[2014] UKUT 0225 (TCC)

FTC/28/2013

LANDFILL TAX - biodegradable material sent to landfill - material decomposes and produces landfill gas including methane - methane used to power gas engines generating electricity - whether that material sent to landfill which generates gas used for electricity generation discarded as waste by appellant

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

PATERSONS OF GREENOAKHILL LTD

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY' S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Hon Mrs Justice Rose

Roderick Cordara QC and Zizhen Yang instructed by KPMG, Manchester for the Appellant
Melanie Hall QC and Simon Charles instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

The appeal of the Appellant IS DISMISSED

REASONS

1. This appeal concerns the application of landfill tax where some of the material deposited in a landfill site decomposes and produces landfill gas which is captured and used by the operator of the site to generate electricity. The First-tier Tribunal ('FTT' or 'the Tribunal') held in a decision dated 2 August 2012 that the Appellant was not entitled to reclaim the landfill tax paid on that biodegradable material.

2. The Appellant ('Patersons') operates a landfill site in Mount Vernon, Glasgow. The site is an old sand and gravel quarry and covers 91 hectares. Patersons developed the site for landfill purposes in stages so that it now consists of four zones. Zones 1 and 2 are closed to the acceptance of more landfill but continue to produce landfill gas. Zone 3 also contains gas-producing materials and is open for the deposit of more material. Zone 4 is an inert area not containing any gas-producing materials. Each zone in the site consists of a series of cells which have been engineered to operate independently of each other so that gas and other materials cannot migrate from one part of the site to another.

3. When a vehicle loaded with material for disposal arrives at Patersons' site gates, it passes over a weighbridge. If the weighbridge operator is satisfied that the load can be accepted, he issues the driver with a ticket and instructs him to proceed. Material other than building waste is taken to the transfer station. Items within the waste such as wood, metal, bricks and stones which can all be recycled are separated out and sold off the site. It is accepted that landfill tax is not payable on that material.

4. Landfill gas is mainly methane with some carbon dioxide. The FTT described the process by which landfill gas is generated in the landfill site:

> "98. It is from the material sent to landfill that landfill gas, and hence methane, is produced. The production process requires no action by Patersons; the decomposition process is triggered by the deposit into landfill. Material decomposes at different rates so that some produces landfill gas in a matter of weeks, whilst other takes much longer for the degeneration process to begin. But when decomposition has begun, it continues for a lengthy period of time – a period which it is impossible to calculate, but which may extend to 50 or more years. Nor can it be said what quantity or quality of methane will be produced by any given load of waste material deposited into landfill…"

5. The landfill gas generated at Patersons' site is collected and the methane is burned in gas generators to generate electricity. Patersons sells that electricity

profitably to the Scottish Power Distribution System, via a cable connecting its site to the grid.

The charge to landfill tax

6. Section 40 of the Finance Act 1996 ('the Act') sets out the circumstances in which the landfill tax is charged:

> '**40 Charge to tax.**
>
> (1) Tax shall be charged on a taxable disposal.
>
> (2) A disposal is a taxable disposal if—
>
> (a) it is a disposal of material as waste,
>
> (b) it is made by way of landfill,
>
> (c) it is made at a landfill site, and
>
> (d) it is made on or after 1st October 1996.
>
> (3) For this purpose a disposal is made at a landfill site if the land on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal."

7. 'Material' is defined as material of all kinds including objects, substances and products of all kinds: see section 70(1) of the Act.

8. It is common ground before me, as it was before the FTT, that conditions (b), (c) and (d) of section 40(2) are met here. The question is whether what happens at Patersons' site is a disposal of material as waste for the purposes of section 40(2)(a).

9. The disposal of material as waste is defined in section 64 of the Act:

> '**64 Disposal of material as waste**
>
> (1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material.
>
> (2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.
>
> (3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) above the person on whose behalf the disposal is made shall be treated as making the disposal.
>
> (4) The reference in subsection (3) above to a disposal on behalf of another person includes references to a disposal—
>
> (a) at the request of another person;
>
> (b) in pursuance of a contract with another person.'

10. Section 41 of the Act provides that the person liable to pay tax charged on a taxable disposal is the landfill site operator. The tax is calculated by taking a set figure (£80 as from 1 April 2014) for each whole tonne disposed of and a proportionately reduced sum for any additional part of a tonne. A much smaller sum per tonne is payable if the material disposed of is 'qualifying

material', that is material that is listed for the purposes of this section, such material being generally speaking inactive or inert.

11. Patersons currently operates its site under a pollution prevention and control permit issued by SEPA, the Scottish Environment Protection Agency ('the PPC Permit'). That Permit came into operation on 30 March 2007. Before that date, Patersons operated under a waste management licence issued by SEPA on 18 June 2000. Its PPC Permit provides as follows.

    a. Patersons must provide a landfill gas management system for each cell at the site, the objective of which shall be to collect, extract and dispose of or utilise landfill gas arising from the site in such a way that minimises damage to the environment and risk to human health.

    b. The landfill gas management system must be operated in accordance with the Management Plan and must optimise the collection, extraction and disposal or use of the landfill gas generated at the site

    c. Detailed requirements are set out for monitoring the composition of the gas, balancing the system with the amount of gas being produced and monitoring emissions from the site.

12. It is accepted by Patersons that it was under an obligation to manage the landfill gas produced at the site either by using it to generate electricity or by flaring it. However, it says that it has put in place at considerable cost measures that go substantially beyond what it is required to do by the PPC Permit in order to promote the production of landfill gas and use it in electricity generation. Patersons claims that it has overpaid landfill tax during the period 31 March 2006 to 31 March 2009. This is because it was charged to tax on all the tonnage of material disposed of at its landfill site. It argues that it should not be taxed on the proportion of that material which comprised bio-degradable material because that proportion decomposes. Patersons says that it is possible to calculate, at least approximately, the amount of material tipped into the cells or voids at the site that subsequently decomposes to create landfill gas which is then used in electricity generation.

