LANDFILL TAX - landfill site operator purchases recycled materials from recycling company for landscaping and road making purposes at its landfill site - recycled material includes highway works material provided by local authority - whether disposal for purposes of s. 40 FA 96 that of local authority or recycling company - appeal allowed

MANCHESTER TRIBUNAL CENTRE
PARKWOOD LANDFILL LTD Appellant
- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: Mr J D Demack(Chairman)

Mr C B H Gill FCA Mr D Wenn FRICS

Sitting in public in Manchester on the 18th and 19th April 2001

Mr Richard Barlow of counsel for the Appellant

Miss Philippa Whippleof counsel instructed by the Solicitor for the Customs and Excise for the Respondents

DECISION

1. Shortly stated, the facts of the instant case are that a local authority on payment of a fee, disposes of unwanted material from its highway works to a recycling company (in which it holds 19 per cent of the share capital), at whose plant it is crushed, sorted, mixed with other material, and graded before being divided into saleable materials and those which are sent to landfill as having no use. Amongst the saleable materials are aggregates and fines, some of which the recycling company sells to a landfill site operator which uses them at its site for road-making and landscaping purposes. The local authority is entitled to dividends on profits made by the recycling company. In those circumstances, the Commissioners of Customs and Excise contend that the site operator is liable to landfill tax on the recycled material deposited on its site since the local authority has discarded it as waste. In contrast, the landfill site operator maintains that the recycled material is disposed of by the recycling company so that there is no liability to tax on it. We are required to decide which of those contentions is correct. (We should add that persons other than the authority also dispose of material to the recycling company, in which case the Commissioners maintain that for landfill tax purposes they are the persons discarding the material as waste).

2. The appeal itself, by Parkwood Landfill Ltd ("PL"), a landfill site operator, is against a decision on review by the Commissioners by letter of 18 November 1999 confirming an assessment to landfill tax of £30,181 (plus interest) notified on 8 July 1999 in respect of accounting periods 2/98, 11/98 and 2/99. (The tax assessed in respect of period 2/98 was a mere £85, and PL accepted liability thereof. Consequently, we proceed on the basis that the assessment for period

2/98 plays no part in the appeal). In their review letter, the Commissioners essentially made two points in confirming the assessment, namely:

that, as material sent to the recycling plant of Parkwood Recycling Ltd ("Recycling") by Sheffield City Council ("the Council") was useless until it had been recycled and the Council made no gain from it, when it was sent for recycling the Council was discarding it as waste; and

that, whilst the Council may have intended none of the material disposed of to find its way to landfill, it had in fact found its way to PL's landfill site.

(We should add that in earlier correspondence the Commissioners had said, "Only if the waste is processed before its disposal to landfill and the process changes the chemical properties is the original producer's intention no longer relevant".)

3. In a comprehensive Notice of Appeal, given on 26 January 2000, PL gave the following reasons for appealing against the Commissioners' decision:

Since the material (aggregates and fines) purchased by it from Recycling was used for road making and landscaping, it was not deposited at its landfill site;

Whether or not the material was deposited, it was not disposed of with the intention of its being discarded, so that it was not disposed of as waste;

The source of the material was only in part the Council and, in the recycling process carried out by Recycling, the material lost its identity so that it was not disposed of by the Council;

The original material was so changed by the recycling process that, even if a particular load had been sourced entirely from the Council, it would no longer be the same material;

The Commissioners' claim that the chemical properties of material must be changed, and/or the person who had provided the original material must have gained "a net value" from it before it could be treated as material different from that disposed of by its original owner when placed at a landfill site, was not supported by any legislative requirement in that behalf and, in any event, the Council did obtain a net benefit from it;

The Council was not discarding material: Recycling was a company in which it had a shareholding and from which it stood to make a financial gain, so that in sending material to Recycling it was not disposing of it as useless.

4. The evidence upon which we are required to make our decision consists of a bundle of documents supplied by each party, the Commissioners being labelled C1, and PL's, P1, the agreed statement of Ms Hazel Davidson, a chemist and the deputy general manager of Alcontrol Geochem who oversaw the analysis of certain recycled products supplied by Recycling, and the parol evidence of:

Mr N R B Robinson FRICS, Associate of the Institute of Waste Management, the managing director of Parkwood Group Ltd ("Group"):

Mr T A Franklin, B.Sc, the operations manager of Recycling; and

Mr S Kaye, a member of the Institute of Civil Engineering Surveyors, and the commercial services manager of the Highways and Lighting Service of the Council.

