

LANDFILL TAX — preliminary point — whether site remained landfill site within s. 66(a) FA 1996 in whole or in part on waste disposal licence being modified to restrict disposal of waste to part of it

MANCHESTER TRIBUNAL CENTRE

LANCASHIRE WASTE SERVICES LIMITED

Appellant

- and -

Respondents

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Tribunal:

Mr D Demack (Chairman)

Professor W R Turner BSc FRICS FCIOB FAE HonsFGoIS FCI Arb

Sitting in public in Manchester on 21st July 1999 and 15th October 1999

Mr R Thomas of counsel instructed by Messrs Addleshaw Booth solicitors
Manchester for the Appellant

Miss C F J Fletcher of the Solicitor's office of HM Customs and Excise, for the
Respondents

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DECISION

1. When the appeal of Lancashire Waste Services Ltd ("LWS") was called on, at the invitation of the parties we agreed to deal with a preliminary point that might resolve the differences between them. That point requires us to decide whether the whole or any part of an area of land at Station Road, Much Hoole, Preston, Lancashire ("the Site"), remained a landfill site within the meaning of s. 66(a) Finance Act 1996 following modification of the site licence relating to the Site. Originally LWS was permitted, subject to certain conditions, to deposit waste on the whole or substantially the whole of the Site but, following modification of the site licence, deposits were restricted to a small part of it that happened to be a "tax free" area. To deal with the preliminary point, we must answer two questions of law, namely

- 1) what is the proper interpretation of the said s. 66(a)? and
- 2) what is the proper construction of the said licence, as modified?

2. The evidence upon which we base our findings of fact consisted of a short statement of agreed facts relating to the preliminary point and those parts of the Appellant's bundle of copy documents to which we were referred. On the basis thereof, we find the following facts to have been established. (We might usefully add that we were not addressed as to what, if anything, had occurred on the Site since the modification of the site licence) nor whether or not any such activities constituted taxable disposals.

3. LWS carries on the business of a waste disposal contractor and is registered for landfill tax. It holds waste disposal licence No. 478 ("the Licence") granted by Lancashire County Council on 14 May 1993 to LWS under the Environmental Protection Act 1990 ("the 1990 Act") in respect of the Site. The Site is delineated and edged red on plan number WD/H1/7/1/24 dated November 1989 attached to the Licence. The Licence is a site licence for the purposes of Part II of the 1990 Act. Part I of the Licence shows it as relating to 'landfill', and providing for the disposal of waste in the form of inert materials by way of landfill. The conditions subject to which the Licence was granted are set out at pp. 1 - 12 thereof. Amongst those conditions are the following:

"A1. Waste shall not be deposited on any part of the site other than in accordance with the terms and conditions of this Licence and the details contained in the working plan. The County Surveyor shall be entitled to agree in writing with the Licence Holder [LWS] that the working plan may be varied, and any such variation shall form part of this Licence. The working plan and any such variation shall be carried out.

B1 All facilities, preparatory works and information required by conditions A1, D4, E1, E2, E3, E4, E5, E6, E7 and E8 shall be constructed, undertaken or provided before the deposit at the site of any waste other than that required for the purpose of the preparatory works.

All preparatory works shall be carried out and maintained to the standard set out in the working plan and required by this Licence. On completion all preparatory works must be approved in writing by the County Surveyor before the deposit of any other waste at the site.

The only waste to be used for the preparatory works shall be waste of the types listed in condition C1 (b) and (c) and suitable for the purpose of forming the preparatory works.

B3. All materials used for the construction of the clay cap the manner in which they are used and the supervision of their use shall be in accordance with the Earthworks Specification. [We were told, and accept, that the Earthworks Specification was at some stage replaced by a Quality Assurance Plan, a copy of which was provided to us].

