[2022] UKFTT 00109 (TC)

TC 08440/V

LANDFILL TAX – application to amend grounds of appeal – permission refused – standard or lower rate of landfill tax – whether the waste comprised qualifying material – Section 42 Finance Act 1996 – Landfill Tax (Qualifying Material) Order 2011 – whether loads contained only a small quantity of non-qualifying material – Section 63 Finance Act 1996 – whether the transfer notes relating to the loads contained an accurate description of the material in question for the purposes of Article 7 Landfill Tax (Qualifying Material) Order 2011

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01973

BETWEEN

ALAB ENVIRONMENTAL SERVICES LIMITED — **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
MR IAN PERRY

The hearing took place on 21-22 February 2022 by way of a remote video hearing using the Tribunal's video hearing service.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Craig Kirkham-Wilson of Simmons & Simmons LLP for the Appellant

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Landfill tax was introduced in 1996. It is payable where material is disposed of as waste at a landfill site. Landfill site operators have to be licensed and there are numerous environmental regulations which must be complied with.

2. One of the purposes of landfill tax is to promote recycling and to reduce the amount of waste which is disposed of by way of landfill. There are two rates of landfill tax, the lower rate which applies to material less likely to cause harm and the standard rate which applies to everything else. When landfill tax was first introduced, the lower rate was £2 per tonne of waste and the standard rate was £7 per tonne. At the time relevant to this appeal, the disparity between the rates had become much more marked with the lower rate being either £2.50 or £2.60 per tonne and the standard rate ranging from £72 to £82.60 per tonne.

3. The appellant in this case, Alab Environmental Services Limited ("Alab") operates a landfill site in Hartlepool. That site is managed on behalf of Alab by Mr Ian Liddell who gave evidence on behalf of Alab.

4. Between July 2013 and December 2015, Alab received 361 lorry loads of waste from its customer, Admec Municipal Services Limited (Admec) comprising 7,123 tonnes in total (approximately 20 tonnes per load on average). Alab paid the lower rate of landfill tax in respect of this waste.

5. Following an investigation by HMRC in 2016, they were not satisfied that Alab had provided sufficient evidence to show that the waste qualified for the lower rate and so, in September and December 2017, issued assessments relating to the difference between the lower rate and the standard rate of landfill tax. The assessments together totalled £563,081. However, following a review carried out in February 2019, the total amount was reduced to £556,001 as a result of double counting.

6. Alab notified its appeal against the assessments to the Tribunal on 27 March 2019. In its grounds of appeal, Alab accepted that the disposals were taxable. Its appeal was based solely on the argument that the material in question qualified for the lower rate of landfill tax and was not therefore taxable at the standard rate.

AMENDMENT TO GROUNDS OF APPEAL

7. In his skeleton argument on behalf of Alab dated 31 January 2022 (i.e. three weeks before the hearing), Mr Kirkham-Wilson introduced a new ground of appeal (referred to as Alab's "primary case") to the effect that no landfill tax was in fact due (even at the lower rate) on the basis that the material in question had not been disposed of but instead had been retained by Alab for future use in restoring the site when it ceased to be used as a landfill site, for example in relation to landscaping.

8. Unsurprisingly, Mr Puzey, on behalf of HMRC, objected to the introduction of this new ground of appeal on the basis that no application had been made by Alab to amend its grounds of appeal, that it was too late to introduce a completely new ground of appeal, that HMRC would be prejudiced by allowing the new ground of appeal and that, in any event, there was no evidence to support the new ground of appeal.

9. The Tribunal treated Mr Kirkham-Wilson's skeleton argument as, in substance, an application to amend Alab's grounds of appeal and dealt with that as a preliminary issue prior to the hearing of the appeal itself given the possibility that, if permission were granted, the hearing might need to be postponed.

10. Although there was perhaps a slight difference in emphasis, there was no real difference between the parties as to the principles which should be applied by the Tribunal in determining whether to give permission for an amendment to the grounds of appeal. This includes the need for each party to be given fair warning of the case it will be required to meet (see *Worldpay (UK) Limited v HMRC* [2019] UKFTT 235 (TC) at [8-11]) and the need for the Tribunal to exercise its discretion in accordance with the overriding objective in Rule 2 of the Tribunal Rules in the light of all the relevant circumstances.

11. In this context, the Tribunal asked the parties to consider whether the principles set out by Mrs Justice Carr (as she then was) in the High Court in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [36-38] should be applied by the Tribunal. Mr Puzey's position was that they should. Mr Kirkham-Wilson accepted that these principles had some relevance but that there should be more flexibility in the Tribunal given that tax appeals are not the same as litigation between commercial parties and bearing in mind the importance of ensuring that the right amount of tax is paid.

12. We agree with the Tribunal in *Allpay Limited v HMRC* [2018] UKFTT 273 (TC) which observed at [14] that:

> "While the rules governing the courts are not directly applicable to the Tribunal, I consider that they are a guide to what is appropriate in a tribunal, particularly when dealing with issues of procedural fairness, which is as important in a tribunal as in a court."

13. We do therefore consider that the principles set out by Carr J in *Quah Su-Ling* are a useful guide to the approach which should be taken. In particular, we accept, as submitted by Mr Puzey, that it is clear from cases such as *BPP Holdings Limited v HMRC* [2017] UKSC 55 at [26] that, even in the tribunals, there is a greater focus on litigation being conducted efficiently and at proportionate cost and enforcing compliance with rules, practice directions and orders.

14. During the course of submissions, the possibility of the hearing having to be postponed if permission were granted was raised. Having taken instructions, Mr Kirkham-Wilson stated that, in these circumstances, the appellant would invite the Tribunal simply to refuse the application and to proceed with the hearing as it did not want any further delay before the matter is determined.

15. Our conclusion was that HMRC had not been given fair warning of the proposed new ground of appeal. Although Mr Kirkham-Wilson relied heavily on Mr Liddell's witness statement (produced in February 2021) which sets out his evidence that, from the outset, he considered that the material could be used for restoration purposes and that it was therefore set aside and stored rather than being disposed of, there is no suggestion in the witness statement that, as a result of this, no landfill tax was due. On the contrary, in the same paragraph Mr Liddell confirms that:

> "Because the material was kept on the landfill site, LFT was accounted for on the material at the appropriate rate, which was the lower rate."

