CHAPTER 28

LANDFILL TAX (1)

28.1 Introduction to Landfill Tax

In this chapter we are going to have a look at Landfill tax which was introduced in the **Finance Act of 1996**. It is under the control of Customs and took effect from the **1st of October 1996**.

Finance Act 1996

The main reasons for introducing the tax were to encourage people to recycle and not dump material in Landfill sites and also to reduce the harmful substances that get into our soil as a result of material being landfilled. The main legislation is the Finance Act 1996. There are also a couple of statutory instruments that give us further details about registration and accounting and these are **Statutory Instrument 1996/1527**, also known as the Landfill Tax Regulations, and **Statutory Instrument 1996/1528** which talks about qualifying material. We will refer to these statutory instruments as we go through this chapter.

SI 1996/1527
SI 1996/1528

28.2 Taxable disposals

What does landfill tax apply to? It relates to **landfill sites**. It only applies to **taxable disposals** and these are defined as:

s.40(2) FA 1996

- a disposal of material as waste,
- it is made by way of landfill, and
- it is made at a landfill site.

We will have a look later as to what constitutes taxable disposals and what are exempt disposals. The person who is liable to pay the tax is the **landfill site operator**.

28.3 Disposal of material as waste

Before we do this, we need to define the phrase "disposal of material as waste." S.64(1) FA 1996 says that "**a disposal of material is as waste if the person making the disposal does so with the intention of discarding it**".

s.64(1) FA 1996

So this tells us two things. We need to find the person who made the disposal and we need to ascertain their intention – because if they do not intend to discard of the material as waste then the tax is not due.

However - hold that thought for a second because the **Finance Act 2009 has inserted a new section into the legislation that makes certain disposals taxable even if there is no intention to discard**! We'll have a look at this section in a minute. But for now – back to section 64.

s.64(3) FA 1996

Section 64(3) is also important. **This says that if a person makes a disposal on behalf of someone else then it is the original person's intention we look at**. You can see that this was written into the legislation to stop people avoiding the tax by inserting an intermediary into the disposal. Take the following illustration:

Illustration 1

You want to get rid of some waste. You know that if you take it to the landfill site, you are the person making the disposal and as you intend to discard of the material as waste, landfill tax is due. However, if instead you passed the material onto someone else and they took it to the landfill site – they could argue that it wasn't their intention to discard of it as waste and therefore no tax is due. Subsection 3 stops this from happening. It says that we look at the original person's intention – so in the latter situation as you were the person who intended to discard of the material as waste and the disposal was made on your behalf, it is your intention that is important.

Section 64 has probably been the most contentious section of the legislation as we have had many tribunal and court cases concerning it.

The most recent case - which we are going to have a look at in a second - involved the **Waste Recycling Group and was heard in the Court of Appeal**. That Court went against Customs and found in favour of the taxpayer's interpretation of the legislation. The result of this case was that if a **landfill operator acquired materials for use on the site e.g. to build roads or to cover the waste at the end of the day then as they did not intend to discard of the materials as waste the disposals were not liable to landfill tax.** Because Customs lost this case – and a significant amount of revenue estimated as £200 million over three years(!) - they have decided to change the legislation to make most of the types of disposals covered in the Waste Recycling Group case liable to the tax. This new legislation is contained in **schedule 60 of the Finance Act 2009**. We'll look at this new legislation in a second but first of all let's look at the cases that led to its introduction. We'll start with the Waste Recycling Group case.

As this case is so long and involved you will find separate notes on it at the end of this chapter. This case also discusses in detail the facts and judgements given in the Parkwood and Darfish cases, which are summarised next.

In the **Parkwood case**, heard in the Court of Appeal, recycled waste was sold to a landfill site for use in road building/landscaping on the site. Customs argued that there was a disposal of material as waste because the local authority that originally provided the material to the recycling company was intending to dispose of it as waste. **Their intention was held to be irrelevant. When the recycling company deposited the waste at the landfill site, this was not a disposal as waste.**

Lanatiii Ltd [2002] EWCA Civ 1707

In the **Darfish case**, a wholly owned subsidiary of Darfish was paid to take away material by two other companies and deposited it at Darfish's landfill site. Darfish intended to use the material so that it could develop another part of its land.