C1 The types of waste which may be deposited on the site are the following wastes: -

(a) household waste provided it has not been treated by fixed plant and equipment for the purpose of pulverisation;

- (b) soil, clay, natural sand, and rock;
- (c) glass, slate, concrete, brick, tarmacadam and ceramics;
- (d) cement, plaster, and plasterboard;
- (e) cardboard, paper, textiles/fibres - natural or man-made, and timber (including foliage, shavings, sawdust and products made from these materials);
- (f) solid fully polymerised materials;
- (g) Non-hazardous metals i.e. iron, copper, zinc, aluminium and its alloys, tin, steel and brass in non-pyrophoric form;
- (h) foundry sand;
- (i) rubber including waste tyres;
- (j) asbestos cement in adventitious quantities only - (less than 5% by volume of any load);
- (k) highway sweepings and gully sludges;
- (l) empty drums in minimal quantities;
- (m) carcasses, contaminated food and offal;
- (n) sewage, sewage sludge; and
- (o) bentonite drilling sludge.
- (p) clinical wastes from the following categories as defined in Waste Management Paper No. 25; Group E, contained in yellow bags with black band.

Provided that, with the exception of the waste types listed in Condition C1(m), clinical wastes from Groups A, B, C and D from commercial and industrial sources shall be strictly excluded.

D4 Waste shall not be deposited on any part of the site until the Licence Holder has notified the County Surveyor in writing of: -

[and the Licence then sets out a number of requirements relating to the persons dealing with operations on site].

E1 Waste shall not be deposited on any part of the site until a site identification board of durable material and finish has been provided and maintained at the site to the specification and at the location shown in the working plan. Safety signs complying with the Safety Signs Regulations 1980 shall be put up and maintained.

Definitions:

For the purposes of this Waste Disposal Licence the following terms are defined thus:

1) 'Waste' is defined in the Control of Pollution Act 1974, the Collection and Disposal of Waste Regulations 1988, the Environmental Protection Act 1990 and the Controlled Waste Regulations 1992."

4. On 27 November 1996 LWS was allowed by Customs to establish a "designated area" for the purposes of reg. 38 of the Landfill Tax Regulations 1996. (Regulation 38 permits waste to be stored temporarily in a designated area and for tax on it to be deferred for a period of up to 12 months, whilst reg. 39 provides for certain disposals to be exempt). That area we shall refer to as "the tax-free area".

5. On 30 April 1997, at the request of LWS and in the terms so requested, the Environment Agency (which had by then taken over environmental protection responsibilities for Lancashire from Lancashire County Council) modified Condition C1 of the Licence so that it then read:

"C1. Waste may only be deposited on site within the area marked green on Drawing No WD/H1/7/1/142. No waste may be deposited on any other area of the site. The types of waste which may be deposited in the green banded area of the site are the following:

a) uncontaminated soils, clays, natural sands and rocks, provided they are in a form and of a nature suitable for restoration;

b) uncontaminated concrete brick, ceramics and tarmacadam provided they are in a form and of a nature suitable for the construction of site roads."

6. The area marked green on Drawing No WD/H1/7/1/142 is identical to the tax-free area.

7. LWS notified the Commissioners of the modification to condition C1 of the Licence by letter of 2 June 1997, and enquired whether consequential amendments were required to its landfill tax registration.

8. Mrs A Baldwin, a senior officer of HM Customs and Excise, replied to LWS's letter on 18 July, saying:

"I refer to your letter of 2nd June 1997 from which I understand you contend that because the Licence does not authorise deposits of waste on parts of the site, those parts of the site are not a landfill site when the restoration takes place and therefore any disposals are not taxable disposals. . . I must advise you that Customs & Excise do not agree with your interpretation of the law.

Section 40 of the Finance Act 1996 provides:

(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.

Section 66 of the Finance Act 1996 defines landfill sites for the purposes of the tax. That definition provides

'66. Land is a landfill site [at a given time] if at that time -

a) a licence which is a site licence for the purposes of Part II of the Environmental Protection Act 1990 (waste on land) is in force in relation to the land and authorises disposals in or on the land.'

It must be borne in mind, when interpreting the wording of section 66, that it is a definition section, and that the reference to the Licence is for the purposes of identifying the land in or on which a disposal takes place and not the purpose of identifying the disposal itself. The reference to authorisation of disposals in or on land is for the purpose only of distinguishing such a Licence from one which authorises some other form of disposal in relation to a defined area of land, and therefore the fact that the authorisation is subject to conditions does not preclude the Licence from being one which 'authorises disposals in or on land'.