16. Against the background of a specific statement in the notice of appeal that Alab did not dispute that tax was payable, we did not consider that Mr Liddell's evidence in his witness statement could or should have suggested in any way to HMRC that Alab was now disputing whether there was any liability to landfill tax at all. Indeed, there was in our minds no doubt that this had only been made clear to HMRC when they received Mr Kirkham-Wilson's skeleton argument.

17. In these circumstances, there would in our view be significant prejudice to HMRC if permission were granted and the hearing were to proceed as they have had no opportunity to obtain any evidence in relation to the proposed new ground of appeal.

18. Whilst Mr Kirkham-Wilson suggested that the factual enquiry in relation to both grounds of appeal would be the same, we did not accept this. The evidence in relation to the original ground of appeal relates to the composition of the material contained in the loads. The evidence which would be needed in relation to the proposed new ground of appeal relates to whether the material had in fact been set aside for restoration purposes as opposed to being put in a landfill cell (as to which there is already conflicting evidence) and the intentions of the relevant parties.

19. Whilst, as will be apparent, the question as to whether the material has in fact been set aside for restoration purposes has some relevance to the question as to whether the material qualifies for the lower rate of landfill tax and we do therefore make a finding on this point based on the limited evidence before us, it is only one of a number of factors to be taken into account. The question as to whether the material has been disposed of by way of landfill goes wider than this and, given the fact that, if it has not, there is no tax at all, we would expect HMRC to want to consider the evidence in relation to this in much more detail.

20. Our conclusion therefore was that if we were to give permission for Alab to rely on the new ground of appeal, the hearing would have to be postponed. We therefore refused permission to rely on the new ground of appeal given Alab's wish to proceed with the hearing in any event.

21. We did also indicate that, taking into account all of the circumstances we would not have given permission to rely on the new ground of appeal and postpone the hearing bearing in mind that:

(1) The proposed amendment is significant as it, in effect, amounts to introducing an entirely new case which would in turn potentially require additional evidence to be before the Tribunal.

(2) Alab could have made an application to amend its grounds of appeal much earlier (for example at or before the time Mr Liddell's witness statement was served) had it wished to do so. Mr Kirkham-Wilson very fairly accepted that Alab could put forward no good reason why such an application had not been made.

(3) The loss of the hearing would result in a significant delay and would be a waste of Tribunal resources.

22. Whilst we accept that one of the functions of the Tax Tribunal is to ensure that taxpayers pay the right amount of tax, this is not, on its own, sufficient justification for a taxpayer to introduce a completely new argument at a very late stage in the proceedings, at least where this would lead to a need to re-assess the evidence required to be put to the Tribunal.

23. Having refused permission for Alab to rely on the proposed new ground of appeal, we proceeded to the hearing of the appeal itself based on the original ground of appeal set out in Alab's notice of appeal to the effect that the loads were only liable to landfill tax at the lower rate rather than the standard rate.

QUALIFYING MATERIALS AND THE LOWER RATE OF LANDFILL TAX – LEGAL FRAMEWORK

24. There have been various changes to the landfill tax legislation during the period relevant to this appeal, principally the introduction of provisions relating to "qualifying fines" (particles produced by a waste treatment process that involves an element of mechanical treatment). There is no suggestion from either party that the loads in question constitute qualifying fines and so, for all material purposes, the legislation has remained the same throughout the relevant

period. However, as we will see, Mr Kirkham-Wilson does rely by analogy on some of the provisions relating to qualifying fines in relation to one particular aspect of his submissions.

25. Section 42(2) Finance Act 1996 ("FA96") provides for the lower rate of landfill tax if the material disposed of "consists entirely of qualifying material". Section 42(3) goes on to define qualifying material by reference to a list contained in an order made for the purposes of s 42.

26. That order is the Landfill Tax (Qualifying Material) Order 2011 (the "2011 Order") which lists the qualifying materials in the schedule to the Order. The schedule is divided into groups and the description of each group is supplemented by notes. For present purposes, the relevant groups are groups 1 and 2. Group 1 is "naturally occurring rocks and soils" and group 2 is "ceramic or concrete materials". The notes to group 1 limit the types of rocks and soils which qualify to those contained in a more detailed list including clay, sand, gravel, construction stone, stone from the demolition of buildings or structures and subsoil. The notes to group 2 similarly limit the materials which qualify by reference to a list which includes bricks and mortar, breeze blocks and concrete.

27. The requirement that the material disposed of must consist entirely of qualifying material is relaxed by s 63(2) FA96 which allows HMRC to direct that material should still be treated as qualifying material if it would be qualifying material but for a "small quantity" of non-qualifying material. The question as to whether a quantity of non-qualifying material is small is to be determined in accordance with the terms of any such direction.

28. HMRC have published guidance about landfill tax in Notice LFT1. A revised version was published in July 2013 with further revisions in March 2015 and December 2015.

29. LFT1 contains guidance about mixed loads. Until December 2015, the guidance was the same in both versions of LFT1 and is contained in paragraph 3.3. To the extent relevant, this provides as follows:

> "… You may ignore the presence of an incidental amount of standard-rated waste in a mainly lower-rated load, and treat the whole load as taxable at the lower rate. For example, we would accept as qualifying for the lower rate:
>
> • A load of bricks, stone and concrete from the demolition of a building that has small pieces of wood in it and small quantities of plaster attached to the bricks as it would have not been feasible for a contractor to separate them
>
> • A load of subsoil that contains small quantities of grass
>
> • Waste such as mineral dust packaged in polythene bags for disposal, and
>
> • A load of subsoil and stone from street works containing tarmac (however a load of tarmac containing soil and stone would not qualify).
>
> It is not possible for us to advise you on every disposal. It is your responsibility to decide whether a particular load disposed of at your site contains a reasonable incidental amount of standard-rated waste – you need to satisfy yourself that the load contains only a small quantity of such waste. The difficulty in separating the standard-rated components from the lower-rated waste is a factor that you can take into account, but this cannot be used to justify applying the lower rate of tax if the standard-rated waste is more than a small amount of the total load. You will need to justify your decision to us."