Darfish Ltd [2000] All ER (D) 361]

The tribunal held that Darfish did not intend to dispose of it as waste and therefore landfill tax was not due. The High Court however, allowed Customs' appeal, saying it was **insufficient to consider only Darfish's intention; the intention of the other two companies must also be considered. They had made a 'disposal'.** A 'disposal' is not confined to the moment the waste is deposited on the site.

In the unreported tribunal decision of **ICI Chemicals**, casings which are used to contain waste are not themselves liable to landfill tax. They are not deposited as waste, as they are being deposited as useful casings.

ICI Chemicals & Polymers Ltd [MAN/97/9500]

As a result of the decision in the **Waste Recycling Group** case Customs issued **Business Brief 58/08** which detailed their interpretation of the outcome of the case. In this brief Customs detailed the uses of materials at a landfill site that would not attract the tax. Log on to Customs website (www.hmrc.gov.uk) and see all the uses they mention in the brief. As an example,

- Material used for cell engineering;
- Material used for temporary or permanent hard standings; and
- Material used to cover the waste at the end of each day

are listed as uses that are not liable to the tax, ie they are not 'taxable disposals'.

However, this is not the end of the story. I mentioned at the start that Customs were not happy with the Court's decision in the Waste Recycling Group case so they decided to change the legislation. The new legislation is contained in **schedule 60 of the Finance Act 2009**. We'll look at it now.

Sch 60 FA 2009

Schedule 60 inserts a new section 65A into the 1996 Finance Act. The section is headed up '**Prescribed landfill site activities to be treated as disposals'**. What the section does is allow an Order to be made that details activities on a landfill site that will be treated as a disposal of material as waste and therefore liable to the tax.

SI 2009/1929

The relevant 'Order' in this case is Statutory Instrument 2009/1929. It takes effect for **disposals on or after the 1st of September 2009**.

Some of the uses included in the Order are:

1. the use of material to **cover the disposal area during the short term cessation in landfill disposal activity**. This is the so-called '**daily cover**' that was the main issue in the Waste Recycling Group case;

2. the use of material to **create or maintain a temporary haul road**. This covers any road within a landfill site which gives access to the disposal area;

3. the use of material to **create or maintain a temporary hard standing**. A 'hard standing' means a base on which an activity such as sorting, treatment, processing, storage or recycling is carried out; and

4. the use of material to **create or maintain a cell bund**. This means a structure within the disposal area which separates units of waste.

These are just some of the activities in the Order. Have a read of the Order now to see all of the activities that are now classed as deemed disposals and liable to landfill tax. You will note that all of the uses listed have something in common. That is that **they all relate to the current disposal of waste at the landfill site.**

Note that **most of them use the word 'temporary'**. Therefore, if a landfill site operator uses material to create 'permanent' roads or permanent hard-standings for instance – which essentially means they are there after the landfill activities have ceased – then these are not prescribed activities and do not incur landfill tax.

They are still governed by the principles in the Waste Recycling Group case. **Customs have updated their public notice on landfill tax to detail the types of uses they envisage are covered by the statutory instrument and those that are not.** They distinguish between temporary structures that necessitate or facilitate the disposal of waste, which are taxable and permanent structures that are still there when the landfill site closes down, which are not taxable disposals.

28.4 Temporary Tax-Free Area

Prior to 1st September 2009, a landfill site operator could apply for a 'temporary tax free' area under section 62 of the 1996 Finance Act. This was an area where material was held temporarily before being put to a qualifying use, such as recycling.

When the material was **deposited into the tax-free area, it was not treated as a disposal for landfill tax**. Landfill tax became due if the material remained within the area, generally, for more than 12 months. The **provisions on temporary tax free areas have been removed from the 1st of September 2009** as a result of the decision in the Waste Recycling Group case.

As a result of this case tax would not be due on materials that are to be removed for recycling etc. Schedule 60 does however give **Customs the power to require a person to provide information to them about the use of materials and designate part of a landfill site an 'information area'** where prescribed materials are to be deposited. And – **if someone does not maintain a record of material in that information area, then this also becomes a 'deemed' disposal under SI 2009/1929** - which we looked at above. Have a look at (h) in the statutory instrument – it gives two circumstances where someone fails to comply with Customs' requirements on information areas - which then makes the material in it a deemed disposal of waste and liable to the tax.