In other words what section 66 means is that land comprises a landfill site if there is in existence in respect of that land a Licence for the purposes of the Environmental Protection Act 1990 which provides for the disposal of waste by way of landfill (as opposed to incineration, recycling etc.) on that land.

We therefore consider that section 66 applies in a way which results in any disposal of waste on land, in respect of which there is a landfill Licence in force, which meets the other conditions set out in section 40(2) being a taxable disposal, notwithstanding the fact that the waste may be used for restoration purposes."

9. LWS did not accept that decision and required Customs to carry out a local review of it. But, on review, the decision was upheld; and it is against the decision on review that LWS now appeals.

The Law

10. Customs letter of 18 July 1997 contains certain sections of the Finance Act 1996 which are relevant to the point at issue, so that we need not repeat them. The other sections of the Finance Act 1996 we must consider are the following:

"s.41(2) The reference here to the landfill site operator is to the person who is at the time of the disposal the operator of the landfill site which constitutes or contains the land on or under which the disposal is made.

s. 69 (2) Where ³/₄

(a) a taxable disposal is made, and

(b) it is made without the knowledge of the person who is liable to pay tax in respect of it,

that person shall for the purposes of this section be taken to permit the disposal."

11. All further references in our decision to section numbers in isolation are to the Finance Act 1996.

12. We must also take account of the following parts of s. 35 of the 1990 Act:

"(1) [A 'waste management licence' is] . . . a licence granted by a waste regulation authority authorising the treatment, keeping or disposal of any specified description of controlled waste in or on specified land . . .

(3) A Licence shall be granted on such terms and subject to such conditions as appear to the waste regulation authority to be appropriate and the conditions may relate ^¾

(a) to the activities which the licence authorises, and

(b) to the precautions to be taken and works to be carried out in connection with or in consequence of those activities;

and accordingly requirements may be imposed in the licence which are to be complied with before the activities which the licence authorises have begun or after the activities which the licence authorises have ceased.

(12) In this Part 'licence' means a waste management licence and 'site licence' and 'mobile plant licence' mean, respectively, a licence authorising the treatment, keeping or disposal of waste in or on land and a licence authorising the treatment or disposal of waste by means of mobile plant."

And, for completeness, we must add s.37(1)(b) of the 1990 Act:

"(1) While a licence issued by a waste regulation authority is in force, the authority may, subject to regulations under section 35(6) above and to subsection (3) below, ^¾

(b) on the application of the licence holder accompanied by [the charge prescribed for the purpose by a charging scheme under section 41 of the Environment Act 1995,] modify the conditions of his licence to the extent requested in the application."

Submissions for the Commissioners

13. Miss Fletcher, for the Commissioners, submitted that it is clear that s. 66(a) defines the land, and not the disposal. She maintained that if s. 66(a) were to be read so that the definition of land depends on the nature of the disposal (namely whether or not a particular disposal is authorised by the licence), s. 40 would have stipulated that a disposal is a disposal authorised by the site licence (and s. 66(a) would have thereby become otiose).

14. She next submitted that it is clear that the Finance Act 1996 is intended to cover all deposits on the land, with specified exceptions, and s. 66 is consistent with that proposition. As an example, she observed that s. 69(2) ensures that disposals made without the knowledge of the person liable for the tax, commonly known as "fly-tipping", are caught. She argued that if LWS's contentions were

accepted, fly-tipping outside an area designated for the deposit of waste would escape the tax, and that was obviously not the intention of the legislation.

15. Miss Fletcher further submitted that the Commissioners' interpretation of s. 66(a) gives the subsection its natural meaning. First, she claimed that it defines the land and nothing else; secondly, it is clear that the only qualification to the definition is that the licence must be extant at the time of the disposal, and the licence must authorise disposals. That qualification, she contended, is in general terms and merely distinguishes between licences which do and do not authorise disposals in or on the land, those in the latter category merely authorising the keeping or treatment of waste on land. The fact that the authorisation is subject to conditions does not preclude a licence from being one which authorises disposals 'in or on the land'. For s. 66(a) to be interpreted as contended for by LWS, she submitted that it would have to read ". . . which authorises disposals in or on land but only in terms of the conditions of the licence".