5. From that evidence, we find the following facts to have been established.

6. PL carries on business as the landfill site operator of a site at Parkwood Road, Neepsend, Sheffield, and holds a waste management licence, ie a site licence for the purposes of Part II of the Environmental Protection Act 1990, in respect of that site. PL is registered for landfill tax purposes.

7. As we understand it, PL is a wholly owned subsidiary company of Group.

8. Prior to 1998 the Council operated its own landfill sites to which most of the surplus material produced by the works of its highways department was taken for disposing by way of landfill. But, on 17 August 1998, it entered into an agreement, a Shareholders' Agreement (P1 pp22-53) with Group for the provision of recycling facilities at a site at Salmon Pastures, Sheffield. One of the principal purposes said to be behind the agreement was "to create and sustain employment in designated areas through the enhancement of environmentally acceptable recycling projects".

9. Recital (C) of the agreement (P1, p. 25) provides as follows:

"(C) [Group] and the Council propose that [Recycling] should be used as their joint venture vehicle for the purpose of establishing and managing an environmentally acceptable waste recycling business for the purpose of assisting the Council fulfil its recycling obligations (pursuant to section 48 of the Environmental Protection Act [1990]) . . ."

10. The parties to the Shareholders' Agreement agreed that the issued capital of Recycling should consist of 1000 £1 ordinary shares, that 810 of them should be allocated to Group and the remaining 190 to the Council. The shares so allocated were issued and fully paid up.

11. Amongst other terms defined in the Shareholders' Agreement is "business". So far as relevant, it reads (P1, p. 27):

"'Business'

means:

the business of receiving, sorting, recycling and if not recyclable in a commercially viable manner (as determined in its sole discretion by the Board [of directors]) disposing (in an environmentally acceptable manner) of construction and other related waste (as the Board shall from time to time determine);

the business of recycling and reprocessing such of the waste received by [Recycling] as may be appropriate into products or material for sale on the open market were considered by the Board (in its sole discretion) viable to do so; and

without prejudice to the generality of the foregoing . . . to enter into a waste recycling contract or contracts with the Council in respect of waste generated by the Council's works . . ."

12. There are various other clauses in the Shareholders'Agreement which we must consider. Under the relevant sub-headings, they are:

5. "Business of the Company" (P1, p31):

"5.1 Each of the shareholders agrees to exercise its respective rights under this Agreement and a shareholder in [Recycling] so as to ensure:

that the primary object of [Recycling] shall be to carry on the Business

that the business of [Recycling] consists exclusively of the Business unless otherwise agreed by the shareholders;

that the Business shall be conducted in accordance with sound and good business practice and the highest ethical standards and on sound commercial profit making principles so as to generate the maximum achievable profits available for distribution;"

"Availability of premises for the company's business" (P1 p32)

"As soon as reasonably practicable after [Recycling] shall have agreed terms with the Council or any third parties for the recycling of waste, the parties shall use all reasonable endeavours to procure that [Recycling] shall enter into arrangements with the Earl of Arundel's Sheffield Estate on terms reasonably acceptable to the Board to secure access to premises situated in Attercliffe Road, Sheffield as shall be reasonably necessary for the purposes of [Recycling's] business."

10. "Specific obligations of the Shareholders" (P1. p34):

"10.1 Subject to [Recycling] securing waste recycling contracts, the Shareholders acknowledge that the success of [Recycling's] Business will depend on the efficient and timely development of the infrastructure required to receive and process the waste to be handled by [Recycling]."

17. "Dividends" (P1 p. 40):

"17.1 In respect of any accounting period that [Recycling] has profits available for distribution . . . the Shareholders shall procure that . . . at least 70 per cent of [Recycling's] profits available for distribution for the financial year in question are distributed by way of cash dividends by [Recycling] within 6 months after the end of such period."

13. We find that the arrangements envisaged in the Shareholders' Agreement have been put into effect.

14. Also on 17 August 1998 the Council and Recycling entered into a Section 48 Waste Recycling Agreement (P1 pp 71-87). ("Section 48" is a section in the Environmental Protection Act 1990, which Act is referred to throughout the Section 48 Agreement as "EPA").

