

LANDFILL DISPOSALS TAX (WALES) BILL

ANNEX A: RECOMMENDATION 5

1. This note is in response to the Committee's recommendation 5, that the Government considers the definition of disposal of material as waste in section 6 to ensure clarity and simplicity.

Introduction

2. The Government can reassure the Committee that, in preparing the Bill, it has considered the matters referred to in its report very carefully, taking full account of existing legislation, relevant case-law (see annex A1) and potential alternative approaches.
3. Whilst we understand the desire for certainty and simplicity around the definition of a taxable disposal this is an intricate area that has been the subject of substantial litigation in the UK and where the potential consequences of any changes need to be carefully considered and balanced. Having carried out this exercise, this Bill proposes a model that builds on the UK Government's approach and develops it further by clarifying the fundamental concepts used to identify taxable disposals and narrowing potential loopholes. In particular, section 6 seeks to clarify a number of issues with the ultimate objective of protecting the revenue by avoiding time-consuming and expensive challenges around the definition of a taxable disposal insofar as possible, whilst ensuring that taxpayers are treated fairly.

Overview of Part 2, Chapters 1 and 2 of the Landfill Disposals Tax (Wales) Bill ('the LDT Bill')

4. Tax liability is established by reference to section 3, which sets out the four conditions that need to be met in order for there to be a taxable disposal, namely:

- a. that there is a disposal of material by way of landfill. This concept is further defined at section 4;
 - b. that the disposal is made at an authorised landfill site (defined at section 5) or at a place other than an authorised landfill site but is a disposal that requires an environmental permit;
 - c. that the disposal is a disposal of the material as waste. This concept is further defined at section 6(1) and related provisions are found at sections 6 and 7;
 - d. that the disposal is made in Wales.
5. Condition 3 is developed at section 6(1), which provides that there will be a disposal of material as waste if *“the person responsible for the disposal intends to discard the material.”* This is the test for whether or not there is a disposal of material, which will need to be met (alongside the other three conditions at section 3) in order for there to be a taxable disposal. This is consistent with the current landfill tax legislation in the UK, where this condition has been the subject of litigation, particularly in terms of whether, if material is being ‘used’ in some way, it can be said that there is not an intention to discard.
6. With this in mind, we have made a number of changes to try to improve the understanding of both landfill site operators and tribunals as to matters that may be taken into account in determining whether a person intends to discard the material. Firstly, we have been clear as to whose intention is relevant and this is dealt with at section 7. This matter was considered in earlier UK case law and not entirely clear on the face of existing legislation. It provides that, in the context of authorised disposals, the person responsible for the disposal will be the landfill site operator; or if a disposal is made by another person without the operator’s permission, that other person. The intention of the waste carrier will not therefore be relevant. A lack of clarity in the UK legislation has generated litigation on this point and we are seeking to avoid the risk of similar confusion by expressly dealing with this point in a way that aligns with the case law.

7. Secondly, we have supplemented the intention to discard test at section 6(1) with provisions at subsections (2) and (3) to directly address issues that have been considered in the course of landfill tax litigation so as to reduce the likelihood of these issues being re-litigated in a Welsh context. These provisions do not replace the substantive test of whether or not there is an intention to discard (at subsection (1)) but are there to supplement that provision and seek to close down potential issues.
8. The first of these provisions, section 6(2), says that an intention to discard may be inferred from the circumstances of a disposal and in particular from the fact that material is deposited in a landfill disposal area; which in layman's terms is the landfill void where the placement of waste generally occurs. This is intended to provide a clear steer that the objective circumstances of a deposit may be taken into account in deciding whether a person intended to discard the material so as to make it clear that there is more to the test at section 6(1) than whether or not a person accepts or denies having an intention to discard the material. Section 6(2) allows a range of matters to be taken into account in ascertaining what a person's intention might be. This is consistent with the case law¹ and intended to put an accepted position beyond doubt on the face of the Bill.
9. Subsection (2) has been prepared to take account of the case law and known issues around the intention to discard test, so as to serve as an indicator that how material is treated on a landfill site (and particularly its placement in an area of the site designated for landfill disposals) can be relevant to a judgement as to whether or not there is an intention to discard on the part of a landfill site operator. It is intended that this should be of assistance to landfill site operators, the Welsh Revenue Authority (WRA), the tribunals and courts when grappling with the question of