16. Miss Fletcher also submitted that LWS's interpretation imports into s. 66(a) a meaning which cannot naturally be imported into it, and produces absurdities. For example, she said that LWS contends that any breach of the conditions of the Licence, however minor, would result in it not authorising disposals; and, if s.66(a) were to be construed narrowly, it would frustrate the intention behind reg. 38 of the 1996 Regulations. She claimed that it would mean that an initial taxable disposal, if held in a tax free area and then deposited on the land, say for restoration purposes, would result in tax never being payable in those circumstances, notwithstanding that reg. 38 merely intends the tax to be deferred pending the sorting of waste.

17. Next, Miss Fletcher acknowledged that LWS relies on the Commissioners' Information Note 3/96 (to which we refer later), but observed that that Note was later cancelled and replaced, and the replacement notice, LFT 1 February 1997, deliberately excluded the wording relied upon.

18. As neither party made mention of the inclusion in s. 40(3) of the words "or falls within land" (or for that matter "or contains" in s. 41(2)) at the original hearing, we subsequently invited them to make further submissions to deal with the omission. In essence, Miss Fletcher added nothing to her original submissions.

Submissions for LWS

19. Before making his submissions, Mr Thomas, counsel for LWS, made two observations on the legislative background to the appeal. First, he observed that the landfill tax legislation charges tax on deposits of waste on land if a site licence exists which permits disposal of waste on the land, so that fly tipping, i.e. waste disposal without permission of the site operator, on authorised land still attracts landfill tax (see s. 69(2)). He maintained that it is otherwise where tipping takes place on an area where there is no authorisation to dispose of waste: in such a case there is no charge to landfill tax (see s.40), but there may be criminal and/or civil penalties. Secondly, he observed that the legislation prescribes not only that there should be a site licence authorising disposals, but also that that licence should authorise disposals at the time when the tipping takes place, s. 40(3).

20. Mr Thomas submitted that in order for there to be a taxable disposal for landfill tax purposes, the land on which the material is to be deposited must be a landfill site, "landfill site" being a term of art defined by s. 66. He contended that

s. 66(a) imposes two separate tests both of which must be satisfied if an area of land is to be treated as a landfill site:

a) there must be a licence in force which is a site licence for the purposes of the 1990 Act; and

b) the site licence must authorise disposals in or on that land.

21. He maintained that site licences under the 1990 Act only authorise disposals of controlled waste, as defined by that Act. Accordingly, Mr Thomas contended that s.66(a) is concerned to see that the licence in question authorises disposals of waste on the land in question. The fact that a licence may require site restoration works to be effected once the waste disposal site is full does not mean that the licence thereby continues to "authorise disposals" within the meaning of s. 66. That section reflects the distinction to be found in Part II of the 1990 Act between authorisations of the activity of disposing of controlled waste (s. 35(1)) and requirements to be complied with (e.g. site restoration) after the activity of waste disposal has ceased (s.35(3)).

22. Mr Thomas then submitted that the Licence specifically prohibits the deposit of any waste (as defined in the 1990 Act) except on one particular area - the tax-free area. He accepted that the site licence in force at the relevant time authorised disposals of waste - but maintained that it only authorised such disposals on one small, well-defined area of the Site, namely, the tax-free area. He contended that, whilst the tax-free area was a landfill site after 30 April 1997, the conditions of s. 66(a) were not satisfied in relation to the remainder of the Site, with the result that that land was not a landfill site for the purposes of landfill tax

23. Mr Thomas observed that when the tax was introduced it was clear that the Commissioners took the same view of the point before us as did LWS for, in their Information Note 3/96, dated 24 July 1996, to which Miss Fletcher referred at the end of her submissions, at paragraph. 2.6, they said:

"A landfill site will be a site for the purposes of the tax if there is a Licence or resolution authorising disposals in or on the land under

- Part II of the Environmental Protection Act 1990 in Great Britain;

If you operate such a landfill site, any waste deposited in it, including waste which you have produced, will be liable to tax unless it is exempt from tax. If a Licence no longer authorises disposals of waste at the part of your site which it covers, waste deposited there is not liable to tax. An example of this is when the Licence conditions have changed to cover only site restoration."