30. This section of LFT1 is not stated to be a "direction" for the purposes of s 63(2) FA96. However, it is accepted practice that the effect of the guidance is to allow the lower rate to be applied where there is a load of qualifying material which contains a small quantity of standard-rated material.

31. The version of LFT1 introduced on 16 December 2015 is substantially different. The guidance in relation to mixed loads is contained in paragraph 7.3 and is specifically stated to constitute a direction under s 63(2) FA96. It notes that the dictionary definition of "small" is "either small in size or weight; or insignificant or unimportant", concluding that whether an amount of standard-rated waste is small will depend on the circumstances and is a matter of fact and degree. It states that the factors to consider should include (but are not restricted to) the weight and volume of the standard-rated material in relation to the qualifying material and the potential for the standard-rated material to cause pollution or other harm. The guidance provides in particular that if the amount of the non-qualifying material causes the load as a whole to be classified as hazardous, the amount of the non-qualifying material can never be regarded as small.

32. Although the period in question in this appeal continued until 31 December 2015, there is no evidence as to whether any of the loads were delivered to Alab after that date. We do not understand HMRC to place any reliance on the change in the direction for the purposes of s 63(2) FA96 introduced by the amended version of LFT1 introduced on that date. We have therefore made our decision on the assumption that all relevant loads were received before this date and so fall under the guidance contained in the previous versions of LFT1.

33. The only authority we were referred to in relation to the question as to whether a quantity of non-qualifying material is small for this purpose is the decision of the VAT and Duties Tribunal in *Cleanaway Limited v HMRC* [2003] Lexis Citation 4205 (Decision number L00017; LON/00/9501). The Tribunal observed at [56] that:

> "In considering the meaning of 'small quantity' we do not agree that a weight based test is the only possible test. In our view weight may well be a relevant factor but a visual test and any other relevant test may also be appropriate."

34. However, having said this, referring to the decision of the Court of Appeal in *O'Rourke v Binks* [1992] STC 703, a case dealing with the capital gains tax legislation, the Tribunal took the following approach at [58]:

> "We are aware of the dangers of applying an authority relating to one tax and one statute to a different tax and different statute, especially where the decision to be made is one of fact and degree. Nevertheless we have found this authority to be helpful as it confirms that, even when considering the application of the word 'small', it is useful to have some form of yardstick. 5% was mentioned in *O'Rourke v Binks* and Mr Wilson reached the same conclusion. We have quite independently come to the same view within the context of s 63(2). Without therefore deciding that the word 'small' in s 63(2) means anything less than 5% we do treat that as a yardstick within the context of which to consider the evidence before us."

35. Whilst we accept that, in some situations, 5% may be a useful starting point, a percentage approach can of course only be applied to weight or volume. It takes no account of other potential factors such as the nature of the material and its potential to cause harm.

36. Given the dictionary definition of small, which refers not only to size and weight but also significance or importance, it is in our view right to take into account other factors such as the potential for the material in question to cause harm. Mr Kirkham-Wilson accepted this when put to him by the Tribunal, agreeing that, for example, a greater quantity of grass than asbestos could be contained in a load of soil before the load ceases to be eligible for the lower rate of landfill tax.

37. Having said this, s 63(2) FA96 requires the question as to whether a quantity of non-qualifying material is small to be determined in accordance with the terms of any direction

made by HMRC. Whilst paragraph 3.3 of LFT1 prior to 16 December 2015 is not framed as a direction, (indeed, the March 2015 version LFT1 specifically states that certain sections of the guidance (but not paragraph 3.3) have the force of law) it is the only guidance from HMRC available at the relevant time as to the application of s 63(2) FA96. In our view, it was intended to be a "direction" for the purposes of s 63(2) FA96 and should be treated as such. We note that this Tribunal reached the same conclusion in *Augean North Ltd v HMRC* [2021] UKFTT 0230 (TC) at [60].

38. Unlike the later version of LFT1, the July 2013 and March 2015 versions of LFT1 do not refer to the potential for the non-qualifying material to cause harm; nor do they state that an amount of non-qualifying material cannot be small if the effect is to render the entire load hazardous for the purpose of the relevant environmental regulations. There is no suggestion that any scientific test or chemical analysis should be carried out in determining whether the amount of the non-qualifying material is small. Indeed, the impression conveyed by the guidance in paragraph 3.3 is that the assessment is rather more rough and ready based on what is known about the load and what is reasonably apparent from an inspection of the load.

39. It is not in our view possible to give a precise definition of what constitutes a small quantity of non-qualifying material in any given situation. It is clear from the context of s 63(2) FA96 that the concept is a relative one; the quantity of the non-qualifying material must be small relative to the total quantity of material contained in the load. 5% of either weight or volume may be a useful starting point but all other relevant factors (which will be different in each case) will need to be taken into account. For example, a load of rock may contain leaves or grass which are much less dense than rock so that the amount of the leaves/grass is more than 5% by volume but much less than 5% by weight. Depending on the circumstances, the quantity may still be small.

40. In addition, the nature of the non-qualifying material is relevant. For example, where a load of bricks contains less than 5% (by volume or weight) of asbestos, this may not be a small quantity of non-qualifying material.

41. Finally, we note that the test must be objective. Whilst some of the evidence on which the Tribunal will base its decision may include the subjective impression of witnesses, the question for the Tribunal is whether it is satisfied, on the balance of probabilities that, objectively, the quantity of any non-qualifying material is small.

42. In relation to this, and all other aspects of Alab's appeal, the burden of proof is on Alab. HMRC's position is that Alab has not provided enough evidence to demonstrate that, on the balance of probabilities, the conditions are satisfied.

