

LANDFILL TAX – Credit – Contribution to approved environmental body – Cheques with name of payee omitted, and cash, handed to director of approved body – Payees' names written in later – Neither payee an approved body – No evidence that cheques or cash paid subject to condition of being spent in course or furtherance of approved objects – Whether qualifying contributions – No – FA 1996 s 50(1); Landfill Tax Regs 1996 (SI 1996/1527) regs 30(1), 31, 32(1), 33(1) – Appeal dismissed

LONDON TRIBUNAL CENTRE

WILLIAM RONALD MUNSLOW

T/A BILL MUNSLOW SERVICES - Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: ANGUS NICOL (Chairman)

MISS A WEST FCA

Sitting in public in Cardiff on 15 February 2002

F J Golden, tax consultant, for the Appellant

Miss Shaheen Rahman, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. The Appellant, William Munslow, operates the Abernant Farm landfill site in Heol-ddu in Carmarthenshire, trading under the name of Bill Munslow Services. He has been registered for the purposes of landfill tax since 1 October 1996. He is appealing against assessments to landfill tax in the total sum of £5,945 in respect of the periods 12/98, 3/99, and 6/99. In his notice of appeal, the grounds of appeal are as follows:

"Under the Landfill Tax Environmental Credit Scheme, a licensed landfill operator can claim a credit of 20% of the L. Tax due if he makes a donation to an environmental charity registered with Entrust. Customs' case is that the monies were not received by that body, and therefore not put to an approved use. Munslow's states that the monies were paid to a director of that body, and consequently had no control over the use to which they were put."

The facts

2. There was no significant dispute about the facts, and we find them to be as follows in the next few paragraphs. Unfortunately the Appellant was in a poor state of health and unfit to travel, though he wished the appeal to go ahead. He was represented in his absence by Mr F J Golden, a tax consultant.

3. The statement of case stated that when the Appellant's accounts were inspected by officers of Customs and Excise on 12 April 2000, they revealed the following claims for landfill tax credits under the Landfill Tax Environmental Credit Scheme in respect of payments to a company called Jem Environmental Research Ltd ("JER"): a credit of £2,086 in the period 12/98, £3,000 in the period 3/99, and £868 in the period 6/99. The visit report of Mr Mordecai-Lamerton related that a payment had been made to JER of £2,758.51, described as a "blank cheque" which, in the context of this appeal we took to mean that the name of the payee had been left blank. A further cheque had been given to Mr Martin Harry, again with the name of the payee left blank, for £3,333.47. It was left that the Appellant would provide details of the cheques and of the accounts to which they were credited, which he failed to provide. On 11 July 2000 the Commissioners therefore issued an assessment to unpaid landfill tax under section 50 of the Finance Act 1996. On 27 August 2000, the Appellant's representatives wrote to the Commissioners contesting the assessment, and enclosing copies of two cheques. The first was dated 29 January 1999 and was for £2,758.51 in favour of Jem Recycling Ltd, and the second, dated 7 April 1999 was for £3,333.47 payable to A.W.M. Ltd. (a total of £6,091.98). The letter said,

"With regard to the assessment above, Mr Munslow wishes to contest it, on the grounds that he acted in good faith in making the donations, and declared the Landfill Tax, credits and donations under the Environmental Credit Scheme on the returns 12.97 to 6.99 inclusive, as required under the LT Regs.

Mr Munslow was asked in your letter of the 14th April 00 to produce evidence of payment of donations as shewn on the returns for the above periods. He was unable to produce suitable records due to storage problems after closure of the business caused by the debacle of the withdrawal of the Licence by the Environmental Agency and the collapse of the JEM business. Requests to the bank produced two copy cheques only at the end of June 00."

Later on in the letter Mr Golden dealt on the Appellant's behalf with the three periods of the assessment in the following terms:

"12.98

This was the period when JEM became involved in the business. They maintained the books, Munslow made out the cheques and signed them as he was responsible for the Landfill Tax. He passed over the cheque to Martin Harry the M.D. of JEM to fill out the name of the E.B., JEM Environmental Research Ltd, and, as one can see on the returned cheque, this was not done.