¹ See for example, paragraphs 41- 66 of the Upper-tier Tribunal judgment in *Patersons of Greenoakhill Ltd v. HMRC [2014] UKUT 0225*, where the judge took account of numerous relevant circumstances. For example, at paragraph 43 it was found that the fact that the material in issue was not separated or retained before being "dumped" in the void was an "indicator that Patersons [the landfill site operator] is not intending to use the material". See also the Chancellor's comments at paragraphs 34 and 35 of the Court of Appeal's judgment in *HMRC v. Waste Recycling Group [2008] EWCA 849* discussing factors (such as economic circumstances of an acquisition, whether recycling or reuse of material has occurred) that "will cast light on his [the ultimate disposer's] intention at the relevant time."

whether there is an intention to discard and therefore a disposal of material as waste. The purpose of subsection (2) is not to override or alter the test subsection (1) but to act as a clear marker that the circumstances of a deposit of material (in both an authorised and unauthorised context) may be relevant to deciding whether or not there was an intention to discard, so as to seek to reduce recourse to litigation insofar as possible.

10. We note the committee's view that the reference to a 'landfill disposal area' at subsection (2) is somewhat circular, given that this is defined as being an area of a landfill site where disposals are being, have been or will be made and that this term is being used in the context of a provision designed to determine whether a disposal has taken place. However, we are satisfied that the provision produces the desired result, namely that if new material is deposited in a part of a landfill site where material is generally disposed of "as waste", that is evidence that the new material is also being disposed of "as waste". In some cases, subsection (2) will not bite but this provision does not purport to be the only way of showing that a disposal of material as waste has occurred and so this is not a problem.
11. We note the Committee's view that section 6(2) is confusing and unhelpful. We note also that Deloitte suggest that establishing tax liability by inference is *challenging* and question the practical assistance that this provision gives. However, to suggest that the tax liability is established by inference is not entirely correct: any inference that may be drawn under section 6(2) will need to be considered alongside any other available evidence in determining whether the person responsible for the disposal had an intention to discard the material. It must also be remembered that an intention to discard (whether inferred or not) is only one of the tests that must be met for a tax liability to arise. An inferred intention will not of itself establish a tax liability if the other tests are not met.
12. In the Government's view, the practical assistance that this inference provides is substantial: by making it clear to WRA (and the courts and

tribunals) that they may take account of the whole picture, and that they need not rely solely on what operators and those who engage in unauthorised disposals claim to have intended, which should make it harder for operators and those who engage in unauthorised disposals to avoid paying LDT. As such, we would expect this provision to facilitate the collection of LDT and to reduce the scope for avoidance and litigation. The principle underlying the provision is, in the Government's view logical, uncontroversial and supported by the case law: namely, that in deciding whether or not a person intended to discard material, it is legitimate to take account of all the relevant circumstances surrounding that disposal and not simply what the person claims to have intended.

13. Detailed discussions have taken place with stakeholders while developing the definition of a taxable disposal, including section 6(2) and the Welsh Government notes and concurs with the evidence of the environmental law expert (Dr Patrick Bishop, of UKELA and Swansea University), that *this represents a common sense approach to the issue which should reduce the scope for protracted legal argument.*
14. Section 6(3) is also a new provision, which again, is intended to give WRA, operators and tribunals some guidance in determining whether or not there is an intention to discard material. It provides that the fact that someone has made a temporary or incidental use of the material or derived a benefit from the material doesn't mean there was not an intention to discard the material. This provision also expressly addresses the history of litigation between HMRC and landfill site operators (in the Patersons case that is discussed further below) about whether tax should be charged on material that produces methane gas, by giving this as an example of a benefit that would not in itself mean that there was no intention to discard.
15. The purpose of this provision is to make it clear that the fact that a person has found some temporary or incidental use for a material or has derived

a secondary benefit from it does not necessarily mean that the person cannot have had an intention to discard the material.