43. There is one other condition which we need to refer to and that is contained in Articles 6-8 of the 2011 Order.

44. Article 6 applies where, as in this case, the owner of the material immediately prior to the disposal (Admec) and the operator of the landfill site (Alab) are different people. In these circumstances, the condition in Article 7 must be satisfied. Article 7 provides as follows:

> "The relevant condition is that a transfer note includes in relation to each type of material of which the disposal consists a description of the material which:
>
> (a) accords with its description in column 2 of the Schedule;
>
> (b) accords with the description listed in a note to the Schedule (other than by way of exclusion); or
>
> (c) is some other accurate description."

45. Article 8 defines a "transfer note" by reference to what, by the start of the relevant period, had become the Waste (England and Wales) Regulations 2011. Regulation 35 defines a transfer note as a written description of the waste which contains certain specified information set out in the Regulation. Although certain of the documents contained in the bundle provided to the Tribunal were described by Mr Liddell in his witness statement as transfer notes, following cross examination of Mr Liddell, it was accepted by Mr Kirkham-Wilson in his submissions that none of the documents before the Tribunal satisfied the definition of a transfer note in Regulation 35.

46. Leaving this on one side, one of the key areas of dispute is what constitutes "some other accurate description" for the purposes of Article 7 of the 2011 Order. Mr Puzey's position is that, bearing in mind the purpose of the condition, the description must be one from which it is possible to determine whether the material falls within the list of qualifying materials in the Schedule to the Order. Mr Kirkham-Wilson on the other hand submits that there is no reason to read this additional requirement into Article 7(c).

47. Both parties rely on HMRC's Revenue and Customs Brief of 15/2012 which, in paragraph 4, states the following:

> "To qualify for the lower rate, the waste transfer note, which is required to accompany most movements of waste in the UK, must accurately describe the waste so that it can be related to the terms used in the Landfill Tax (Qualifying Material) Order 2011 (SI2011/1017) ('the 2011 Order'), which came into force on 1 April 2011. In other words, the load must not only be of a material listed in the Order, but also described in a manner that clearly evidences that fact on a waste transfer note and/or any other commercial documentation."

48. The parties accept that this note only constitutes guidance but Mr Puzey submits that it requires the nature of the material as qualifying material to be apparent from the description contained in the transfer notice and that, in this respect, the Business Brief is a reasonable and accurate interpretation of Article 7(c).

49. For his part, Mr Kirkham-Wilson focuses on the fact that the brief anticipates the possibility that the description which evidences the fact that the material is qualifying material may be contained in the waste transfer note or in other commercial documentation. The condition in Article 7(c) would therefore, he says, be satisfied as long as the description in the transfer note is accurate and there is some other document which makes it clear that the material is qualifying material.

50. In this respect, the wording of HMRC's brief is unfortunate. The first sentence clearly anticipates that the relevant description which links the waste to the list of qualifying materials will be contained in the waste transfer note itself. The second sentence, however, casts doubt on this given the reference to a description contained in other commercial documentation.

51. However, as the parties accept, HMRC's brief is only guidance. The Tribunal must determine for itself the correct interpretation of Article 7(c) of the 2011 Order.

52. In our view, HMRC's interpretation is the correct one. The effect of Article 6 is that, even if a load consists of qualifying material, it will not qualify for the lower rate unless the condition in Article 7 is met. The clear purpose of the condition in Article 7 is to link the description of the material in the transfer note to the list of qualifying materials in the Schedule to the 2011 Order. This is plain from the alternatives set out in Article 7(a) and 7(b) which apply where the material is described by reference to the actual terms used in the Schedule to the Order (for example, "rock" or "clay").

53. Mr Puzey submits, and we agree, that the purpose of Article 7(c) is to prevent people being tripped up by using a description which does not accord with the precise terms of the Schedule to the 2011 Order but which nonetheless makes it clear that the material falls within one of the descriptions listed in that Schedule. Mr Puzey gave as an example a transfer note which described the material in question as "basalt". The Schedule to the 2011 Order refers only to "rock" but basalt is of course a form of rock and so it is readily apparent that it is a qualifying material.

54. In our view, this must be the correct interpretation of Article 7(c). It would be completely meaningless to impose a condition simply requiring the material to be described in a way which could be said to be accurate but which nonetheless does not allow any determination to be made as to whether or not the material is qualifying material. The transfer note itself must therefore contain an accurate description of the material from which it is clear whether or not the material is qualifying material. It is not sufficient for that link to be contained in some other document.

55. With this background in mind, we now turn to the evidence and the facts in this appeal.

THE EVIDENCE AND THE FACTS

56. The documentary evidence consisted of a bundle of documents and correspondence. In addition, we heard oral evidence from Mr Ian Liddell who, as we have mentioned, is the manager of the landfill site in question and from Mr David Noble, the HMRC officer who carried out the review of HMRC's original decision.

57. Mr Noble's evidence was brief. Although we considered that he was doing his best to answer the questions put to him, his evidence provided little assistance in relation to the key factual findings which we need to make.

58. Our original assessment of Mr Liddell is that his evidence was somewhat unreliable. However, as his cross-examination progressed, it emerged that, although he is in charge of the relevant landfill site, he had little involvement in the documentary side of the process, this being dealt with by Head Office and/or the appellant's Sales Manager, Mr Short. No evidence was given by Mr Short as he had left Alab several years ago.

59. This went some way to explaining a major discrepancy between Mr Liddell's clear evidence that, from the outset, the material in question had been set aside and stored for future restoration purposes, whereas at least two letters written by Alab's lawyers, Simmons & Simmons to HMRC during their enquiry referred to the waste having been put into a cell for landfill. It was clear that Mr Liddell had had no involvement in the instructions given to Simmons & Simmons and had not seen the letters in question prior to giving evidence.

60. By the end of his evidence, we were satisfied that Mr Liddell was doing his best to give honest answers to the questions which were put to him although, for the reasons set out above, there were a number of areas where he was unable to provide assistance or could only tell us what he had been told by Mr Short.