24. At the resumed hearing, Mr Thomas concurred with the preliminary conclusion of the tribunal released to the parties (which incidentally the tribunal has now replaced by this decision) that all three references in s. 66(a) to the "land" must be to the same area of land, and on the basis thereof submitted that for land to be a landfill site for landfill tax purposes requires each and every part of it to be authorised to receive waste. He submitted as an example of what the draftsman would have had in mind in phrasing s.66(a), a site licence originally authorising the deposit of waste but for which the authorisation had been withdrawn. In those circumstances, he maintained that a site subject to such a licence would not be a landfill site for landfill tax purposes, because no part of it satisfies the second condition in s. 66(a).

25. Mr Thomas submitted that the intention of Part III of the Finance Act 1996 is to distinguish between disposals of controlled waste on land authorised to receive them, and disposals of such waste on land not so authorised. He claimed that, in order to achieve consistency, one must treat the special case of a large area of land covered by a site licence of which but a small part is authorised to receive waste as being only in part a landfill site, i.e. that part which satisfies both requirements of s. 66(a). He maintained that it would be wholly inconsistent with the intention of the legislature to treat the entire area as a single landfill site: that would involve the wholly inappropriate act of reading words into s. 66(a). Further, it would "emasculate the second condition in s.66(a)" , reducing it to such an extent that it would cease to be a condition and become a mere description of the sort of site licensed under the 1990 Act. In consequence, Mr Thomas submitted that if the tribunal were to accept that s. 66(a) should be so interpreted, it would follow that the deposit of waste on a site not licensed to receive it would be liable to landfill tax - and argued that clearly could not be the case.

26. Mr Thomas next submitted that if the construction of s. 66(a) which he advanced were adopted by the tribunal, it would not result in certain words in s. 40(3) being redundant. He maintained that s. 40(3) is not a substantive provision: its function is simply to identify the time at which one tests whether a disposal has taken place at a landfill site. More specifically, it is needed to cope with timing difficulties which arise from the fact that a charge to landfill tax does not always arise at the moment of the physical deposit of waste (see ss. 61 and 66(3)(b)). He thus maintained that had the draftsman wished to extend the definition of a landfill site to include land that was not authorised to receive waste, he would have been astute to do so by incorporating clear words in the body of the definition section itself and not by an ambiguous reference in a timing position.

27. Finally, Mr Thomas advanced three reasons why the draftsman had used the words "constitutes or falls within" rather than "is" in s. 40(3). First he submitted that it might have been done to counteract tax avoidance. Secondly, it might have been done for grammatical completeness. Thirdly, it might be because the draftsman had sought, incorrectly, to apply the principle *reddendo singula singulis*, thus distributively applying "constitutes" to the words "land on which ... it is made", and the words "falls within" to the words "under which it is made".

Conclusion

28. It is common ground that (a) prior to 30 April 1997, the whole of the Site was a landfill site; (b) the Licence in its form up to 30 April 1997 related to and imposed conditions on the whole of the Site, and those conditions included the original Condition C1; and (c) the Licence still applies to the whole of the Site, but in its varied form.

29. The difference between the parties to the appeal is restricted to the effect and impact of the last phrase of s. 66(a), i.e. "and authorises disposals in or on the land", and hence to the effect of the Environment Agency Notice amending Condition C1 of the Licence. Mr Thomas contends that "the land" as referred to at the end of s. 66(a) should be construed as "that land", i.e. that for any land to constitute a landfill site disposal must be authorised on the whole of that land $\frac{3}{4}$ and thus he contends that in the instant appeal the landfill Site must constitute the Site excluding the area on which disposal was not permitted following amendment of Condition C1. Miss Fletcher maintains that the term "authorises disposals" simply indicates that it does not include other matters to which the Licence may relate (such as "treatment" or "keeping"). She also contended that

s.66(a) defines the land, not the disposal. In our judgment, s. 66(a) defines neither "disposal", nor "land": what it does define is "a landfill site".