16. The wording has been deliberately and carefully constructed to address a specific issue that is known to have been the source of much argument and litigation in the context of the UK legislation. It deliberately does not go so far as to say that the presence of these circumstances will automatically mean there is an intention to discard as to do so would be inappropriate – but these are factors to be considered when applying the intention to discard test at section 6(1) that feeds into the test of whether or not there is a taxable disposal at section 3.
17. Finally, in some circumstances the LDT Bill provides that a disposal will be treated as a taxable disposal regardless of whether the four conditions at section 3 are met. This is because section 8 sets out a list of specified landfill site activities, which, when taking place at an authorised landfill site, will automatically be treated as taxable disposals. This provision is based on UK secondary legislation with some refinements, some of which reflect known litigious issues (see annex A1).

The Preferred Approach

18. The Government's main objectives (as reflected in the carefully drafted provisions within the Bill), are to build on the existing concepts underpinning both landfill tax² and Scottish landfill tax³, but to do so in a

² Current UK landfill tax provisions are found in the Finance Act 1996 ('FA 1996) and secondary legislation made under FA 1996. A liability to landfill tax arises when a "taxable disposal" is made, which is defined as "a disposal of material as waste", which is "made by way of landfill", made at "a landfill site" and it is made "on or after 1 October 1996". The concepts within this definition are further expanded upon within the interpretation provisions of Part III FA 1996. In response to landfill tax litigation (see Annex A1) changes were introduced to FA 1996 in 2009. The Finance Act 2009 added section 65A into FA 1996, which gives the Treasury the power to make an Order prescribing activities that are to be treated as taxable disposals. This power has been exercised through the Landfill Tax (Prescribed Landfill Site Activities) Order 2009, which sets out eight categories of activities that are "to be treated as taxable disposals", including, for example, the use of material to create or maintain a temporary haul road.

³ The Landfill Tax (Scotland) Act 2014 ('LTSA') approach to defining a taxable disposal for Scottish Landfill Tax purposes is very closely aligned with the UK legislation, save that the definition of a landfill site at section 12 LTSA

way that reduces ambiguity about the identification of taxable disposals. In doing so, the intention is to minimise the scope for avoidance of tax and to reduce litigation around the meaning of the legislation. This approach is beneficial in two important ways:

- a. It ensures that there is a high degree of continuity with the system that is well known and understood within the sector; and
- b. It retains compatibility with the existing case-law that has developed around the key concepts of *disposal of material as waste* and *intention to discard*.

19. The provisions setting out the definition of a taxable disposal in the LDT Bill also allow scope for adjustments to be made if operational practice or future developments render this necessary, although do not allow for a wholesale change of approach. The LDT Bill does not allow for the four conditions that need to be met in order for there to be a taxable disposal (section 3) to be changed but do allow for the meaning of a disposal of material by way of landfill (section 4) or the meaning of a disposal of material as waste (section 6) to be modified and for activities that are deemed to be taxable disposals (section 8) to be added, modified or removed.

20. The Welsh Government considered alternatives, including the approach that we understand is being pursued by the UK Government, as set out at Clause 47 of the Finance Bill 2017 (as published on 5 December 2016).⁴ Our current understanding of the policy behind these new proposals is that all material deposited on a landfill site (including in the void) would be taxable unless specifically exempted. This would be the case regardless of a landfill site operator's intentions, or whether or not the material is

means that the tax can apply to disposals made outside of an authorised landfill site. See ss.3, 4, 5, 6, 12, 30 and 31 LT(S)A; The Scottish Landfill Tax (Prescribed Landfill Site Activities) Order 2014; Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015/3

⁴ A further draft of this Bill and accompanying secondary legislation are expected to be published soon.

used. When considering different approaches, we had a number of concerns about this model, primarily around:

- a. the difficulty of drawing up an effective list of exemptions;
- b. the likelihood of litigation in a new and untested area, namely the list of exemptions;
- c. the operability of this model in the context of unauthorised disposals;
- d. the loss of any readily identifiable principle as to when something should be within or outside the scope of the tax if everything is 'in' but a large number of things are subsequently exempted.