61. We should record that neither party applied for permission to give expert evidence. Therefore, although the bundle of documents contains the results of a number of tests carried on the material in question, it was impossible for us to interpret those results in any meaningful way. Indeed, both parties cautioned against us doing so despite Mr Kirkham-Wilson relying on one of the tests which were carried out after HMRC started their investigation in support of his submissions.

62. The main factual question for us to determine is whether the material comprised in the relevant loads is qualifying material which contains no more than a small quantity of non-qualifying material. However, before doing this, it is helpful to set out the background facts in respect of which there is no real dispute.

63. Alab's relationship with Admec started in March 2011. One of Alab's sales managers, Danny Short, provided a "provisional quotation" to Admec for the disposal of waste which was described as "Sweeper Waste (road sweepings)". The European Waste Code (generally known as an EWC code) quoted was 20.03.03 which is defined as "street-cleaning residues". The quote included a charge for landfill tax at the lower rate and also required Admec to provide a transfer note.

64. During the period from July 2013-December 2015, Admec transferred to Alab 361 loads of material comprising 7,123 tonnes.

65. Prior to or shortly after acceptance, a chemical analysis of some of these loads was carried out by an independent third party, Chemtec Environmental.

66. Prior to despatch, Admec completed a "qualifying material questionnaire". This described the material as "roadsweeper waste" quoted the EWC Code 20.03.03 and contained the additional information that the material was "swept from construction sites". The questionnaire contained a declaration that the information contained in it was true and correct and that it would be used to determine landfill tax liability. The declaration was signed by Admec's operations manager. The questionnaire also confirmed that none of the input wastes were hazardous.

67. On leaving the Admec facility (described as a waste transfer station) the driver would be provided with a weighbridge ticket signed by Admec's weighbridge operator and by the driver. This weighbridge ticket described the material as "road sweepings" and again quoted the EWC Code 20.03.03.

68. On arrival at Alab, a further weighbridge ticket was generated. The customer, carrier and load information was pre-populated by Alab's Head Office. If the weighbridge operator noted any discrepancies, they would need to call Head Office to get them to make any necessary amendments. The Alab weighbridge ticket described the waste type as "roadsweep grp 1&2 sweeper waste (roa 20 03 03)".

69. The weighbridge was equipped with overhead CCTV which allowed the weighbridge operator to inspect the load contained in the lorry. Following the review by the weighbridge operator, the driver was then given instructions as to where on the landfill site the load should be deposited.

70. Mr Liddell personally inspected the first load which arrived from Admec. He walked around the site on a regular basis and so inspected a number of further loads although not every load which arrived.

71. In March 2016, HMRC undertook a check of Alab's landfill tax returns leading in particular to questions about the waste with EWC Code 20.03.03 declared as lower rate waste. Despite a significant amount of correspondence between Alab, its representative and HMRC, HMRC were not persuaded that the waste qualified for the lower rate of landfill tax and so, as we have already mentioned, issued assessments in September and December 2017 in order to collect the difference between the two rates. The reason the assessments were issued at this stage was partly due to the time limits for making assessments.

72. Correspondence continued in 2018 with HMRC asking on a number of occasions for information about the specific origin of the sweepings, for example whether they were from within the boundary of the construction sites or from the surrounding roads. This information was however never provided.

73. In December 2018, Alab commissioned an analysis of the Admec waste from Chemtech. This described the sample as "loamy sand with gravel and roots". This report was sent to

HMRC in February 2019 prior to Mr Noble completing his review of HMRC's decision to issue the assessments which had been requested by Alab in January 2019.

74. The review however upheld the assessments subject to a minor amendment to rectify the double counting of tax charged in respect of 2013.

75. In May 2020, Alab commissioned a further analysis from Chemtech comprising a "loss on ignition" test. Chemtech described the sample as "sandy clay with gravel and roots". The result of the loss on ignition test was a loss of 6%.

DISPUTED FACTS

76. Before addressing the question of the composition of the material in question, there are two issues we need to consider which have some relevance to that question. The first is whether the material was, as Mr Liddell says, stored at the landfill site for future restoration work; the second is whether the material, although described as road sweepings, did in fact come from construction sites.

Was the material set aside for restoration?

77. Mr Liddell's evidence was that he was told by Mr Short to inspect the material from Admec when it first arrived at the site as, in Mr Short's view (having visited Admec to inspect the material), it could potentially be used in the future for restoration. Having done this, Mr Liddell formed the view that the material could indeed be used for this purpose and his evidence is that it was therefore segregated and stored on the landfill site rather than being placed into one of the landfill cells.

78. In his oral evidence, Mr Liddell went into more detail about this explaining that the area on top of cells 1 and 10 at the landfill site had been earmarked to be turned into a pond when the landfill was completed around 2027 and had therefore been left clear. This was therefore an ideal place to store the waste which was deposited at the bottom of a slope and then pushed up by bulldozers into a pile.

79. Mr Puzey drew Mr Liddell's attention to the letter written by Simmons & Simmons in November 2018 which clearly states that the material in question had been transferred to cell for landfill and to a subsequent letter written by Simmons and Simmons in February 2019 stating that it was only in the process of testing the waste in December 2018 that Alab had formed the view that it would be suitable for use as restoration material and that it would in due course be removed from the cell where it had been placed.

80. The statements in these letters of course contradict Mr Liddell's evidence. Mr Liddell explained that he had not been involved in the drafting of either of the letters and, indeed, had not seen them prior to the hearing. In his view, the statements in those letters were simply incorrect.

81. We prefer Mr Liddell's evidence to the statements contained in the letters. We accept his evidence that he had no involvement in writing the letters despite the fact that he was the main person with first-hand knowledge of what had happened to the material given his position as manager of the relevant landfill site.

82. In our view, Mr Liddell is in the best position to say what happened to the material. This is not a situation where reliance is placed on an individual's memory of what might have happened some years ago. Assuming Mr Liddell is right that the material has been stored on top of two landfill cells, it is still there and he will see it on a daily basis. Mr Liddell has been absolutely clear in his witness statement and his oral evidence that the material was stored and was not placed into a cell. Our assessment of Mr Liddell is that he was an honest witness and we do not therefore accept that he would make these statements knowing them to be untrue,

particularly in circumstances where they could easily be shown to be false had HMRC decided to visit the landfill site.