15. The recitals in the Section 48 Agreement read as follows (P1 p. 72):

"(A) In accordance with its powers and duties pursuant to sections 45, 48, 49 and 55 and in particular section 48(2) of the EPA the Council as Waste Collection Authority wishes to increase the quantities of Waste it recycles.

(B) [Recycling] proposes to acquire the premises, plant and machinery in order to implement existing technology to recycle Waste.

(C) Pursuant to the powers conferred upon the Council by sections 48(2) and 55 of the EPA the Council requests [Recycling] to take and [Recycling] agrees to accept Waste available to the Council from time to time on the terms and conditions set out in this Agreement and [Recycling] further agrees to make available its facilities for the recycling of Waste at the Site to the public as provided herein."

16. In the Section 48 Agreement, "waste", so far as relevant for present purposes, "means the waste matter generated by the Council's Works and Highways departments and waste matter that comes into the control of the Council in its capacity as a Waste Collection Authority (pursuant to section 48 EPA) . . . and which waste the Council is (pursuant to section 48(2) EPA) permitted to dispose of for recycling".

17. And "Site" means "the sites shown red on the Plan [annexed to the Section 48 Agreement] being the site to be leased by [Recycling] from [the Earl of Arundel's Sheffield Estate] at Salmon Pastures, Attercliffe Road, Sheffield."

18. Clause 3 of the Section 48 Agreement, headed "Agreement" (P1 p.75) reads as follows:

"3.1. In consideration of the mutual obligations contained in this agreement, the Council agrees to deliver to [Recycling] and [Recycling] agrees to accept . . . not more than 50,000 tonnes but not less than 35,000 tonnes of Waste per Calendar Year at the site for recycling upon the terms but subject to the conditions set out in this Agreement"

19. (In the 12 months immediately last past, Recycling received between 62,000 and 63,000 tonnes of materials for recycling. A little under one half of that amount was deposited by the Council. That contrasts with Recycling's first few months of trading, when between 75 and 80 per cent of the material it received was deposited by the Council).

20. The Section 48 Agreement also contains the following relevant clauses (P1 p.77)

"6. OWNERSHIP OF WASTE

All Waste delivered to the Waste Reception Area in accordance with the terms of this Agreement shall upon discharge of the same at the Waste Reception Area be deemed to be the property of, and held at the risk and responsibility of [Recycling] subject always to the duty of care provisions in section 34 of the EPA, and further subject to clause 5.5 of this Agreement.

7. OBLIGATIONS OF RECYCLING

7.1 In consideration of the receipt by [Recycling] of the Gate Fee, [Recycling] shall use as much of the Waste as shall be supplied to it (subject always to the relevant plant and machinery being able to handle the volume of Waste supplied at the time) for the purposes of recycling the same.

7.2 To the extent that the volume of Waste supplied shall be in excess of that which the relevant manpower, plant and machinery can process at the relevant time and which it is not practical to store pending the availability of capacity, [Recycling] shall be free to dispose of the same in such manner as it shall determine provided [Recycling] complies with Environmental Law."

21. We find that the recycling plant operated by Recycling is operated in accordance with the Section 48 Agreement.

22. For present purposes, the materials deposited at the recycling plant are first divided into waste and recyclable material. Those in the latter category are recycled into aggregates and fines. Aggregates are concrete and other materials sorted, crushed and mixed so as to form mixed aggregate in pieces of 70mm, or less, in diameter. Fines are a soil like material produced by sorting and mixing suitable materials to form a product which has the appearance and many of the characteristics of soil, including the ability to support the growth of plants, and consist of pieces of material of 12 mm, or less, in diameter. (That diameter has now been increased to 25mm or less). Recycling sells the aggregates and fines it produces from the recycling process at an average price of £2.50 per tonne.

23. Once the Section 48 Agreement had been in operation for some time the Council came to know what material would prove suitable for, and be accepted by, Recycling for recycling. Consequently, it now dispatches to Recycling only material which it knows will be accepted for recycling, i.e. loads consisting entirely, or almost entirely, of concrete, brick, tarmac and soil. The Council sends other material produced by its works and highways department which does not satisfy the criteria laid down by Recycling straight to landfill. Recycling charges depositors between £5.50 and £6.50 per tonne of material deposited depending on quality but, in view of the large quantity of material the Council provides, it is given a substantial discount on those rates.