Conclusion

21. Whilst we acknowledge that some of the conceptual issues around the tax are challenging, the Government considers that the Bill improves the clarity of the law in a way that maintains consistency with the existing framework (which is familiar to operators), facilitates the collection of the tax and reduces the scope for dispute and litigation.

ANNEX A1: RECOMMENDATION 5 - LANDFILL TAX LITIGATION

The definition of a taxable disposal, and in particular the question of whether there is “a disposal of material as waste”, as set out at sections 40(2)(a) and 64 Finance Act 1996 has been the source of litigation for HMRC. The summary of the key case law is set out below.

HMRC v. Darfish Limited [2001] Env. L.R. 3 (Moses J, QBD)

The case concerned an authorised landfill site that was operated by Darfish Limited. A wholly owned subsidiary of that company brought material (topsoil and subsoil/clay) that it had purchased from third party companies and deposited it on the landfill site and that material was to be used for site engineering purposes.

The Tribunal found that Darfish had not intended to discard the material and there was therefore no liability to tax and HMRC appealed this decision.

HMRC argued the appeal on the basis that the disposal was not made (as the tribunal had found) on behalf of Darfish but on behalf of the companies from whom the material has been purchased.

The Court noted that ‘disposal’ was not defined by the legislation, although ‘disposal by way of landfill’ is defined (by s. 65 FA 1996). The Judge observes that ‘disposal’ must mean something wider than deposit or else the legislation could just refer to a ‘deposit’ and that it must be wider than the term ‘discard’, as the implication from the legislation is that someone can dispose of something without intending to discard it.

The Court concluded that it was the intention of the companies who had sold the material, rather than the landfill site operator that was

relevant and remitted the case to the tribunal for a decision on the facts based on that finding.

Parkwood Landfill v. Commissioners of Customs & Excise [2002] EWCA Civ 1707 (Court of Appeal)

This case concerned the use of recycled material that Parkwood (a landfill site operator) was purchasing for road making and landscaping purposes on the landfill site. Parkwood contended that this was not taxable as there was not a disposal of the material “as waste”, because it did not intend to discard the material. Parkwood succeeded in this argument before the VAT and Duties Tribunal.

However, the Commissioners view was that it was not Parkwood’s intention that was relevant but the intention of the local authority who were disposing of the materials with a company from whom Parkwood then purchased the material. The High Court (Sir Andrew Morritt VC) upheld the Commissioner’s appeal, forming the view that the fact that the other conditions of a taxable disposal (i.e. ‘by way of landfill’ and ‘at a landfill site’) were not satisfied at the time of the local authority forming an intention to discard did not mean that this was not a taxable disposal, provided those other conditions were met at some other stage.

Parkwood appealed this decision and the Court of Appeal upheld this appeal, finding that it was the disposal at Parkwood’s landfill site that was relevant and that that had not been a disposal as waste. It held that in order for there to be a taxable disposal, all of the conditions (at s. 40(2)(a)-(d) FA 1996) need to be satisfied at the same time and rejected HMRC’s contention that each condition was self-contained.

Commissioners for HMRC v. Waste Recycling Group Limited [2008] EWCA Civ 849 (Court of Appeal)

WRG (acting as the representative member of a group of companies) was seeking a landfill tax refund of over £2m in relation to inert material that it had used on its landfill sites for (i) the construction of roads and (ii) daily cover of its active waste. WRG's claim for a refund was rejected by HMRC (both initially and following a review) and by the VAT and Duties Tribunal but its appeal was allowed by the High Court. HMRC appealed that decision to the Court of Appeal and that appeal was dismissed.

The Court were bound to follow the decision of the Court of Appeal in *Parkwood* that the four disposal conditions laid down at s. 40(2) need to be satisfied at the same time, noting that that *"is likely to be the moment when the material is disposed of as landfill in accordance with the provisions of s. 65."* WRG conceded that the material had been disposed of by way of landfill in accordance with s. 65 (which the Court was therefore not required to determine but certainly did not seem convinced about) and there was no doubt that this was a landfill site within the s. 66 definition. The question therefore was whether WRG had made a disposal with the intention of discarding the material.