3.99

Similarly, the same procedure was followed as the enclosed cheque shews.

6.99

This payment was made in cash.

To summarise,

Mr Munslow declared the LT, the credit claimed and the donations made on all of the returns. As you can see, he had imperfect understanding in how the donations are calculated, either understating or overstating the amounts allowable (now corrected).

When he passed over the cheques to Harry for completion of the name of the payee, he was following a common enough procedure, which one sees frequently employed in shops and businesses. The responsibility for the apparent misappropriation of these sums is Harry's. He accepted the cheques (and the cash, 6.99). He should have shewn the proper payee, he did not. He should have put those funds to the approved purposes of the E.B. I assume he did not. Even if he had shewn the proper title of the E.B., there is nothing to assure one that it would have been put to approved purposes. He did not advise Entrust that a donation had been received - which was his responsibility. Once those cheques and the cash donation were in Harry's hands, he took over the responsibility for the proper usage of the monies, it was out of Munslow's control. The latter's responsibility was to record the LT, the credit, the donation and the registered number of the E.B. on the return - which he did."

The letter went on to say that Mr Golden had warned Entrust that those donations might be suspect, as they were found to be, that Harry had said that he had told the Commissioners that the donations had been received by him, and contended that "the *mens rea* falls squarely to Harry". He goes on to request that the assessments be withdrawn.

4. The two cheques were produced. That of 29 January 1999 was made payable to Jem Recycling Ltd, in a handwriting clearly different from that on the rest of the cheque. The other cheque, dated 7 April 1999, was made out to AWM Ltd, again in a different hand from that of the rest of the cheque. The Commissioners considered, unsurprisingly, that these cheques did not establish that payments had been made to JER or to any other approved environmental body.

5. The request to withdraw the assessments was refused by the Commissioners. In a letter dated 1 November 2000, Mr Golden pursued the matter further. He said, *inter alia*,

"The reasons why the appeal should be allowed were contained in my submission of the 27 Aug. and I am rather disappointed that the arguments made were not responded to on a point by point basis.

In the first instance, the donations were allowable to JEM Environmental Research Ltd under Fin. Act 96 Sec 51 etc., because the Environmental Body was properly registered and the Landfill Tax had been paid by Munslow for the periods in question.

The information which I passed to both the audit manager, John Morgan, at Entrust and the Customs and Excise, Cardiff, in November 1999 that the donations were likely to have been put to

unauthorized uses were in the nature of a voluntary disclosure. This was information of suspected malfeasance by Martin Harry, the director of JEM Ltd, not by Munslow.

The Landfill Regs 1996, Sec 36 require the Commissioners to serve a notice on the approved body if the donations have not been put to an approved use. In this instance, the donations were made in good faith, and Munslow had no control over the donations after they had left his hands.

. . .

Credits on 12.98, 3.99

Munslow could have been more diligent by writing the payee's name on two of the cheques, but it is a common enough practice to date, enter the sum and sign, before leaving the payee to complete his name (a practice in every supermarket). In these instances it made it just that little bit easier for Harry to make off with the money.

6.99

There is no requirement in the Regs that payment in cash should not be done, but payment was declared on the return, and the receipt acknowledged by Harry to his visiting Officer (advised by the latter to Munslow).

. . .

My submission is therefore that Munslow made the donations in good faith, the Environmental Body, JEM Environmental Research Ltd., presumably put them to unapproved use without informing Munslow, and Munslow did not act without due care in making the donations."

6. Mr Golden's request for reconsideration was answered by Mr Priest on 24 January 2001. That letter summarised the factual position and the Appellant's contentions as follows:

"As I understand matters, Mr Harry had dealings with your client in two ways, firstly as a business associate, and secondly as a director of an approved environmental charity seeking funds.

It is your contention that your client paid Mr Harry three payments which were for the environmental charity and that these payments were correctly treated as suitable for a landfill tax credit by your client on this landfill tax returns.

I understand and agree with you that the payment of money from your client to JEM Environmental Research Ltd would be suitable for landfill tax credit during the periods in question.