24. The weighbridge operator at the Salmon Pastures plant examines each load of material as it is delivered, whether by the Council or by other persons, and determines whether it is suitable for recycling. In the event that he determines it to be suitable, he accepts it; but if he rejects it, the person delivering it is required to take it elsewhere for disposal.

25. After a load of material has been accepted by Recycling, it is first sorted by hand to ensure that true waste materials such as plastic, wood and paper are removed from it. They are dispatched to landfill. Brick and tarmac are also removed by hand as they too are unsuitable for recycling purposes. (Crushed brick is however suitable as a base for informal footpaths, and crushed tarmac (planings) is predominantly used for undersurfaces of footpaths. Consequently, there is a market for both materials of which Recycling takes advantage). The remaining material is then subjected to primary screening over the first screening station. That which is too big to pass through the screen is passed through the primary crusher, and is then fit for use as a coarse road sub-base. The material which has passed through the screen is separated into aggregates and fines, the former consisting of larger lumps of material, and the latter material not more than 12mm in diameter (since September 2000 25mm), having the appearance of soil. (The quality of the aggregates produced by Recycling is now so high that it has received accreditation as MOT type 1 by the Department of Transport, i.e. it is accepted as suitable for use in highway construction: and the fines produced contain sufficient soil to sustain plant growth). Fines are mainly used for intermediate blinding, but some are applied in final site restoration work. As Recycling does not have its own transport, all material sent for recycling must be

delivered by the person disposing of it, and all material it sells must be collected by the purchaser.

26. As we mentioned earlier in our decision, PL is a wholly owned subsidiary of Group. So too is Recycling. And, as we also mentioned, Recycling is owned as to 81 per cent of its shares by Group, and as to the remaining 19 per cent by the Council. Notwithstanding those arrangements, we find that the companies concerned deal with each other at arm's length. (We were informed that Group is the registered member of a VAT Group of which at least Recycling and PL form part, so that, as far as inter-group transactions are concerned, no VAT is charged on them. Whether Recycling is part of the VAT group we are unable to say, no evidence being adduced on the point).

27. For landscaping and road making purposes, PL can purchase anduse either aggregates and fines formed from recycled material or from freshly quarried minerals; both are equally suited to the purpose.

The Legislation

28. The legislation we must consider consists of the following sections of Part III of the Finance Act 1996:

"s. 39 Landfill tax

A tax, known as landfill tax, shall be charged in accordance with this Part.

s. 40 Charge to tax

Tax shall be charged on a taxable disposal

A disposal is a taxable disposal if (

it is a disposal of material as waste,

it is made by way of landfill,

it is made at a landfill site, and

it is made on or after 1st October 1996

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.

s. 64 Disposal of material as waste

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.

The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant

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.

s. 65 Disposal by way of landfill

There is a disposal of material by way of landfill if (

it is deposited on the surface of land . . .

29. It is common ground that disposals with which the appeal is concerned were made at a landfill site and were all made after 1 October 1996.

30. It is also common ground that two questions arise out of the provisions of s. 40 which we must answer in reaching our decision. They are:

Is there a disposal of material as waste?

Is there a disposal of material by way of landfill?

31. If we answer either question in the negative, then the appeal must succeed.

32. In her submissions, Miss Whipple, for the Commissioners, dealt first with the question of disposal of material as waste. She submitted that, in seeking to identify the disposal in the instant case, we should first identify the relevant disposal, ask who made that disposal and, finally, ascertain the intention of the person making the disposal.

33. If we were to adopt that approach, Miss Whipple submitted that the first disposal we should analyse was that of the Council. She observed that the Council paid Recycling to take the material it wished to dispose of, and maintained that that was the best possible evidence of the Council intending to discard it as waste, defined by Butler-Sloss LJ in Cheshire County Council v Armstrongs Transport (Wigan) Ltd (1995) Env LR 62 as:

"it has to be that which is disposed of, discarded, got rid of, not needed any more, by the person who is in the process of discarding it or disposing of it. It is to be of no further use to that person who has possibly produced it but is certainly discarding the material."

34. Miss Whipple added that, if the three questions she had posed were to be asked of the disposal by Recycling, the Commissioners accepted that it charged for the aggregates and fines that went to PL as landfill. She further conceded that Recycling, taken alone, did not intend to dispose of that material as waste.