13. Whether or not the landfill tax is chargeable depends on whether all the material deposited at the site is regarded as material disposed of as waste. The FTT held that it was and that the tax was therefore properly charged by HMRC. Permission to appeal was granted by the FTT.

The Tribunal's decision and this appeal

14. The FTT considered written evidence from William Paterson, the chairman of Patersons, from his son Thomas Paterson and from Patersons' site engineer, Mr Selvey. They also heard evidence from Mr Grantham, a consultant on behalf of Patersons and from Mr Bourn, a research scientist at the Environment Agency's Evidence Directorate. The FTT also visited the site (with counsel) and were provided with a DVD of what they saw.

15. The FTT made the following findings of fact:

    (a) Patersons has spent some millions of pounds in setting up its electricity generating capacity including purchasing the gas engines and connecting the whole electricity system to the National Grid.

(b) Prior to 1999 Patersons had no intention commercially to exploit methane produced at the Site. Nevertheless, material the company sent to landfill before that year continues to produce methane.

(c) The gas extraction infrastructure which Patersons has put in place on the Site was primarily installed to satisfy its regulatory legislative obligation to provide it. It was essentially the same whether the landfill gas was being flared or used to generate electricity.

(d) Electricity generation has proved extremely profitable for Patersons, and it now makes twice as much profit from the sale of electricity as it makes from tipping by waste contractors.

16. I should note here that I was not addressed at the hearing on what the FTT described as 'the Scottish question': see paragraphs 9 and 10 of the FTT's decision.

17. The Decision sets out at length the submissions of the parties and dealt relatively briefly with the FTT's own reasoning for dismissing the appeal against the Commissioners' decision. The FTT held that:

(a) it was not bound by Court of Appeal decisions which Patersons asserted were determinative of the case in its favour;

(b) Patersons has a regulatory obligation to use the methane provided at the Site and cannot recharacterise its obligation as commercial exploitation. The FTT said that 'all the evidence points to Patersons being a landfill business making profit out of [what] it is obliged to do for regulatory purposes': paragraph 239;

(c) it would be counter-intuitive to allow a deduction from tax for biomass, having regard to the purpose of the tax being to encourage recycling and to discourage putting material into the ground: paragraph 240;

(d) it would be too difficult to calculate the amount of overpaid tax in the event of Patersons' appeal succeeding: paragraph 242; and

(e) there must be one 'intention' in relation to a particular load of waste disposed of at the site for the purposes of section 64(1) of the Finance Act – the contention that Patersons can have an intention to discard an unascertainable proportion of material at the time it is deposited into landfill whilst having no intention with regard to the unascertained balance was absurd: paragraph 245.

18. In a concluding paragraph, the FTT said:

> "246. We need add nothing more by way of explanation for concluding the case in favour of the Commissioners, except to say that we have considered and rejected the remaining submissions of Mr Cordara but accept the correctness of those of Mrs Hall. We adopt the latter as our other reasons for dismissing the appeal."

19. In the schedules to the Decision, the FTT set out the calculation provided by Patersons for the tax alleged to have been overpaid.

20. Patersons' Grounds of Appeal set out 6 distinct grounds and I discuss those in the remainder of this judgment. Patersons' skeleton argument for the hearing included in addition a table listing many paragraphs of the FTT's decision and setting out the nature of the error alleged. For many of these it was asserted that the error 'was of the *Edwards v Bairstow* nature', referring to the well known decision of the House of Lords in *Edwards v Bairstow* [1956] AC 14. By this was meant that the error was one where it was apparent that the FTT had acted without any evidence or upon a view of the facts that could not reasonably be entertained, or, to put it another way, where the FTT had come to a conclusion which on the evidence no reasonable person could have arrived at. On analysis, it seems to me that the table does not really disclose alleged errors in the FTT's findings of fact but rather challenges their conclusions about how the law applies to those facts. Thus the allegation that the FTT erred in its conclusion that the relevant material was not recycled or that it was not 'physically used' does not arise from some misunderstanding on the part of the FTT as to what happened to the material but from whether what happened can properly be described as 'recycling'. Similarly the assertion that there was an *Edwards v Bairstow* type error when the FTT found that it was too difficult to calculate quantum or that the GasSim model relied on Patersons was unsuitable is not correct. These are not challenges to findings of primary – or even secondary - fact by the FTT but part and parcel of the ground of appeal complaining about the FTT's conclusions on quantum.

21. It does not appear to me therefore that the table set out in Patersons' skeleton argument really raised challenges to the FTT's findings of fact rather than to the application of the law to those facts: the facts in this case are not controversial. That is subject to one point that I consider below as to whether the FTT found that everything that Patersons did at the site to collect and remove the gas would also have had to be done if it had decided to flare the gas and was therefore not attributable to Patersons' use of the gas to generate electricity.

Ground (1): Binding nature of *Parkwood* and *WRG* judgments

22. The first aspect of the FTT's decision challenged by Patersons is that the FTT did not regard themselves as bound to decide the case in Patersons' favour by the decisions of the Court of Appeal in *Customs and Excise Commissioners v Parkwood Landfill Ltd* [2002] EWCA Civ 1707 ('*Parkwood*') and *HMRC v Waste Recycling Group* [2008] EWCA Civ 849 ('*WRG*'). The FTT said that the factual differences between Patersons' case and the operations considered in *Parkwood* and *WRG* 'could not be greater' (paragraph 232 of the Decision) and that the FTT could deduce nothing of any real value from the Court of Appeal judgments. Patersons says that these judgments were binding on the FTT and the Tribunal was wrong to distinguish them.