Did the Material come from construction sites?

83. Alab has consistently explained to HMRC that the sweepings do not come from municipal roads but come from construction sites, at the outset of HMRC's enquiries providing HMRC with an example of the qualifying material questionnaire signed by Admec confirming that the waste was "swept from construction sites". Mr Liddell confirmed in his evidence that he had been told by Mr Short that the material came from construction sites but was not otherwise able to confirm this from his own knowledge.

84. He was however able to confirm that, from his own inspection of the material, it was consistent with the sort of waste which might result from sweepings from construction sites as opposed to municipal roads. He explained that he had previously worked on construction sites and so was aware that lorries and heavy plant using a construction site would pick up mud and sandy gravel which would be deposited on the roads outside the construction site and would need to be swept. In addition, construction sites typically had dirt roads which would need to be swept regularly to keep them clear. He contrasted this with sweepings from a municipal road which was likely to contain significant quantities of municipal waste as well as tar and gravel.

85. In our view the descriptions used by Chemtech in 2018 and 2020, being "loamy sand with gravel and roots" and "sandy clay, gravel and roots" respectively tend to support Mr Liddell's analysis.

86. Mr Puzey relies on two main points in support of his submission that, based on the evidence provided by Alab, the Tribunal cannot be satisfied on the balance of probabilities that the material did in fact come from construction sites. The first point is the use of the EWC Code 20.03.03. He submits that this does not correspond with waste from construction sites. Codes starting with 20 denote municipal waste (household waste and similar commercial, industrial and institutional waste). Within this, 20.03 relates to "other municipal waste" and, as previously mentioned, 20.03.03 is a sub-category of this referred to as "street-cleaning residues".

87. Mr Puzey suggests that sweepings from construction sites would more naturally fall into Category 17 which is headed "Construction and Demolition Wastes" and includes within the sub-categories concrete, bricks, soil and stones. He speculated that one reason for using EWC Code 20.03.03 could be that materials falling within this code are automatically categorised as non-hazardous, unlike materials within Category 17 which may be hazardous or non-hazardous.

88. Whilst we accept that it is arguable that the wrong EWC code has been used (and Mr Liddell accepted in his evidence that another category might perhaps be appropriate), this does not in our view lead to the conclusion that the material in question did not come from a construction site. Indeed, despite Mr Puzey's point about street cleaning residues being classed as non-hazardous, it would seem to us quite surprising if somebody trying to pull the wool over HMRC's eyes in relation to their liability for landfill tax would deliberately choose an EWC code which, in many cases, would not qualify for the lower rate – which is of course precisely why HMRC focussed on this point when undertaking their checks in 2016.

89. The second point relied on by Mr Puzey is Alab's failure to answer HMRC's questions about precisely where the road sweepings came from. However, the questions posed by HMRC related to whether the sweepings came entirely within the boundary of the construction site, entirely from the surrounding highways or a combination of the two. Whilst it might of course

have been helpful had Alab answered these questions, it cannot in our view be inferred from their failure to do so that the material did not originate from construction sites.

90. As mentioned above, we note that the qualifying materials questionnaire signed on behalf of Admec, which stated that the sweepings came from construction sites, contained a declaration that the information was true and that it would be used to determine the liability to landfill tax.

91. Based on all of this, we are satisfied on the balance of probabilities that the material in question does indeed constitute road sweepings from construction sites. That is the description given by Admec at the time, it has consistently been Alab's position during HMRC's enquiries, it is supported by Mr Liddell's evidence as to the nature of the material and it is also supported by the description of the samples given by Chemtech.

THE COMPOSITION OF THE MATERIAL

92. We now need to determine whether, on the balance of probabilities, the loads in question contained no more than a small quantity of non-qualifying material applying the principles we have summarised in paragraphs [38 – 40] above.

93. Mr Kirkham-Wilson's starting point is that it is clear from paragraph 3.3 of LFT1 that the taxpayer, in effect, has to self-assess whether the amount of any non-qualifying material is small. The assessment should, he says, therefore be made based on the expertise of the relevant person (in this case, Mr Liddell) and credit should be given to the taxpayer's judgment.

94. The first question is whether the loads are comprised primarily of qualifying material. We have already found as a fact that the loads represent sweepings from construction sites. Mr Liddell's evidence is that such material would comprise primarily mud, sand and gravel. This is consistent with the Chemtech tests which described the material as loamy sand or sandy clay with gravel and roots. Mr Liddell explained that the mud would dry out leaving soil, clay or sand.

95. In his witness statement, Mr Liddell describes the material as a black, "compost-like material" although in cross-examination also described the material as "sandy gravel". On re-examination, he clarified this explaining that the earlier loads were blacker and the later loads consisted primarily of sandy clay.

96. Mr Puzey draws attention to the discrepancies between the descriptions used by Mr Liddell. He also observes that there is no evidence as to where the samples were taken from which were tested by Chemtech in 2018 and 2020, suggesting that little reliance can therefore be placed on those tests.

97. During cross-examination, Mr Liddell was unable to explain clearly whether the material fell within group 1 or group 2 of the schedules to the 2011 Order. Mr Puzey submits that this is a further reason why little weight should be given to Mr Liddell's evidence, noting that Mr Liddell's evidence is neither objective nor independent.

98. In addition, Mr Puzey places reliance on the fact that Alab has failed to provide information (requested several times by HMRC) as to precisely where the waste has come from. He therefore submits that the Tribunal cannot rule out the possibility that the waste includes other common materials such as oils, plastics, metals or organic waste contamination.

99. In further support of his submission that the Tribunal cannot be satisfied on the balance of probabilities that the loads consist primarily of qualifying material, Mr Puzey referred to a description of road sweepings in the Guidance from Natural Resources Wales on the "recovering of street sweepings" which strongly suggests that such waste would not contain

materials qualifying for the lower rate of landfill tax. It is however equally clear that the publication is describing waste recovered from municipal roads rather than construction sites.