35. Mr Barlow observed that, in considering the subjective intention of the disposer of material, it was important to note that persons taking material to Salmon Pastures did not intend it to go to landfill, but he accepted that some of it would eventually do so. The important point, in his submission, was that disposers of material to the recycling plant intended it to be recycled into new materials: they were not getting rid of material as "useless", but with the intention of it being recycled into useful products. In his further submission, the relevant disposal was that of aggregates and fines by Recycling.

36. That led to what Mr Barlow submitted was the main issue in the appeal: whether the materials that found their way to PL's landfill site were the same as those taken to the Salmon Pastures recycling plant. He maintained that what was disposed of at the landfill site was not the same material as the Council supplied to Recycling: if it were not the same material, then the relevant disposer for the purposes of the appeal was Recycling. He added that it was important to note that the Section 48 Agreement referred to materials before they were recycled, and not after that process; and it did not refer to materials supplied by other third parties. He also claimed that the definition of "waste" in the Section 48 Agreement did not determine the meaning of that word for landfill tax purposes.

37. Mr Barlow maintained that the reference by Butler-Sloss LJ to "discarded" in the Cheshire County Council case was usually extended to "discarded as useless". In the instant case, he maintained, the Council sent material to Salmon Pastures to be recycled. He added that the Finance Act 1996 recognised that "waste" might cease to be waste if converted into something useful: as the evidence of the witnesses indicated, the aggregates produced by Recycling were similar to quarried material and were used with, or in substitution for, such material; and the fines were very similar to ordinary soil in that they would sustain plant growth.

38. As to Miss Whipple's concession that Recycling, taken alone, did not intend to dispose of recycled material as waste, Mr Barlow submitted that that was good reason for interpreting S.64(2) as he contended for, i.e. by taking account of the fact that a person would benefit from the recycled material.

39. Moving on to deal with the question of disposal as landfill, Miss Whipple submitted that the deposits of aggregates and fines in point in the appeal constituted disposals by way of landfill as defined by section 65. She maintained that the fact that they were used for site engineering purposes was irrelevant: the legislation provided its own definition of deposit, which we should apply.

40. Miss Whipple next submitted that, once it was demonstrated that (a) any material was deposited by way of landfill (a factual enquiry), and (b) it could be said that that material, at any stage in its preceding history, was disposed of as waste, then the conditions for the tax to apply were fulfilled.

41. She continued, saying that it was an important part of the Commissioners' case that there might be one or more parties interposed between the disposer and the landfill site operator, adding that in this case Recycling was to be interposed between the Council and PL. Although factually different, that situation applied in CEC v Darfish Ltd (Ch D 2000, unreported) as Moses J indicated, particularly at para 19 of his judgment; saying:

". . .the concept of making a disposal in section 64(1) seems to me to connote more than the mere deposit of the material. Disposal seems to me, in the context of these provisions, to connote the parting with or the alienation of something. It is a term wider than discarding, since the statute contemplates that someone may dispose of something without discarding it leading to the conclusion that the material was not disposed of as waste. It is also a term wider than deposit, otherwise there is no reason why the statute does not use the word "deposit" throughout. Disposal will include but not be confined to, any of the processes of removal, transport and deposit. It must include deposit because it is the deposit which triggers the tax and also identifies the time when the landfill site operator must be identified as such, but disposal is not limited to the process of deposit."

42. Mr Barlow responded with two answers to Miss Whipple's claim that once material was deposited by way of landfill and was, at any stage in its history, disposed of as waste, the conditions for the tax to apply were fulfilled. They were:the instant case was not one where there was a disposal of the material supplied by the Council to Recycling: the material supplied by Recycling to PL was different from the original material; andthere had to come a point where recycled material lost its original identity and took on another one: that point had been passed in the instant case.

43. Mr Barlow accepted that section 64(3) envisaged persons being interposed between the disposer and the landfill site, and that the legislation was wide enough to catch interposed persons who look title to waste and passed it on: if then used for landfill, the tax bit. He submitted that it was the intention of the disposer which was relevant.

44. Miss Whipple contended that if PL's arguments were correct, the intention of the legislation - to defer landfill by taxation as part of a wider environmental programme - would be undermined, indeed defeated: the tax could be avoided by the simple expedient of interposing a third party between the disposer and the landfill site, thus, making Recycling's role in the overall scheme irrelevant for landfill tax purposes.