23. In *Parkwood* the taxpayer was a landfill site operator at Neepsend in Sheffield. A related company called Recycling carried on business at a premises called Salmon Pastures sorting and dealing with material that was deposited with it by Sheffield City Council. The Council paid Recycling a fee per tonne of waste. At Salmon Pastures, Recycling divided the material into two

categories, waste and recyclables in particular aggregates and fines. The waste was sent to landfill and there was no dispute that landfill tax was chargeable on that. The aggregates and fines were sold to Recycling's customers at an average price of £2.50 per tonne. One of those customers was Parkwood which used the material for road-making and landscaping at its landfill site.

24. The issue in the case was whether landfill tax was payable on the material that was sold by Recycling to Parkwood and then used by Parkwood at the site. The main area of debate at all stages of the case was different from the main area of debate in the current case because there was very little discussion of what Parkwood's intention was in disposing of the waste. Before both the VAT Tribunal and the Court of Appeal, the parties' submissions focused on identifying the relevant disposal for the purposes of section 40. Linked to that was the question whether all four conditions in section 40(2) had to be satisfied at the same time in order for there to be a chargeable disposal. The Commissioners argued that they could rely on the intention of the City Council when it deposited the material with Recycling as satisfying section 40(2)(a) and then jump forward in time to rely on either Parkwood or Recycling as disposing of the waste by way of landfill at a landfill site to satisfy the other three conditions in section 40(2). The Court held that this was not permissible; all four conditions had to be satisfied at the same time. Aldous LJ (with whom the other members of the Court agreed) held the natural meaning of section 40(2) did require the disposal to satisfy all the conditions at the same time. He concluded that the tax was not therefore payable:

> "23. The tax is a landfill tax, not a landfill and recycling tax. The tax is to be paid when waste material is disposed by way of landfill in a landfill site: not on waste material (e.g. fines) which has been recycled (e.g. into blocks) which may be used in a landfill site (e.g. to build a wall or hard standing). The disposal referred to in section 40(2) is a particular disposal."

25. Aldous LJ further concluded that the tribunal had been right to concentrate on the disposal at Parkwood's landfill site because it was that disposal that was made by way of landfill. They had also been right to hold that it was not a disposal as waste.

26. There was thus no discussion either before the tribunal or in the Court of Appeal about Parkwood's intention. Rather, it appears to have been assumed that Parkwood's intention in acquiring and then using the recycled material bought from Recycling in 'road making and landscaping' was **not** an intention to discard. This may have been because it was treated as having been conceded by the Commissioners in that case. At paragraph 13 of his judgment, Aldous LJ refers to Parkwood's acceptance that the definition of waste in section 64(1) 'makes clear' that 'material used for road and the like is not waste as the person making the disposal, Parkwood, did not intend to discard the material'. He then records:

> "The commissioners accept the submission of Parkwood in so far as it goes, but they submitted that Parkwood's submissions concentrated upon

the wrong disposal. Upon the facts as found, the city council disposed of the material."

27. It was that submission that the Court ultimately rejected.

28. I do not regard *Parkwood* as authority for the proposition which Patersons puts forward, namely that even material that is tipped into the void at the landfill site is not regarded as discarded if it is put there to be used as a road or for other landscaping purposes. The Court of Appeal did not make or record any detailed findings about where the roads were nor did the Court consider Parkwood's intention when making the disposal by way of landfill.

29. I therefore hold that the FTT was right not to regard itself as bound by *Parkwood* to determine the appeal in Patersons' favour.

30. I turn now to *WRG*. In that case the VAT and Duties Tribunal at first instance (Colin Bishopp Esq) rejected an appeal by the taxpayer WRG against the imposition of the landfill tax on certain material used in the business of the landfill operator. The tribunal found that the landfill site operator, in order to comply with its licence, must keep sufficient stocks of inert material or something else suitable for use as daily cover, that is to lay over the waste at the end of the day's operation to prevent it from blowing away, emitting smells or otherwise creating a nuisance. There were a number of ways to provide daily cover but WRG did it, in part at least, by separating out from the material that it received from its customers material which was suitable for that purpose. The question was whether when WRG used that separated out material for daily cover, it was disposing of it as waste for the purpose of section 40(2)(a).

31. In the Court of Appeal, Sir Andrew Morritt C reiterated the conclusions arrived at in *Parkwood*, namely that all four conditions in section 40(2) must be satisfied at a particular point in time – although they may start to be satisfied sequentially there must be one point at which all of them are satisfied: see paragraph 30. The passage in the Chancellor's judgment most relevant to Patersons' case is in paragraphs 33 onwards:

> "33. So the question posed by s 64(1) is whether WRG then intended to discard the materials. The word 'discard' appears to me to be used in its ordinary meaning of 'cast aside', 'reject' or 'abandon' and does not comprehend the retention and use of the material for the purposes of the owner of it. I agree with counsel for WRG that s 64(2) does not apply in such circumstances because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material.
>
> 34. It follows from this conclusion that the relevant intention may well not be that of the original producer of the materials. There is no principle that material once labelled as 'waste' is always 'waste' just because the original producer of it threw it away. That is not the relevant time at which the satisfaction of the conditions imposed by s.40(2) is to be considered. Recycling may indicate a change in the relevant intention but is not an essential prerequisite; re-use by the owner of the material for the time being may do likewise …".