30. It will be recalled that Miss Fletcher submitted that if s. 66(a) were to be read so that the definition of "land" depended on the nature of the disposal, s. 40 would have stipulated that a disposal was a disposal authorised by the site licence. Section 40 defines a "taxable disposal" by reference to four criteria, the last of which (restricting the charge to tax to disposals made on or after 1 October 1996) we may for present purposes ignore. It is not until one reaches ss. 64-70 that one finds an interpretation of each of the first three criteria referred to in s. 40. Of the five situations dealt with by s. 66 only three make reference to "licence", so that we are unable to accept Miss Fletcher's submission in that behalf.

31. Condition A1 of the Licence, prevents waste from being deposited on any part of the Site except "in accordance with the terms and conditions of this Licence and the details contained in the working plan". Condition B1 requires certain facilities to be available and preparatory work to be completed before any waste is deposited at the Site. Condition D4 prevents waste from being deposited on any part of the Site until LWS has given certain information about the persons responsible for its operation. And Condition E1 prevents waste from being deposited on any part of the Site until a site identification board has been provided and maintained on the Site. Those are but some of the conditions contained in the Licence which prevent LWS from depositing materials anywhere of its choice on the Site, and which make provision for its controlled filling by the orderly deposit of waste. None of them is, in our judgment, for present purposes any different from amended Condition C1: each may be said to prevent or restrict the deposit of waste on part of the Site at a given time. If we were to accept Mr Thomas's submission that amended Condition C1 prevented all areas outside that marked green on Drawing No. WD/H1/7/1/142 from forming a landfill site after that amendment took effect, we should equally have to accept that other parts of the Site did not constitute a landfill site at any time when LWS had not satisfied one, or perhaps more, of the various conditions in the Licence governing the deposit of waste on those parts.

32. It will also be recalled that Mr Thomas submitted that s. 66(a) imposes two separate tests, both of which must be satisfied if an area of land is to constitute a landfill site. They are:

1) that a licence must be in force which is a site licence for the purposes of the 1990 Act; and

2) the site licence must authorise disposals in or on that land.

33. Section 35 of the 1990 Act deals with waste management licences in general. Subsection (12) thereof divides such licences into site licences and mobile plant licences. The same subsection also provides that site licences may relate to "the treatment, keeping or disposal of waste in or on land" : it does not provide that site licences may relate to "the treatment, keeping and disposal of waste in or on land". Thus, by reference to s.66(a), only site licences authorising the "disposal of waste in or on land" have landfill tax implications.

34. It is against that background that we must interpret s. 66(a). In our judgment, it is plain that the words "authorises disposals in or on the land" are merely descriptive of the type of site licence concerned (i.e. one which authorises "disposal" as contrasted with "treatment" or "keeping"), and do not define the

extent of a landfill site. That definition is to be found in the words "a licence ... is in force in relation to the land" in the earlier part of s. 66(a). We are unable to interpret those words as indicating anything other than that the entirety of the land to which a site licence of that type relates is a landfill site. As we have indicated, such a licence can restrict disposals to a particular part or to particular parts of land constituting a landfill site. Thus we hold that, following modification of the Licence on 30 April 1997, the whole of the Site, whilst subject to conditions restricting where disposals might take place within it, remained a landfill site within the definition in s. 66(a).

35. In our judgment, that interpretation of s. 66(a) is confirmed by s. 40(3) which does, of course, provide that "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" (our emphasis). And, if further confirmation of our interpretation of s. 66(a) were needed, we consider it is to be found in s. 41(2), where reference is made to "the landfill site which constitutes or contains the land on or under which the disposal is made" (again, our emphasis).

36. For completeness, we should add that we have considered all the submissions of each party and, in so far as we have not referred to them specifically in our conclusion, are unable to accept those which differ from our conclusion, or the basis on which it is made.

37. The parties applied for, and we make, additional directions in the following terms:

1) that the hearing of the other matters in dispute identified in LWS's skeleton argument filed on 6 July 1999 is adjourned sine die with liberty to either party within 60 days of the release date of our decision on the preliminary issue to apply for the appeal to be relisted, and that any such application include the grounds and reasons on which the relisted appeal is to be argued; and

2) that the parties are at liberty to apply for further directions

David Demack
Chairman

Release Date
19 November 1999