draw-Off Chamber
Relocated Site of Essex Wildlife Trust Wildfowl and Visitor Centre
Creation of Water Meadows
B1026 Raised Causeway
Peldon Col Dam
Site Compound (South)
Stafford's Bund
Bilsts Col Dam
PELDON
Mouldham Col Dam
Abbots Bund
Wigborough Bay
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NOTES
LEGEND
CURRENT ISSUE INFORMATION
ESSEX & SUFFOLK WATER
ESSEX & SUFFOLK WATER
ABBERTON SCHEME
ABBERTON RESERVOIR
ABBERTON CONSTRUCTION BOUNDARY
MWH
1 : 10000
410/002962-04/01/329/1336