In practice the removal of the provisions on temporary tax-free areas are being directly replaced with requirements to supply similar information that is already required under the current legislation, so there is **no real change for landfill site operators**.

There has been a useful case on temporary tax free areas that is still relevant even after the legislation changes in September 2009. This is because it provides a **general principle that Customs should not use their powers of assessment to penalise a taxpayer for a regulatory breach**. The purpose of the legislation should be followed.

Generally Customs will authorise a temporary tax free area for a limited period of time. Once the time limit approaches expiry, the operator can renew the authorisation. In the **Easter Hatton case**, the renewal of the authorisation was not made. Customs assessed the operator to landfill tax on the material contained in the area at the date the authorisation had lapsed. The **tribunal quashed the assessment** based on the purpose of the legislation. **Effectively the assessment amounted to a penalty for not renewing the tax free area authorisation in time.** However, as all of the material had been put to a qualifying use and was not landfilled the tax should not be due. The purpose of the legislation was to tax material that was landfilled.

Easter Hatton v. HRMC L00026 29th Nov 2007

28.5 Rates of tax

We have learnt that landfill tax only applies to taxable disposals, but what are the rates of tax? The rates are **£48 per tonne or £2.50 per tonne,** calculated pro rata for part tonnes. The latter rate applies if the disposal is of qualifying material.

s.42 FA 1996

From this, we can see that if we classify our waste correctly there are quite a lot of savings to be made if we are disposing of qualifying material.

From **1st April 2011, the standard rate is set to rise to £56 per tonne**. Also note that the tax is set to increase by £8 each year until it reaches £72 per tonne from 1st April 2013.

The **tax point is the date of disposal or if an invoice is issued within 14 days** – the invoice date becomes the tax point.

s.61 FA 1996

28.6 Exemptions

First let's take a look at the types of material that are exempt from the tax. You will find these in Section 43 onwards of the Finance Act. They include the following: s.43 FA 1996

- Disposal of material which has been **removed from water**, such as rivers and canals, and had formed part of the bed of the water or projected from it;
- Disposal of material, which has been removed from water approaching a harbour which has been **removed in the interests of navigation**, and formed part of or projected from the bed. Note that this also includes material that has been added to the waste so that it is not liquid waste;
- naturally occurring mineral material which has been removed from the sea during **operations carried out to obtain sand or gravel** or other substances such as those from the seabed;
- material which has been removed from land which was covered by a certificate from Customs. This essentially covers **cleaning up of contaminated land.** Certain disposals are excluded from this and you will find these listed in Section 43A(4). They include instances where someone has been given a notice to clean up the land under the Environmental Protection Act of 1990. This does include cleaning pollutants from one part of the land to the other – but where the person "spreads" the pollutants out to obtain a suitable contour, this will not satisfy the law. This was confirmed in the **Stuart Baldwin tribunal case.** s.43A(4) FA 1996 Stuart Baldwin L/00022 8/12/04

  Also – a certificate will not be granted if hazardous material is going to be deposited on the land as the 'relevant activities have not ceased to give rise to pollutants' under 43A(8).

  This was looked at in the High Court case of Augean. The **word 'pollutant' which is not defined in the Act should carry its ordinary meaning**. The judge agreed with Customs that it means a **substance capable of causing pollution** and because Augean's activity would result in the presence in the land of substances capable of causing pollution, the relevant activity had not ceased. Augean [2008] EWHC 2026 (Ch)

  Note that this exemption is being phased out. Relief is given where the disposer holds a relief certificate from Customs. **Applications for certificates will not be accepted on or after 1st December 2008. Anyone in possession of a valid certificate will have until 31st March 2012 to dispose of their waste** and still benefit from the exemption. Disposals made on or after 1st April 2012 will incur landfill tax.

- Note that there used to be a specific exemption from landfill tax where qualifying material was used in the restoration of a site. This meant that the site was being closed down and restored to its previous use – which could have been forestry/agriculture etc.

As a result of the Waste Recycling Group case the use of material in this way has been held to not be a disposal of material as waste. It also has not been included in the list of 'deemed' disposals in SI 2009/1929 (because remember the uses listed there are all 'temporary' type uses that relate to the disposal of the waste and not the cessation of landfill activities – which effectively occurs after the disposal of waste.)