In considering this definition, the Chancellor expressed the following view on the meaning of 'discard':

"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."

On the facts of the case, the Court found that there was either no disposal or no disposal with the intention of discarding the material, meaning that the material used for daily cover and building roads were not the subject of a taxable disposal.

Patersons of Greenoakhill Ltd v. The Commissioners for HMRC [2014] UKUT 0225 (TCC) (Upper Tribunal- Rose J) and [2016] EWCA Civ 1250 (Court of Appeal)

Patersons is a landfill site operator in Glasgow. Some of the biodegradable material that it accepts produces landfill gas (methane) as it decomposes and Patersons are able to collect that methane and use it to generate electricity (by burning it in gas generators), which it then sells for use in the national grid.

In the context of that biodegradable material, there was no dispute between the parties that the taxable disposal conditions at ss. 40(2)(b), (c) and (d) FA 1996 (made by way of landfill, at a landfill site, after 1 October 1996) had been satisfied and the issue before the tribunal was therefore whether Patersons had disposed of the material as waste (s. 40(2)(a) FA 1996) given that the material was producing methane, which was being used to generate electricity, which was being used as a source of power.

The First-tier Tribunal ('FTT') found that the material deposited at the site should be regarded as material disposed of as waste and found that HMRC had properly charged tax. The FTT did however grant Patersons permission to appeal to the Upper Tribunal.

The Upper Tribunal (Rose J) rejected Patersons' submission that the FTT should have been bound by the earlier case law of Parkwood and WRG. She noted, in considering Parkwood *"there was 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. ...in 'road making and landscaping' was not an intention to discard."*⁵ Rose J did however conclude that the FTT had gone too far in its total rejection of

⁵ It seems that the focus in this case and to an extent WRG, was on establishing whose intention was relevant for the purpose of the taxable disposal definition.

the earlier authority and in particular WRG⁶ and she drew the following propositions from that case which were of relevance to Patersons:

- Just because material goes into the void by way of landfill, it may not have been discarded for the purposes of the s. 40 taxable disposal test.
- Whether or not an activity was required (e.g. applying daily cover as part of the permit requirement) was not determinative of whether there was an intention to discard.
- The fact that material will be left in the void and abandoned after it has performed its function does not necessarily mean that there is an intention to discard at the point that it is put into the void.

Rose J felt that *“the nub of the case is whether what happens at Patersons’ site amounts to the use of biomass to generate electricity”* and ultimately concluded 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).”*

In reaching this conclusion, the Upper Tribunal pointed to a number of relevant factors, including: (i) the fact that a separation of material can be indicative of an intention to retain or use material, whereas putting everything into the void without separation can be an indicator of an intention to discard (albeit not conclusive) and (ii) the fact that methane gas was to be produced from the material was an inevitable outcome of the material being in the ground without anything further needing to be done to bring this about.

⁶ The FTT had concluded that the fact that those judgments involved material that had mass and occupied space distinguished them from the case it was considering.

The Upper Tribunal therefore found that the material deposited at the site should be regarded as material disposed of as waste and that HMRC had properly charged tax.

Patersons then appealed to the Court of Appeal, who handed down judgment after the introduction of the LDT Bill, on 17 December 2016 and unanimously dismissed the appeal. The essence of the Court's reasoning is encapsulated at paragraph 4 of that judgment:

“The question whether Patersons disposed of the material as waste for the purposes of section 40(2)(a) must be decided at the date of the deposit by reference to the material in the form it then was. At that time, there was no methane. That came later. Therefore, I would dismiss this appeal.”