45. She added, as an "obvious point", that the disposer's intention must be to dispose of the material as waste: it was unnecessary to show that the disposer intended the material to be disposed of to landfill. Thus, she maintained, it mattered not that the Council did not know how its waste would be dealt with once it was delivered to Recycling: the Council disposed of it as waste; if that waste in fact ended up as landfill, the tax bit.

46. Miss Whipple accepted that material emanating from different persons was mixed or sorted before being used as landfill by PL, and thus any given load of landfill delivered to it might contain material from more than one disposer. But, she maintained, there was no significance in that fact: there was nothing in the legislation which required traceability of a particular load of landfill.

47. She further accepted that Recycling undertook a role of mixing and sorting the material it received, and also "processed" it in the sense of breaking it up into smaller pieces: nevertheless, she submitted, the material remained intrinsically unchanged by Recycling.

48. Miss Whipple then acknowledged that, in the legislation, there was no reference to the material being changed. But she added, the Commissioners' leaflet LFT1 granted a non-statutory concession in these terms:

"Only if waste is processed before its disposal to landfill and the process changes the chemical properties, is the original producer's intention no longer relevant. Composting is an example of such a process. However, by crushing, bailing, sorting or screening waste, you do not change its properties and it remains waste."

49. As PL's activities fell within the final sentence of that quotation, Miss Whipple submitted that it failed to qualify for the concession.

50. Mr Barlow responded, maintaining that the characteristics of an identifiable product did not depend upon the molecular structure of individual pieces of material: crushed bricks were not the same as uncrushed bricks for any purpose.

He submitted that the "concession" referred to by Miss Whipple was not in fact a concession, but a true statement of the law. But, he added, whilst the Commissioners recognised that some materials might change, they were not prepared to acknowledge that such a change did not always involve a change in the chemical properties of a material.

51. Miss Whipple next dealt with the concept of "net benefit", saying that, whilst it did not form part of the legislation, the Commissioners recognised that, if a person profited from a disposal of material, it was difficult for him to allege that he had dispensed of the material as waste. But, she submitted, the Council made no gain from a disposal, rather it paid to be rid of the material, and the fact that it thereby complied with its obligations under the Environmental Protection Act 1990 did not affect the analysis for landfill tax purposes: it plainly disposed of the material as waste.

52. In conclusion, Miss Whipple submitted that the tribunal must respect the corporate structures involved, and not merge the activities or intentions of the Council with those of Recycling, because the legislation required the intention of the disposer to be regarded and not the intention of, or potential benefit to be gained by, anyone else. If the Council were profiting financially from the sale of material to Recycling, that would be relevant to the Council's intention, but any indirect profit from Recycling's activities was irrelevant to discovering that intention at the point of disposal.

53. Mr Barlow maintained that the Council did make a gain on disposing of material because it cost less to send it to Recycling than it would have done to send it to landfill. Further, he observed, the Council was entitled to dividends from Recycling (assuming it made profits), which would further reduce the cost of its disposing of material. In his submission, the instant case differed from that of FL Gamble & Sons v CEC (1998) Decision No. L00004, which appeal failed because the sorting and classifying of material took place after the material had been delivered to a landfill site.

Conclusion

54. It will be recalled that Miss Whipple submitted that, in coming to our decision, we should first identify the relevant disposal, and maintained that the first disposal we must analyse was that by the Council. We propose to follow the pattern she suggested. She observed that in its disposals the Council pays Recycling to take the material off its hands. That we accept. Next, she claimed that that was the best possible evidence of the Council's intention to dispose of the material as waste, as that word was defined by Butler-Sloss LJ in the Cheshire County Council case. It will be recalled that the learned judge indicated that waste is that which is "disposed of, discarded, got rid of, not needed any more". Further help in determining the meaning of waste was offered by Mr P J Crawford QC, sitting as a deputy judge of the High Court, in Berridge Incinerators v Nottingham County Council, unreported but cited at para 2-2046 of the Encyclopaedia of Environmental Health, a case relied upon by the tribunal in ICI Chemicals and Polymers Ltd v CEC (1998) Decision No LO2. In his judgment, Mr Crawford said that, "the correct approach is to regard the material from the point of view of the person who produces it. It is something which is produced as a product, or even as a by-product of his business, or it is something to be disposed of as useless". Whilst that differentiation might have been adequate in the Berridge case, it is not so for our purposes. Nevertheless, we find it helpful, for it supports Mr Barlow's submission that, in considering Butler-Sloss LJ's definition of waste, we should add to "disposed of" the words "as useless".