> 35. It may be that the economic circumstances surrounding the acquisition of the materials in question by the ultimate disposer of them will cast light on his intention at the relevant time. They cannot, as I see it, affect the decision on this appeal because the use of the relevant materials by WRG is clear and such use is conclusive of its intention at the relevant time by whatever means and on whatever terms WRG acquired them.
>
> 36. In my view, the materials used by WRG for daily cover and building roads were not the subject matter of a taxable disposal as defined in s.40(2). …"

32. I agree with Patersons that the FTT went too far in its rejection of the authority at least of the *WRG* decision. The FTT said that there was no real value in either Court of Appeal case because the premise of the Court's reasoning was that the material in point 'had mass, occupied space, and was diverted from landfill'. This the FTT said was not the case in Patersons' appeal. It is true that there has been some confusion about whether Patersons' assertions concern all the biodegradable content of the dumped material or the landfill gas (or methane) produced by it or that part of the biodegradable content which subsequently turns into landfill gas or methane. As I understood Mr Cordara's argument, the tonnage that should be deducted is the third of those. Patersons is not purporting to deduct a tonnage of methane from the taxable volume. Schedule 1 to the FTT's Decision says that the value of the reclaim is the amount of tax:

> "…which relates to so much of the material disposed of at the Site as is capable (as predicted by the GasSim computer model) of actually decomposing into landfill gas and thus generating renewable energy (i.e. the putrescibles)"

33. Since Patersons' claim relates to the tonnage of biomass that is likely in due course to turn into landfill gas, that material does, at the time it is disposed of have mass and occupy space. This is not a reason for distinguishing the case from *Parkwood* or *WRG*.

34. Further, the FTT was wrong to hold that the premise of the *WRG* judgment was that material was diverted from landfill because some of the material was put into the landfill void as daily cover. In my judgment, *WRG* is authority for the following propositions that are useful in determining the present case:

> (a) that the fact that the material goes into the void by way of landfill does not of itself mean that it is discarded for the purposes of section 40. There is no doubt from the facts recited in the tribunal's ruling and set out in the judgment of Sir Andrew Morritt C that part of the material in dispute was material that went into the void and stayed there, albeit that other material was used in road-making etc away from the void. The Chancellor recorded the submissions of counsel for WRG that the relevant disposer of the material was WRG and that at the moment of disposal of the material at the landfill site it was not the intention of WRG to discard the material but to use it for the purposes of daily cover and road construction;
>
> (b) the fact that the use made of the material is pursuant to a regulatory obligation imposed on the landfill operator does not of itself mean that

there is no intention to discard it. The Court of Appeal referred to the fact that WRG was obliged to lay daily cover on the void (although not of course obliged to use segregated aggregates to do so) but did not regard that as preventing an intention to use rather than to discard.

(c) the fact that the material will be left in the void after it has performed the useful function for which it was put in there and is therefore, at that point, abandoned does not mean that there is an intention to discard at the moment it is put into the void.

35. I note that this is consistent with the earlier case to which the parties referred me, *ICI Chemicals and Polymers Ltd v The Commissioners of Customs and Excise* [1998] WL 1120723, a decision of the Manchester Tax Tribunal. That case concerned Andricite which was a co-product of one of the taxpayer's industrial processes. The issue there was whether the taxpayer was using the Andricite to entomb contaminated waste at a landfill site. The Commissioners had decided that the taxpayer's intention was to discard the Andricite by depositing it in the landfill site in such a manner that they also made use of its beneficial properties as an entombing material. The Commissioners held that that amounted to a disposal. The Manchester Tribunal disagreed holding that the Andricite was not disposed of as useless or discarded but was used for the encapsulation of mercury and other contaminated waste as required by the tax payer's licence. They allowed the appeal.

36. I do not accept, however, Mr Cordara's submission that *WRG* requires me to decide this appeal in Patersons' favour. Although the aggregates placed into the void in *WRG* were nonetheless regarded by the Court of Appeal as 'used' and hence not discarded, that does not mean that the biomass here is also being 'used'. It still leaves open the question whether the biomass in the tipped material at Patersons' site is being discarded. That is the issue to which I now turn.

Grounds 2 and 6: interpretation of sections 40(2) and 64 of the Finance Act

37. The second ground of appeal is expressed in the Notice of Appeal as an assertion that the FTT erred in holding on the evidence that Patersons intended to discard the biomass when 'the evidence plainly showed' that they had no such intention.

38. As I indicated earlier, it does not seem to me that this is a point about evidence at all – although there remains some challenge to the FTT's factual findings. The evidence is largely uncontroversial: Patersons knows (to adopt a neutral word) that the biomass within the material will in the future decompose and generate methane; that that methane will be collected by the pipe network built within the void and that it will then be transferred to the engines where it will be burned to generate electricity that will be transferred to the grid. The FTT did not reject that evidence but they held that on those facts, Patersons was not 'using' the biomass; hence it did still have the intention to discard the biomass for the purpose of sections 64 and 40(2)(a). This is a point raising the proper interpretation of those statutory provisions not a point on evidence. This ground therefore covers much the same ground as Ground 6, which asserts that the FTT erred in holding that the landfill tax was properly chargeable on the biomass as Patersons 'had no intention to discard the biodegradable

material'. The nub of the case is whether what happens at Patersons' site amounts to the use of the biomass to generate electricity.

39. The parties' arguments can be summarised as follows. Patersons relies on the fact that it has built an expensive infrastructure to collect and transport the methane created by the decomposition of the biomass and then to burn it in its eight engines on site in order to generate electricity. HMRC see the facts from the opposite angle. They say that Patersons is not using the biomass at all but is responding to the fact that active landfill waste inevitably generates methane which poses dangers both immediately in terms of having the potential to explode and longer term because it is a pollutant and contributor to global warming. Patersons is required to manage the gas produced and dispose of it by generating electricity from it. Managing the potentially hazardous properties of operating a landfill site does not amount, HMRC argue, to using that material even though ultimately a valuable resource, electricity, is generated and sold.

40. I have concluded that the FTT was right to hold that the material deposited by Patersons was not used by it to generate electricity and that it was disposed of by the company with the intention of discarding it for the purposes of sections 64 and 40(2). I set out in the following paragraphs the reasons for my conclusion.