100. Based on the totality of the evidence, we are satisfied on the balance of probabilities that the waste in question does consist primarily of qualifying materials being sand, clay, gravel, subsoil, silt and possibly some brick.

101. Based on Mr Liddell's evidence, we consider it likely that road sweepings from construction sites would be mainly comprised of such material. In addition, Mr Liddell's evidence is that the loads in question did in fact contain such material. This is supported by what Mr Liddell says he was told by Mr Short about the nature of the material following a visit by Mr Short to Admec to inspect the waste, which prompted Mr Short's suggestion to Mr Liddell that he should consider whether the material could be used for restoration purposes.

102. Although there were discrepancies as to how Mr Liddell described the material, we accept that the reason for this is that there was a mixture of material. This is supported by the Chemtech descriptions. In 2018 the main description was "loamy sand" which would be consistent with Mr Liddell's witness statement where he described the waste as a "black, compost-like material". In 2020, the Chemtech description was "sandy clay" which is consistent with the description used by Mr Liddell in his oral evidence. We do not therefore consider that too much can be read into these discrepancies, particularly as all the material described would fall within the definition of qualifying materials.

103. As far as the samples examined by Chemtec in 2018 and 2020 are concerned, Mr Liddell accepts that he did not see those samples being taken. However, he gave fairly detailed evidence in his witness statement as to the process used for taking samples based on his observation of samples being taken on other occasions. Based on this evidence and on the description by Chemtech of the waste as "Admec waste" or "Admec sweeper waste", we accept that these samples are likely to be representative samples of the waste in question.

104. We have also found as a fact that the waste was in fact stored by Alab for future restoration purposes. Again, this provides some support for Alab's case that the material consists primarily of qualifying material as the use of the material for this purpose would be consistent with Mr Liddell's description of the material.

105. Whilst Mr Liddell may not have been confident about the finer details of the schedule to the 2011 Order (for example which group a particular type of material would fall into), we are satisfied that he had sufficient knowledge of what type of materials qualified for the lower rate of landfill tax to be able to make an appropriate assessment of the waste in question.

106. We therefore find as a fact that the loads were comprised primarily of qualifying material.

107. It is however accepted that the waste also contains some non-qualifying material including tin cans, leaves and roots. In addition, Mr Puzey submits that, based on the evidence available, it is impossible to say that the waste does not contain other contaminants, such as oil, which may not be immediately apparent from a visual inspection. We therefore need to consider whether Alab has satisfied us that the quantity of any such non-qualifying material is small within the meaning of s 63(2) FA96.

108. Mr Liddell's evidence is that, from his inspection of the loads, any such material only comprised a small part of the load. The presence of leaves is explained by leaves having settled on top of the load whilst stored by Admec. The presence of roots in the samples analysed by Chemtech is explained by the fact that, whilst the material was stored by Alab, grass had started to grow on top of the waste. Mr Liddell's evidence is that any such materials comprised well under 5% of the load.

109. Mr Puzey however submits that this is an insufficient basis for determining whether the quantity of any non-qualifying material contained in the load is small. He observes that the tax at stake is over £500,000 and so it is important to get the right answer to the question. He suggests that there is a heavy burden on the taxpayer who should for example carry out tests on the waste, find out precisely where it has come from and what (if any) processing has taken place.

110. Although he cautioned against reading anything into the test results, Mr Puzey drew our attention to the fact that the 2018 tests conducted by Chemtech appeared to show that the sample contained 621mg/kg of hydrocarbons compared to an apparent limit for inert waste of 500mg/kg. Mr Puzey suggested that this might indicate a quantity of hazardous waste which could not be said to be small given the nature of the material.

111. Mr Kirkham-Wilson relies principally on Mr Liddell's evidence about the nature of the waste from his inspection of it. He submits that, based on the guidance in LFT1 (prior to December 2015) there is no obligation on a taxpayer to demonstrate the precise proportion of non-qualifying material and that, indeed, in most cases, it would be impractical to do so given that it would be necessary to actually separate the qualifying material from the non-qualifying material. He draws attention to one of the examples in LFT1 ("small quantities of plaster attached to bricks") where it is clearly accepted that it would not be feasible for the contractor to separate them.

112. Mr Kirkham-Wilson also makes the point that roots and leaves are not particularly dense materials and that, taking into account the *Cleanaway* yardstick of 5%, it would take a considerable volume of roots and leaves to exceed 5% by mass.

113. It is in relation to this issue that Mr Kirkham-Wilson also relies on one of the chemical tests, being that carried out by Chemtech in 2020. This test was what is known as a "loss on ignition" test which is a test required by LFT1 in relation to qualifying fines for determining the organic content of the material. At the time, the acceptable limit was a reduction of 15% (although this has subsequently been reduced to 10%). The reduction in the sample was only 6%. This, he suggests, supports the conclusion that the quantity of any non-qualifying material is small.

114. Although it is impossible to say precisely what quantity of non-qualifying materials was contained in the loads, we are satisfied from the evidence we have seen that, on any basis, the quantity of such material was small within the meaning of s 63(2)FA96 as supplemented by paragraph 3.3 of LFT1.

115. It is clear to us from the guidance in LFT1 (which, as mentioned above, we take to be a direction for the purposes of s 63(2) FA96) that there is no requirement to undertake a detailed scientific analysis of the waste in order to determine whether the quantity of any non-qualifying material is small. That this is so is demonstrated by the examples which are given which very much suggest a common sense, practical approach based on little more than a visual inspection.

116. We accept HMRC's warning that the taxpayer will need to justify their decision to HMRC and so there does need to be some evidence that the amount of non-qualifying material is small. However, we consider that Alab has discharged this burden.

117. As Mr Kirkham-Wilson submits, the primary evidence is Mr Liddell's own evidence of his inspection of the waste. He is quite clear that the amount of any tin cans, leaves or roots is small and, in his view, well under five per cent. We accept that this is small in relative terms and is also not important or significant for any other reason.