As Lady Justice Arden (with whom Lady Justice King agreed) expressly recognised (at paragraph 51), the key issue in the Court of Appeal's judgment was about the meaning of material rather than “use” arguments. Lady Justice Black did however see fit to also address the “use” arguments and in her judgment, concluded (at paragraph 72) that *“Patersons was intending to get rid of the material by way of landfill and the methane came naturally, and inevitably, as a later by-product of that activity....and thus it was a “disposal of material as waste” within section 40(2)(a).”*

The Court of Appeal did not give leave to appeal to the Supreme Court. However, Patersons have made an application to the Supreme Court for permission to appeal that is still outstanding.

Other litigious issues

In the wake of the Court of Appeal decision in WRG, took steps to introduce a list of prescribed activities that would be treated as taxable disposals (see legislation summary above). Meanwhile, HMRC initially reacted to the

judgment by publishing a notice⁷ inviting claims for repayment and setting out its interpretation of the judgment as follows:

“On 22 July 2008 the Court ruled in favour of Waste Recycling Group Limited in their action relating to landfill tax liability. The Court found that where material received on a landfill site is put to a use on the site (for example, for the daily coverage of sites required under environmental regulation, and construction of on-site haul roads), it is not taxable, as there is not, at the relevant time, a disposal with the intention of discarding the material.

We accepted the Court's decision and did not seek leave to appeal to the House of Lords.

Notwithstanding any possible future changes to landfill tax legislation that the Government might decide to introduce, the judgment means that materials put to use on a landfill site are not taxable.”

The notice included an illustrative list of non-taxable uses of material, which included the use of “fluff”, which is essentially soft black bag waste from which any sharp or heavy and other materials has been removed. The careful placement of this waste within a landfill cell is said to protect the cell lining from damage. As a result, many landfill site operators put in claims for repayment and some of these were paid by HMRC.

There was then a shift in HMRC’s position as they distinguished between ‘reverse or top fluff’⁸ and ‘side and base fluff’⁹. On 18 May 2012 it issued Revenue and Customs Brief 15/12¹⁰ intended to clarify its previous interpretation and essentially stating that repayment claims relating to ‘reverse or top fluff’ would not be paid as HMRC did not view this as a ‘use’ of material

⁷ Revenue and Customs Brief 58/08, issued on 22 December 2008

<http://webarchive.nationalarchives.gov.uk/20081230184923/http://hmrc.gov.uk/briefs/excise-duty/5808.htm>

⁸ Materials “which are said to be used to protect or provide a suitable stable substrate for the overlying layers at the top of a landfill cell.” (HMRC Brief 15/12)

⁹ “Material used for basal landfill engineering to protect the integrity of the lining system.” (HMRC Brief 15/12)

¹⁰ <http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/briefs/excise-duty/brief1512.htm>

whereas 'side and base fluff' claims that pre-dated the Prescribed Activities Order 2009 would be paid. This Brief was further supplemented by Revenue and Customs Brief 18/12 on 1 June 2012¹¹.

This decision triggered the issue of claims against HMRC, arguing that 'top' fluff is a use of material and should not be taxable. In the course of considering these claims, HMRC's policy changed. Therefore, on 23 January 2014¹² HMRC announced that no further repayments would be made for fluff claims, whether they related to 'top' or 'base and side' fluff.

As a result of HMRC's change of position, a number of landfill site operators brought judicial review claims¹³, claiming that the HMRC Brief had given rise to a legitimate expectation that claims for repayment would be made, which following a change of policy, HMRC have since rejected.

This is in addition to a number of claims before the first-tier tax tribunal as to the correct tax treatment of fluff (in particular, 'top/reverse fluff' as this is not dealt with in the Prescribed Activities Order 2009), of which a selection of lead cases have been heard and are awaiting judgment, with the others stayed behind them.

¹¹<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/briefs/excise-duty/brief1812.htm>

¹² HMRC Brief 2/14

<https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2014-landfill-tax/revenue-and-customs-brief-2-2014-landfill-tax>

¹³ See for example, *R (on the application of Veolia ES Landfill Limited and others) v. The Commissioners for HM Revenue and Customs* [2016] EWHC 1880 (Admin) and *R (on the application of Biffa Waste Services Ltd) v. The Commissioners for HM Revenue and Customs* [2016] EWHC 1444 (Admin)