(a) Lack of segregation or retention prior to disposal into the void

41. What is the antonym of 'discard'? Sir Andrew Morritt C in the key passage in *WRG* said that the word 'discard' does not comprehend the retention and use of the material for the purposes of the owner of it. HMRC sought to distinguish the present case from both *Parkwood* and *WRG* because in both those cases there was some segregation of the material then 'used' for road-making, landscaping or daily cover by the landfill operator whereas here, the biomass is tipped into the void still mingled with the other material just as it was when it arrived in the lorries at the site entrance.

42. The tribunal in *WRG* investigated whether the scale of the work undertaken by WRG to separate out the material that was suitable to use as daily cover was the same as that undertaken by Recycling in *Parkwood* to separate out the aggregates and fines. It found that much less work was carried out and this led the tribunal to conclude that nothing was 'produced' by WRG from the waste it received in order to use that 'produced' material as daily cover. I note, however, that this kind of investigation played no part in the Court of Appeal's deliberations and one can easily see that nice distinctions as to what work is or is not done to separate material are likely to be unhelpful as a test for this purpose. I do not read the Court of Appeal's decision in *WRG* as requiring that some act of 'retention' or separation out of a part from the rest of the whole must be identified before an operator can be said not to be discarding the waste for the purposes of section 64.

43. That said, I consider that the fact that there is initial separation and retention of some material out of the whole mass by the landfill operator, even though

ultimately both end up in the void, is an indication that there is an intention to use that retained matter for a different purpose – otherwise why bother to segregate and retain it? HMRC argued that as a matter of law, there cannot be a separate intention in relation to some part of an undifferentiated mass of material as compared with other parts. The whole lorry load is tipped into the void and Patersons must have the same intention in respect of the whole lot. I do not accept that that is the case. I may buy a banana with the intention of eating the inside and discarding the peel. It becomes a matter of semantics whether I have different intentions with regard to different parts of the whole banana or whether, because my intentions are different, the banana should be treated as comprising two different elements. I therefore regard the fact that the biomass is not segregated or retained by Patersons before being dumped into the void as an indicator that Patersons is not intending to use the material but not as determinative of an intention to discard.

(b) The inevitability of landfill gas production

44. The second factor which leads me to conclude that the electricity generation which occurs does not result from the 'use' of the biomass is that methane production occurs inevitably from the decomposition of the biomass included in the material tipped into the void. Patersons does not do, and does not need to do, anything to bring this about.

45. In my judgment, the concept of intending to use something, as the antithesis of intending to cast it aside or abandon it, involves some action to harness the properties of an item and direct them towards a purpose of the user. If a gardener sets up a water butt to collect rainwater from the roof and guttering, she then uses that rainwater to water the plants if during the summer she transfers the water into a watering can and waters the garden. But one would not normally say that the gardener 'uses' the rain to water the garden during the winter when all that happens is the rain falls onto the garden and soaks the plants. She certainly benefits from the natural falling of the rain but she is not 'using' the rain in the ordinary sense of that word. In the present case, there is no 'use' of the biomass to produce landfill gas by Patersons because all that happens is that the biomass decomposes in the normal course and generates the gas. This would happen whether Patersons used the methane to make electricity or disposed of the gas by flaring. The fact that it may 'use' the methane does not mean that it uses the biomass since the methane is not what is tipped into the void and either discarded or not. It is the biomass that is disposed of by way of landfill, not the methane.

46. I therefore hold that the biomass is not 'used' to make methane because the methane production is an inevitable consequence of tipping biomass into the landfill site and will occur whether the methane is collected or not and whether it is flared or not.

(c) The difference between flaring the gas and making electricity from it

47. Patersons argued that the equipment that it has installed in the void and at the rest of the site to collect, transport and then burn the methane shows that it is

'using' the biomass to generate the methane which then makes the electricity that its sells to the grid. This led to a debate before me as to whether (i) Patersons is under an obligation to use the methane to make electricity or whether it has a free choice whether to use it or flare it; (ii) Patersons in fact does something 'over and above' what it is required to do rather than only doing what is 'part and parcel' of being a law-abiding landfill operator; and (iii) whether as a matter of law the answers to these questions make any difference.

48. For the purposes of what follows I will treat use of the methane as if it were use of the biomass contrary to my findings earlier.

(a) Is Patersons under an obligation to use the methane or could it flare the gas?

49. I have referred above to the PPC Permit issued to Patersons. On its face it requires Patersons *either* to use the methane to generate electricity *or* to flare it. Despite this, HMRC's case is that Patersons is under a legal obligation to make electricity from the gas and not to flare it. They invite me to arrive at that conclusion in the following way.

50. Council Directive 1999/31/EC on the landfill of waste ('the Landfill Directive') (*Official Journal* 1999 L 182 p. 1) provides in Article 8 that Member States must ensure that the competent regulatory authority does not issue a landfill permit unless it is satisfied that the landfill project complies with all the relevant requirements of the Directive including the Annexes to the Directive. Paragraph 4 of Annex 1 to the Landfill Directive deals with gas control and provides in paragraph 4.2:

> "Landfill gas shall be collected from all landfills receiving biodegradable waste and the landfill gas must be treated and used. If the gas collected cannot be used to produce energy, it must be flared".