55. Miss Whipple maintained that the test laid down by Butler-Sloss LJ was satisfied in the instant case: as the Council has no use for the material and is willing to pay to dispose of it, it is waste. With respect, that seems to us to be an over-simplification of the situation. Undoubtedly the Council has no need of the material delivered to Recycling: it does not require it in the form in which it then exists. That is far removed from saying that it is useless, (defined in the Shorter Oxford English Dictionary as being of no use). If it were of no use, in our judgment, it could not be recycled. As it is capable of being, and is in fact, recycled, we conclude that the material in question is not disposed of as useless by the Council, i.e. in landfill tax terms as waste. That conclusion applies equally to material disposed of by others at the Salmon Pastures site, for were it waste it would cost them more to dispose of it to landfill. As we perceive it, it is necessary to distinguish between material which has no use whatsoever or is disposed of by a person as having no such use, and material which is incapable of use in the form in which it exists but is of use in a form into which it can be converted.

56. That the Council pays to deposit the material at Recycling's site does not affect the position. Consequently, we conclude that the disposal with which we are concerned is not that by the Council to Recycling. In our judgment, the relevant disposal is that of Recycling to PL. There is no question of the material comprised in that disposal being waste, so that the conditions required for landfill tax to be imposed are not satisfied. It follows that we allow the appeal.

57. But, in the event that we are wrong in so concluding, we proceed to deal with the other submissions of the parties which we regard as confirming our decision.

58. We are able quickly and easily to deal with the question of whether the aggregates and fines used by PL at its landfill site are disposed of by way of landfill. After the most careful consideration, we find ourselves unable to accept Mr Barlow's submission that, for material to be deposited, it has to be set down especially carefully in a proper place and for the purpose of safekeeping. As Miss Whipple observed, if we were to accept that definition, it would indeed make nonsense of the legislation. We find that the aggregates and fines used by PL at its landfill site for landscaping and blinding are deposited by way of landfill.

59. There are only two other matters with which we find it necessary to deal. First, we must consider the submission by Mr Barlow that the material deposited at PL's landfill site differs from that delivered to Recycling by the Council. We earlier described the processes which the material delivered to the Salmon Pastures site undergoes in the process of recycling. Some, true waste one might say, is removed before the recycling process proper begins. The remainder then has bricks and tarmac removed from it so that its composition becomes that required of aggregates and fines. And then, by crushing and screening, it takes the form in which it is sold.

60. As Mr Barlow observed, there is nothing in the legislation to support the Commissioners' contention that the recycling process must change the chemical properties of material for it to cease to be waste. There is merit in his argument that removing the waste (such as wood, plastic and paper), and bricks and tarmac changes the chemical properties of the material delivered to Recycling by the Council but, since there is no legislative requirement in that behalf, we find it was necessary to deal with the question in the form posed. The evidence adduced clearly indicates that the aggregates and fines supplied by Recycling are just as well fitted to the tasks of road making and landscaping as are newly quarried materials which PL would have to use were the materials provided by Recycling not available. It appears to us that, in those circumstances, it was not the

intention of the legislature to tax recycled material of the sort produced by Recycling, even when disposed of to landfill. In the present case, we are quite satisfied that the recycled material produced by Recycling differs from the material delivered to it by the Council, so that again we find that the relevant disposal of material for the purposes of s. 40 is not made by the Council.

61. Finally, we turn to the concept of "net benefit" which, as Miss Whipple freely conceded, also does not form part of the legislation. We are quite satisfied that the Council obtains a financial benefit from its disposal of materials to Recycling, whether looked at as the simple disposal of material delivered for recycling or considered in combination with the Council's entitlement to dividends paid out of profits made by Recycling. The evidence clearly shows that it is more expensive for the Council to dispose of materials to landfill sites than to Recycling, so that, even without its dividend entitlement, it derives some financial benefit from disposals to Recycling. That the Council must pay however it divests itself of surplus highway material we accept, but that is nothing to the point in the present context. Again, we find that the Council does not dispose of the material as waste.

62. As we said earlier, we allow the appeal.

DAVID DEMACK

Chairman

Release Date: 5th June 2001

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