118. This assessment is supported by the qualifying material questionnaire completed by Admec prior to the waste being sent to Alab which is effectively confirmation that the waste

qualifies for the lower rate of landfill tax and contains a specific declaration that it will be used for the purposes of determining the liability to landfill tax.

119. In addition, the evidence shows that some contemporaneous testing was carried out by Chemtech in relation to the loads sent by Admec to Alab. These are described as "waste acceptance criteria testing". Whilst, in the absence of expert evidence, we cannot tell precisely what was being tested or what the outcome of those tests was, it is in our view likely that any indication that the loads contained more than a small quantity of non-qualifying material which might not otherwise have been immediately obvious would have been identified by these tests. As there is no suggestion that these tests raised any red flags, this therefore, in our view, further supports the proposition that the amount of any non-qualifying material is small.

120. It is also interesting to note that, in all of those contemporaneous test results, the amount of hydrocarbons is well below the limit for inert waste for 500mg/kg. Whilst we cannot pretend to understand what this result means (indeed it is noteworthy but there was no agreement at the hearing as to whether "mg" signified milligram or microgram), it does lead us to conclude that any doubts which Mr Puzey suggests that we should entertain based on the 2018 test results should not be a significant factor in reaching our conclusion.

121. In any event, as we have said, we do not consider that Alab was obliged to conduct the detailed chemical analysis in order to enable it to conclude that the quantity of any qualifying material was small. The fact that it did so and still reached the same conclusion can only support a finding that, objectively, the amount of any non-qualifying material was indeed small.

122. Whilst Mr Puzey might be right that the risk of the loads containing hazardous, non-qualifying material cannot be ruled out, in the light of the fact that tests were carried out and in the absence of anything to suggest that such material may be comprised in the loads, this does not affect our conclusion. In this respect, we have also taken into account the fact that the qualifying material questionnaire completed by Admec specifically confirms that none of the input wastes are hazardous.

123. In reaching our conclusion we have placed no weight on the loss of ignition test referred to by Mr Kirkham-Wilson given that we have no expert evidence as to what this test is measuring and how it might be applied by analogy to the loads in question even though they do not consist of qualifying fines.

124. Our overall conclusion therefore in relation to the composition of the material is that it is qualifying material within s 42(2) FA96 which, for the purposes of s 62(3) FA96 contains no more than a small quantity of non-qualifying material.

TRANSFER NOTICES

125. Although we have found that the loads in principle qualify for the lower rate of landfill tax, the effect of Article 6 of the 2011 Order is that the material cannot be treated as qualifying material unless the transfer note satisfies the condition in Article 7.

126. As we have explained, in our view this requires the transfer note to describe each type of material contained in the load in a way which is both accurate and which allows it to be determined whether the material is qualifying material.

127. Although some of the documents contained in the evidence were originally thought to constitute transfer notes, it is clear that they are in fact weighbridge tickets which do not satisfy the definition of a transfer note in Regulation 35 of the Waste (England and Wales) Regulations 2011. They do not, for example, contain Alab's address and are not signed by Alab, nor do they have details of any relevant environmental permit numbers for Admec or Alab.

128. Mr Liddell was not able to confirm in his evidence whether or not transfer notes in fact existed in relation to the loads as his evidence was that they would have gone direct to head office. The most that he could say was Alab had a proforma transfer note on its website which was available to customers to download and to complete.

129. Mr Kirkham-Wilson invited us to infer from this that each of the loads would have been accompanied by a transfer note.

130. Although Mr Kirkham-Wilson did not refer to it, we do note that the provisional quotation supplied by Alab to Admec in 2011 requested that a transfer note be completed by Admec. However, even taking this into account, it is in our view impossible to infer from the evidence provided that a transfer note does in fact exist for each of the loads in question.

131. Indeed, the very fact that no transfer notes have been included in the evidence supplied strongly suggests to us that there are no transfer notes. Alab clearly have retained records in relation to the loads as they have been able to supply the weighbridge tickets produced both by Admec and by Alab. We would therefore have expected that, if transfer notes existed, these would have formed part of those records and could easily have been produced.

132. In the light of this, we find on the balance of probabilities that there are no transfer notes within the meaning of Articles 7-8 of the 2011 Order in respect of the various loads and that the condition in Article 7 has not therefore been satisfied. The result is that, in accordance with Article 6 of the 2011 Order, the loads cannot be treated as qualifying material.

133. Although, in the light of this, we do not need to do so, we have also concluded that, even if we were able to infer the existence of a transfer note, the condition in Article 7 of the 2011 Order will still not be satisfied as the description of the material would not allow a determination as to whether it was qualifying material.

134. It is clear that, if a transfer note existed, it would have been completed by Admec (not Alab). The Admec weighbridge ticket refers to the material as "road sweepings" with the EWC code 20.03.03. Had Alab completed a transfer notice, we infer from this that it would have used the same description on the transfer note.

135. However, this description firstly is not accurate (as it does not refer to construction sites as opposed to municipal roads) and secondly it is impossible to say from the description whether the waste is qualifying material or not. Indeed, based on the description in the guidance from Natural Resources Wales, it might well be inferred that such waste is in fact unlikely to be qualifying material.

136. We note that the weighbridge tickets produced by Alab specifically refer to groups 1 and 2 (presumably of the 2011 Order) which would indicate that the material is qualifying material. However, as we have said, any transfer note would have been produced by Admec and not Alab and so there is no evidence to suggest that any description in a transfer note would have included a reference to groups 1 and 2 of the 2011 Order.

137. As we have already explained, we do not accept that the condition in Article 7 of the 2011 Order can be satisfied by reference to documents other than a transfer note despite the terms of the Revenue and Customs Brief 15/2012 referred to by both parties.

CONCLUSION

138. Although we accept that the loads consisted of qualifying material and contained no more than a small quantity of non-qualifying material, they must, in accordance with Article 6 of the 2011 Order be treated as non-qualifying material liable to landfill tax at the standard rate as the condition in Article 7 of the 2011 Order has not been satisfied.

139. The result is that Alab's appeal fails and the assessments are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

140. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 24 MARCH 2022