51. Paragraph 4.2 was implemented in England and Wales via the Landfill (England and Wales) Regulations 2002 (S.I. 2002/1559) ('the 2002 Regulations'). The 2002 Regulations were made under section 2 of the Pollution Prevention and Control Act 1999. Regulation 8 of the 2002 Regulations provides that a landfill permit must include appropriate conditions for ensuring compliance with, amongst other things, Schedule 2 to the 2002 Regulations. Schedule 2 in turn provides in paragraph 4(2) that landfill gas must be collected from all landfills receiving biodegradable waste and 'the landfill gas must be treated and, to the extent possible, used'

52. The 2002 Regulations were revoked entirely by the Environmental Permitting (England and Wales) Regulations 2007/3538, also made under section 2 of the Pollution Prevention and Control Act 1999 ('the 2007 Regulations'). The 2007 Regulations came into effect on 6 April 2008: see reg 1(1)(b). Schedule 10 to the 2007 Regulations made provision in respect of landfill and paragraph 5 of Schedule 10 provided that the regulator must exercise its relevant functions so as to ensure compliance with, amongst other things, Article 8 of the Landfill Directive.

53. HMRC submit, and I accept, that the effect of revoking the 2002 Regulations and substituting a direct reference, via Article 8 of the Landfill Directive, to paragraph 4.2 of Annex 1 to the Landfill Directive is to impose an obligation on the regulator, when granting a permit to a landfill operator, to require the operator to use the landfill gas if it can do so.

54. In Scotland, the Landfill (Scotland) Regulations 2003 (SSI 2003/235) ('the Scottish Regulations') were also made under section 2 of the Pollution Prevention and Control Act 1999 and provide in regulation 10(3) that a landfill permit must include conditions for ensuring compliance with the general requirements for landfill set out in Schedule 3. Schedule 3 to the Scottish Regulations, like Schedule 2 to the 2002 Regulations, provides in paragraph 4(2) that landfill gas must be collected and, to the extent possible, used. Landfill gas which cannot be used to produce energy must be flared. It is accepted by HMRC that the Schedule does not itself impose obligations on the landfill operator: see Regulation 10(4) – those obligations must be imposed through the permit.

55. It does not appear that the Scottish Regulations have been revoked and replaced by provisions similar to the 2007 Regulations. But it does not seem to me to matter in this case whether the words 'to the extent possible' apply or not. Clearly it is possible for the landfill gas generated at the Patersons site to be used rather than flared and there is therefore an obligation on the regulator to ensure, through the permit granted, that the operator is obliged to use the gas to generate electricity rather than flare it.

56. Is then the wording of Patersons' PPC Permit in breach of the Scottish Regulations in seeming to give Patersons a free choice as to whether to use or flare the gas, so that Patersons can assert that by using the gas it is doing something that it is not required to do? I do not consider that Patersons can so assert. It is required by its PPC Permit to operate the landfill gas management system in accordance with a Gas Management Plan: see clause 8.1.2 of the PPC Permit. In its Gas Management Plan Patersons says that it is 'committed to maximising the use of gases generated by the degrading waste, in line with the requirements of the Landfill Directive and the Landfill (Scotland) Regulations 2003, as amended)'.

57. In my judgment therefore SEPA relies upon the commitment of Patersons in the Gas Management Plan as the means by which SEPA fulfils its own obligation to ensure that the permit granted *requires* Patersons to use the landfill gas rather than flare it. This must be so despite the apparently limited objective being 'to dispose of or utilise landfill gas' in paragraph 8.1.1. as if those alternatives were equally compliant with the PPC Permit.

58. I therefore find that Patersons was required to use the gas, since it is clearly able to do so.

(b) Does Patersons do anything over and above what it is required to do?

59. Mr Cordara QC pointed me to various parts of Patersons' written evidence submitted to the FTT as showing that the company did undertake expenditure over and above what it was required to do. Mrs Hall QC for HMRC says that in fact none of this evidence survived cross-examination and the FTT found, and was fully entitled to find, that there was nothing done that was 'over and above' rather than 'part and parcel'. Indeed the evidence of Mr Bourn given before the FTT on behalf of HMRC was that there were steps which could be taken by a landfill operator to encourage the creation of methane but which were not taken by Patersons, for example, as regards the spacing of the gas collection wells or the creation of pin wells. Activities that Patersons relied on heavily, such as the presence of an engineer at the site to monitor various parameters was in fact evidence of inefficient ways of working since at other sites, such monitoring was achieved much more efficiently by telemetry.

60. The FTT was very clear in its factual conclusions on this point at paragraphs 106 onwards of the Decision. The FTT said that:

> "106. We are satisfied, and thus find, that a great many steps taken by Patersons in connection with the operation of the Site which it maintains to be evidence of its intention not to discard material disposed in landfill are necessary, or are required, to comply with its site permit or its regulatory obligations. Indeed, we are unable to identify anything it does beyond powering and supplying its gas engines with methane as not being a regulatory requirement. In order that there may be no dispute as to the actions to which we refer, we list below the specific findings of fact we make, and indicate the persons on whose evidence we rely for the purposes."

61. The Tribunal went on to describe the steps taken by the site engineer, Mr Selvey and recorded that Mr Selvey had accepted in his evidence that the Patersons' gas collection system contained no features taking it beyond the norm for discharging Patersons' obligations to capture the gas. The FTT listed 12 aspects of Patersons' system that were necessary whether the gas was used or flared. The Tribunal also found that there was nothing to indicate that Patersons took steps to encourage customers to bring biodegradable waste to the site.

62. Patersons argued that this was a finding that was contrary to the evidence and which I was entitled to overturn following *Edwards v Bairstow*. Both Patersons and HMRC provided me with extracts from the evidence given in written statements and during the course of the hearing. From these I conclude that significant concessions were made by Patersons' witnesses during cross-examination so that it would not be right for me to base any assessment of the evidence on their written statements prepared before the FTT hearing. This was one of the major issues which engaged the FTT and to which substantial evidence was directed. This is very far from being a case where I can conclude that the FTT made findings of fact that no reasonable tribunal could make.

(c) Does it matter?