I also agree with you that the method of payment of such donations is not specified within the legislation and that in

consequence there is nothing which would preclude the payment of such donations in cash.

I further agree that if the payment is made to the environmental body who then misappropriate the funds, then it is a requirement of Customs and Excise to make a notice of direction for the return of the funds by the environmental body.

The question which is paramount in my mind at present is at the point of passing over the monies whether your client made payment of the said amounts to Mr Harry as an individual, JEM Environmental Research Ltd, JEM Recycling Ltd, or to any other business which Mr Harry was involved in.

I accept that your client met with Mr Harry and gave him two cheques and some cash. What I am unable to establish on the basis of the evidence is to which company your client made the payments and for what purpose."

He summed up the evidential position in the following terms:

"The facts as I see them are:

1. Mr Munslow met with Mr Harry and paid him three sums of money, two by cheque and one by cash.
2. Mr Munslow did not make the cheques payable to the environmental body to whom he says he wished the payments to go.
3. Mr Munslow did not receive any receipt from the environmental body for the monies paid.
4. There is no supporting documentation proving that there was an agreement by Mr Munslow to pay the environmental body any monies.
5. There is no evidence that the monies were safely received and placed into the control of the environmental body.

On this basis I can do no other than decide that there is insufficient evidence to prove that the monies were made [paid?] to the environmental body."

Accordingly he upheld the decision that credit could not be allowed in respect of those payments.

7. Mr Golden himself gave evidence in support of the Appellant's case. He said that the absence of Mr Munslow from the hearing gave rise to difficulties. He said that Mr Harry had managed the tip at Abernant, and that it had been the Appellant's responsibility to render the landfill tax return. He had issued invoices to Jem which had never been paid. When donations were made to an environmental body, that body was required to notify Entrust that the money had been received, and this would be recorded by Entrust who would make a small charge for running costs. But in the case of the three payments by the Appellant

that had not happened. Mr Golden said that he had been called in by the Appellant to assist in recovering the bad debt due from Jem Recycling. He said that if the Appellant had inserted the name of JER on the cheques as payee all would have been well. He could not account for that not having been done. He referred to another report by Mr Mordecai-Lamerton relating to a donation of £25,000 made to JER under the scheme, inquiries into which shewed that that money had been paid into a savings account with the Abbey National in the name of Harry. In cross-examination, Mr Golden said that Harry had been acting as agent for the Appellant when he filled in the names of the payees of the cheques. He conceded that the environmental body did not receive the money, whatever the Appellant's intention may have been.

The law

8. Section 50(1) of the Finance Act 1996 empowers the Commissioners to assess, to the best of their judgment, the amount of landfill tax due where a person has failed to make the returns required, or where the returns appear to be incomplete or incorrect. Paragraph 14(1) in Part V of Schedule 5 to the Finance Act 1997 gives the Commissioners a similar power where any amount has been repaid to a person and that amount exceeds the amount which the Commissioners were liable to repay to that person.

9. Part VII of the Landfill Tax Regulations 1996 (SI 1996/1527) provides for credit where a qualifying contribution is made to a body concerned with the environment. So far as is relevant to this appeal, that Part provides:

"30—(1) In this Part—

"approved body" means a body approved for the time being under regulation 34;

. . .

"qualifying contribution" has the meaning given in regulation 32;

. . .

31—(1) Subject to the following provisions of this regulation, an entitlement to credit arises under this Part in respect of qualifying contributions made by registered persons.

(2) Subject to paragraph (3) below, a person shall be entitled to credit in respect of 90 per cent of the amount of each qualifying contribution made by him in any accounting period; . . .

(3) In respect of the qualifying contributions made in each contribution year, a person shall not be entitled to credit of an amount greater than 20 per cent of his relevant tax liability.

32—(1) A payment is a qualifying contribution if—

(a) it is made by a registered person to an approved body;

(b) it is made subject to a condition that the body shall spend the sum paid or any income derived from

it or both only in the course or furtherance of its approved objects;

(c) the requirements of paragraphs (2) to (2B) below have been complied with in relation to that payment; and

(d) it is not repaid to him, or to a contributing third party, in the same accounting period as that in which it was made.