Therefore the exemption was removed from the 1st September 2009 because it has become unnecessary. In Customs' public notice on landfill tax they confirm that materials used to restore a landfill site are not taxable disposals. However, they have inserted into the legislation a provision that requires someone to notify them that they are commencing the restoration of a site. If someone does not notify them then it becomes a deemed disposal in SI 2009/1929 - we have seen this SI a few times now!

Back to our list of exemptions then.

- naturally occurring material which results from mining or quarrying and qualifying material made at a quarry. Again, you can see that the legislation used the words "qualifying material", which we will look at on the next page;

And finally disposals of the remains of **dead domestic pets at pet cemeteries** are exempt disposals.

28.7 Qualifying material

We have already heard this phrase a few times, but what exactly is "qualifying material"? As stated above **qualifying material is subject to the reduced amount of £2.50 per tonne**, as opposed to the full rate. We have also learned that one of the purposes of landfill tax is to stop the disposal of harmful substances getting into the soil.

Therefore, the reason this material is allowed to be dumped at a reduced rate is that it is **not going to harm our soil**.

s.42(3) & (4) FA 1996

Qualifying material will be listed in an Order and in order to get listed it must be described as **inactive or inert** i.e. this means it is not going to harm our environment when it is dumped.

The relevant Order that contains a list of qualifying material is Statutory Instrument 1996/1528. It consists of **nine groups** and a description of the material covered in each group is given in the second column of the table in the schedule to the Order. If there are any conditions that attach to the material they are listed in column 3 of the table. There are also various notes about each group underneath the table.

SI 1996/1528

It is worthwhile to open up the statutory instrument and have a look at the notes that accompany the table.

Let's have a look at the groups.

Group 1	covers rocks and soils and includes clay, sand, gravel, sandstone and limestone, plus a number of other stones. The condition is that they must be naturally occurring.
Group 2	covers ceramic or concrete materials which include glass, ceramics and concrete. There are further conditions in the notes as to what these 3 categories actually include.
Group 3	includes minerals that have been processed or prepared, but not used and covers things such as clays, silica, mineral abrasives, and man made mineral fibres.
Group 4	covers furnace slags which include things like slag from waste incineration.
Group 5	covers ash such as that from wood, coal or waste combustion.
Group 6	covers low activity inorganic compounds and includes things like titanium dioxide and calcium carbonate.
Group 7	covers calcium sulphate subject to the condition that it is disposed of either at site not licensed to take putrescible waste or in containment cell which takes only calcium sulphate. This includes things like gypsum and calcium sulphate based plasters, excluding plasterboard.
Group 8	covers calcium hydroxide and brine which must be deposited in brine cavity and
Group 9	covers water containing other qualifying material in suspension.

Extra Statutory Concession Notice 48 also allows used foundry sand to come within Group 3.

Note that the current Order is being reviewed with a view to removing some of the substances currently listed.

Example 1

You need to decide whether the type of disposal is a normal taxable disposal and therefore liable to landfill tax at the full rate, whether it is a disposal of qualifying material and therefore liable to the reduced rate of £2.50 per tonne or whether the disposal is exempt by virtue of the legislation and therefore is not liable to landfill tax at all

Disposal	£40 per tonne	£2.50 per tonne	Exempt
1. Material dredged from a canal.			
2. Soil containing a small amount of grass.			
3. Domestic pets at a pet cemetery.			
4. Household waste.			
5. Building site waste.			
6. Foundry sand.			
7. Clear glass bottles.			
8. Glass reinforced plastic.			
9. Fly ash from clinical waste incineration and			
10. Naturally occurring material from mining.			

28.8 Determining weight

We have already mentioned that landfill tax is charge per tonne of weight of waste. But how is the weight determined? There are 3 methods listed in the legislation; the **basic method**, the **specified method**, and the **agreed method**.

reg.41 SI 1996/1527

The basic method applies unless a specified or agreed method is used. The **basic method is to weigh the material at the time of disposal**, i.e. at the landfill site itself.

The specified method says that weight is determined by a Public Notice. The relevant Notice is Landfill Tax 1 and this provides that where a specified method is used, it must be used for a continuous 12 month period and the person must use the method consistently, i.e. use the same method for the same types of waste or for the same type of customer. Currently the **Notice prescribes 3 methods.** None of them require prior approval from Customs to use.

reg43(1) SI 1996/1527

Landfill Tax 1

Method 1 is the maximum weight of container method. This involves recording the maximum weight that the lorry, for instance, is permitted to carry. That permitted weight is then used and applied to the rate of landfill tax. What this means is that if you only have a half load in your lorry you will overpay, because the tax will still be based on a full load.