63. It is clear from the PPC Permit as well as being a matter of common sense that flaring the methane is not 'using' the methane. I therefore accept that in so far as the infrastructure installed by Patersons at the site would need to be installed even if it was flaring the methane, it cannot be evidence that it is using rather than discarding either the methane or the biomass that generates the methane. That, as I understand it, means that most of what Patersons relied on in this part of the case is neutral in evidential terms as to its intention. The eight engines that Patersons has installed at the site that convert the methane into electricity and send it along to the grid are clearly directed at using rather than flaring the methane. Do those engines establish that Patersons is using the methane and hence that it is not discarding the biomass?

64. Even though I accept that Patersons is under such an obligation to use the methane and does not have a free choice to flare it instead, I do not agree with HMRC that that means that it must have discarded the biomass. As I explained earlier, the Court of Appeal in *WRG* regarded the intention to use material as daily cover as precluding an intention to discard the material despite the fact that the landfill operator is required to put daily cover on the top of the void at the end of the day's operations. I agree with Patersons that there is nothing inherent in the concept of being obliged to use something that makes it any the less a use of that thing. To put it another way, just because you are obliged to use something does not mean that you are in fact discarding or abandoning it rather than using it.

65. HMRC raised a different point on the relevance of the obligation to use the methane. They argued that if Patersons was right, then almost every landfill operator in the country would be able to claim a reduction on the tax that they pay per tonne of rubbish tipped into the void to reflect the inclusion of biomass in that rubbish. There are a number of exceptions to the application of the landfill tax included in Part III of the Finance Act 1996. There is no exception for biomass. The absence of any such provision in the legislation indicates, HMRC argue, that Parliament cannot have intended that the generation of electricity from biomass means that the biomass is not discarded by the landfill site operator.

66. The flaw in this argument it seems to me is that Parliament, as well as providing for those three exceptions itself, enacted section 46. This confers on the Treasury a power by order 'to produce the result that' disposals that would otherwise be taxable are not taxable and that disposals that would not otherwise be taxable become taxable. The Treasury have used that power to insert extra sections into the Finance Act and then to repeal them: see for example The Landfill Tax (Contaminated Land) Order 1996 (S.I. 1996/1529) which inserted section 43A into the Act as from 1 August 1996 providing that disposals of material from contaminated land were not taxable and then The Landfill Tax (Material from Contaminated Land) (Phasing out of Exemption) Order 2008 (S.I. 2008/2669) which omitted section 43A. Since Parliament intended that the Treasury should add or remove exceptions, the absence of an exception for biomass from the initial legislation does not, in my view, say

much about Parliament's intention as to what should or should not be excepted. Further, I do not consider that it is open to HMRC to rely on the Treasury's failure to exercise the power in section 46 to provide an exemption for biomass as favouring any particular interpretation of sections 40 or 64. I therefore do not accept that if Parliament had intended that the great majority of landfill operators should be able to assert that disposal of biomass should not be taxable they would have provided in primary legislation to that effect. Parliament might have been relying on the Treasury to exercise its powers under section 46 to produce that result.

67. My conclusion is therefore that Grounds 2 and 6 of Patersons' appeal must be dismissed.

Grounds (3) and (4): the issue of quantum

68. Patersons complains that the FTT wrongly took into consideration the issue of quantum when determining the only question that was before it, namely the question whether Patersons had intended to discard the biomass within the meaning of section 64. It also argues that the FTT failed to understand the basis of Patersons' case on quantum. If the FTT had understood it, they would have realised that it was entirely consistent with the company's case on the main issue of intention to discard.

69. An order was made by the FTT on 10 June 2011 directing that the issue of quantum should be dealt with separately from the issue of the application of the tax. This does not automatically preclude any reference to quantum, if it is relevant to the question of liability to pay the tax.

70. The FTT noted the evidence that had been given by Mr Grantham on behalf of Patersons as to how the tax repayment claim had been calculated. It was based on assumptions about the percentage of each load of a particular kind of waste (domestic, commercial or industrial) that is likely to be gas producing. Those assumptions were said to be based in part on figures generated by a risk assessment tool called GasSim. GasSim is a model developed for the Environment Agency and has been endorsed by SEPA as a way of assessing how much gas is likely to be produced at a particular site. Mr Grantham accepted that the GasSim model 'is the subject of serious scientific debate'.

71. At paragraph 242 of the decision the FTT said that they were 'totally unable to accept Mr Cordara's claim that it cannot be too difficult to calculate quantum in the event of Patersons' appeal proving successful, and that the formulaic approach proposed should be used'. Their reasons can be summarised as follows:

    (a) Patersons' claim for repayment of tax was originally valued at £17.5 million and then reduced to just over £3.5 million without any explanation given for the reduction. The FTT appear to have regarded this as indication of the fragility or arbitrariness of the quantum calculation.

    (b) The GasSim model was designed as a risk assessment tool and was 'therefore completely unsuited to the calculation of a liability to tax'; it was 'the subject of serious scientific debate' – which the FTT thought

meant that it was unreliable – and evidence showed that a comparison of the GasSim prediction of gas production at a particular site with the actual production showed a discrepancy of 10 per cent;

(c) Patersons does not currently record details of the nature of the waste on the waste transfer notes.

72. I agree with Patersons that the FTT was in error in taking into account problems with assessing quantum as a ground for dismissing the appeal. The reasons for the reduction in the amount claimed was explained to the FTT and indeed, as Mr Cordara pointed out, it was set out in one of the tables appended to the FTT's decision. It was because the original decomposition percentages were expressed as a percentage of the wet weight of material which is how the material is received by Patersons whereas the percentages used in the GasSim model should be expressed as a percentage of the dry mass of cellulose/hemi-cellulose. This led to very substantial reductions in the percentages of different waste streams treated as biomass.