...

33–(1) A body is eligible to be approved if—

(a) it is—

(i) a body corporate, or

(ii) a trust, partnership or other unincorporated body;

(b) its objects are or include any of the objects within paragraph (2) below (approved objects);

(c) it is precluded from distributing and does not distribute any profit it makes or other income it receives;

(d) it applies any profit or other income to the furtherance of its objects (whether or not approved objects);

(e) it is precluded from applying any of its funds for the benefit of any of the persons—

(i) who have made qualifying contributions to it, or

(ii) who were a contributing third party in relation to such contributions;

(f) it is not controlled by one or more of the persons and bodies listed in paragraphs (1A) and (1B) below;

(g) none of the persons or bodies listed in paragraph (1B) below is concerned in its management; and

(h) it pays to the regulatory body an application fee of £100 or such lesser sum as the regulatory body may require."

The persons listed in paragraph (1A) include a registered person. Those listed in paragraph (1B) include persons who have committed some offence or irregularity in respect of approved bodies or charities, or who has been convicted of an indictable offence, or a person connected with any such persons.

The contentions

10. The Appellant's contentions are set out in the letters from Mr Golden to the Commissioners quoted above in paragraphs 3 and 5. Mr Golden did not add anything to them or vary them at the hearing, save to stress that the responsibility for the destination of the donations was entirely that of Mr Harry, and to give an instance of another, much larger, donation having got no further than the hands of Mr Harry.

11. The Commissioners' case was as summed up in their letter quoted above in paragraph 4. Miss Rahman referred us to the relevant law, and added that had the money in fact gone to JER, which was an approved environmental body, the Appellant would have been entitled to the credit. But the donations did not reach JER.

Conclusions

12. Two facts stand out from the rest in this case. First, the two cheques were not drawn in favour of JER or any other environmental body, whatever may have been the Appellant's intention. They were not made out by the Appellant in favour of any person at all, though there was no reason why they should not have been made out in favour of JER. The second is that the donations were in fact paid to two different corporate bodies, neither of which was an approved environmental body. For those reasons alone, in our view, the Appellant was not entitled to credit.

14. It is not, in our view, a comparison of like with like to point out that in shops and supermarkets it is a common practice to leave the payee's name out, in writing a cheque, for the shop or supermarket's employee to enter. It is invariably the case that either the shop has a stamp of its name, or that the till prints in the name. Either way, it is done then and there in the customer's presence. In the present case evidently the name of the payee was not entered when the cheques were handed to Mr Harry. Further, it was of particular importance that the cheques should be made payable to JER, an approved environmental body, and it was undoubtedly the responsibility of the Appellant to ensure that it was so payable. Even if, as Mr Golden said, the *mens rea* was all on the part of Mr Harry, the fact remains that the cheques were not made out to JER. Had they been, and had a receipt for the cash been obtained in the name of JER, and then some malefactor had managed to embezzle the money, the Appellant would have been able to shew that he had paid the money to the approved body. Nor was there any evidence that the three sums of money were handed to Mr Harry subject to the condition required by regulation 32(1)(b) of the Regulations. To say, as Mr Golden did, that the Appellant had no control over the donations after they had left his hands, was strictly true. But the Appellant could have had such control, and should have retained control, by entering the name of the payee on each cheque, and obtaining a receipt from JER for the cash.

15. The law requires that to obtain credit under the Environmental Bodies Credit Scheme, a donation must be made to an approved environmental body. In this case, no such donation was made, whether the fault was that of Mr Harry, the Appellant, or of some other person. The evidence shews, on the contrary, that the cheques and the cash were passed over, physically, to Mr Harry as an individual, since, without the payee's name the cheques were handed directly into his sole control, and in such a form that he was able, foreseeably, to do what he liked with them.

16. For the above reasons this appeal is dismissed.

17. The Commissioners made no application for costs, and accordingly we give no direction as to costs.

ANGUS NICOL

CHAIRMAN

RELEASED:

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