73. As regards the suitability of the GasSim model, that cannot have any bearing on the proper interpretation of the statutory provisions and should not have played any role in the question of the principle of whether landfill tax applied to biomass or not. The fact that the model is designed for a different purpose does not necessarily mean that it is unsuited for this purpose – if it is a reliable method (even if still subject to 'scientific debate') for assessing the likely volume of gas generated from waste in a landfill site for the purpose of risk assessment there is no reason automatically to dismiss it as a means of assessing the amount of biomass for the purpose of deducting a relevant tonnage from a chargeable disposal. In any event, that was an issue which would be addressed at the quantum stage, not at the liability stage.

74. The FTT also erred in relying on the apparent difficulty of quantifying the proportion of biomass included in the rubbish tipped into the void as supporting the argument that there must be an intention to discard that material. I accept that it would be virtually impossible to work out precisely for each actual tonne of rubbish exactly how much biomass was in there or how much of that biomass was going to turn into methane. But as Patersons said it in its submissions, there is nothing unusual about, and indeed HMRC frequently promote, the use of formulae, assumptions and estimations in computing an amount of tax due in the context of both landfill tax and other indirect taxes.

75. The current position as regards discounting the weight of water in determining the chargeable tonnage might provide a model for this. Section 68 of the Finance Act 1996 confers a power to make regulations for determining the weight of material disposed of on a taxable disposal. HMRC has exercised that power in the Landfill Tax Regulations 1996 (S.I. 1996/1527). Part X of those Regulations deals with 'determining the weight of material comprised in a disposal' for the purpose of discounting water. It is not difficult to see that if this appeal were to succeed rules could be specified or agreed to discount

biomass forming a constituent of material disposed of, subject to whatever minimum percentage, if any, HMRC thought appropriate.

76. So far as the lack of information recorded on the transfer notes and weighbridge dockets currently produced by Patersons' operations at the site, I do not regard this as relevant to the question that was before the FTT and is now before me. The Patersons' current ways of working are devised and operated in a context where there is no reduction in tax made to reflect the percentage of biomass. If, contrary to my primary findings, Patersons is entitled to a deduction from the taxable charge to reflect the percentage of biomass contained in the waste, Patersons would have to adapt its procedures to make sure that it is in a position to make good its claim for a deduction. I note, for example, that regulation 39 of the Landfill Tax Regulations 1996 dealing with exempt disposals provides that a disposal shall not be treated as an exempt disposal unless the landfill site operator concerned has made and, in relation to that disposal, maintained a temporary disposal record containing the information specified in that regulation.

77. The GasSim model used and adapted by Patersons is one possible way of working out what deduction from the tonnage of rubbish tipped should be deducted before applying the per tonne tax. Mr Cordara accepted that it has its advantages and its disadvantages though he stressed that it is a mechanism that has been used in a different context by the Environment Agency. In my judgment the FTT erred in rejecting the validity of the model when that was a matter that was relevant only to quantum and in treating that rejection as a reason for dismissing the appeal.

Ground 5: policy objectives of the landfill tax

78. The fifth ground on which Patersons allege that the FTT erred is in the finding that if Patersons' appeal were to succeed 'it would defeat the very object of the tax, that object being to encourage recycling and to discourage putting material into the ground': see paragraph 240 of the Decision.

79. Patersons argues that what happens at its landfill site should be treated as 'recycling' the biomass and that it is better, from a policy objective, that methane gas produced at the landfill site is used to generate electricity than being flared. It relies on the White Paper 'Making Waste Work' which was published in 1995 prior to the landfill tax being introduced. Patersons argues that the White Paper shows that the landfill tax is not intended as simply a revenue generating tax but has a strong policy agenda. This is illustrated in the central purpose of landfill tax, which is outlined in the White Paper (emphasis added):

> "to ensure that landfill costs reflect environmental impact thereby encouraging business and consumers, in a cost effective and non regulatory manner, to produce less waste; **to recover value from more of the waste that is produced**; and to dispose of less waste in landfill sites…"

80. The White Paper refers to a 'waste hierarchy' which is a graphical representation ranking waste management options according to what is best for the environment. Patersons argues that the hierarchy illustrates Parliament's intention to encourage use of the waste that is produced and the White Paper makes clear that the Government regarded the landfill tax as one of the key policy instruments for achieving this target, as well as contributing to waste reduction. The recognition that there is a need to reduce the reliance on landfill as the main waste management route is also in line with the general approach within the European Union. If the central purpose of the tax is to encourage businesses to recover value from the waste produced, which the Appellants argue that they have done, then tax should not be charged on the biomass content of the waste.

81. I can deal with this point shortly as I consider that policy has only a limited role to play in the construction of the clear wording of the statute. The primary policy goal behind the landfill tax must be to reduce the amount of waste deposited in landfill. Patersons' activity does not achieve that goal. In so far as there is a policy that landfill gas should go to generating electricity rather than being flared, that goal is achieved both by imposing a requirement on landfill site operators to do so (in which event there is no need for an additional tax incentive to encourage them to do so) and by allowing them to keep the money that they make from the profitable sale of the gas to the Grid. I do not see that there is any policy reason by giving them an additional benefit of a tax relief. The various policy documents I have seen show that it is regarded as more beneficial to the environment if biomass is diverted from landfill and used to generate electricity either in incinerators or in anaerobic digesters. In so far as lifting the burden of landfill tax would reduce the incentive on waste producers to use biomass in those better ways, then it would be contrary to the policy of the tax. I do not therefore find that the FTT erred in deciding that the policy arguments behind the landfill tax favour the construction of the legislation for which HMRC contends.

Disposal

82. In the light of my reasoning set out above, although I have upheld some of the criticisms Patersons makes of the Decision, the appeal is dismissed.

Mrs Justice Rose

RELEASE DATE: 22 May 2014