Method 2 is a volume to weight conversion method. This involves finding the cubic capacity of the vehicle carrying the waste and then, depending on the waste that is being carried, conversion factors are used to calculate the weight of the material. All of this information is available in the Public Notice.

The final method is **method 3 which allows weighing of waste prior to disposal** at the landfill site. If, for example, the landfill site does not have a weighbridge, then the person disposing of the waste can weigh it before they leave their own premises. An accurate audit trail will need to be kept for Customs purposes.

The final method is the **agreed method**. Where this applies the basic and specified will not and Customs will agree a method for a 12 month period. The agreed method is an agreement between a registered person, i.e. the landfill site operator, that weight will be determined in a different way other than the basic or specified methods. This might be used if, for example, using the weighbridge would be costly. For example, waste does not normally pass near the weighbridge, or if perhaps the weighbridge has broken down.

28.9 Registration

We have already said that the landfill site operator is liable to pay the tax. In order to do this they must register with Customs in accordance with Section 47 of the Finance Act 1996, and also comply with the rules in the Landfill Tax Regulations Statutory Instrument 1996/1527. Section 47 requires a **landfill site operator who carries out taxable activities to register**.

s.47 FA 1996

SI 1996/1527

The time limit for registration is based on when they **form the intention** to carry out taxable activities. They must notify Customs on Landfill Tax Forms and these are called LT1 and LT1A. **LT1** is the application for **registration** and **LT 1A** provides information to Customs about the actual landfill **site**.

LT1
LT 1A

You need to tell Customs **within 30 days** of having formed the intention. In addition, if you cease to operate a landfill site, you also have to tell Customs. This must be done within 30 days of ceasing. The Notice given to Customs must include the date that you ceased to have the intention and the date on which you ceased to carry out taxable activities. If your particulars **change** in any way, you also have to tell Customs. You must also do this within **30 days** of the change occurring.

reg.4(4) SI 1996/1527

The type of change that Customs need to know about are:

- if the name or trading name, or address of the landfill site that's operated changes;
- if the landfill site operator changes his status, for example, he goes from being a sole proprietor and forms a limited company; or
- if he operates as a partnership if the name or address of any partner changes then this must be notified as well.

28.10 Transfers as a going concern

What if we sell our landfill site to somebody else? If this happens, under normal circumstances, the person disposing of the site would need to de-register for landfill tax purposes and the person buying the site would need to register. However, if both parties agree, then they can **apply for the registration number of the seller to be transferred to the purchaser**. reg.7 SI 1996/1527

The conditions are as follows: LT68

- the business must be transferred as a going concern;
- the registration number of the seller must still be active;
- as a result of the sale the seller's registration would otherwise be cancelled and the purchaser would become liable to register; and
- both parties sign the form LT68.

Customs will then pass the seller's registration number to the purchaser at the date of the sale of the business, and as a result of this, like with VAT and many other indirect taxes, the **purchaser will take over the seller's history with respect to landfill tax**. Therefore, if the seller, has been accounting for landfill tax incorrectly then Customs may assess this on the purchaser.

28.11 Special circumstances

Before we come on to record keeping and accounts, a couple of special circumstances that you need to be aware of. Firstly, some rules regarding unincorporated bodies. If an unincorporated body, other than a partnership, operates a landfill site, responsibility for complying with the legislation lies with:

- the President or Chairman, Treasurer or Secretary, on a **joint and several liability** basis.
- If there aren't any of these positions, then the joint and several liability will be imposed on any committee; and
- if there is no committee then every member of this unincorporated association will be jointly and severally liable.

Notification of registration, change in particulars, or cessation etc. can only be validly given by one of the people who has been obligated under this above provision. So, if there is a President, then a member of the organisation cannot validly make the notification.

If the unincorporated body is a partnership, the normal partnership rules apply, and that is that **every partner is jointly and severally liable** for compliance with the law.

Our final look at special circumstances is a situation where an operator becomes bankrupt, or if he is running a company, the company goes into liquidation. If a registered person becomes bankrupt, or the company he runs goes into liquidation or receivership, then **Customs may treat any person who carries on that landfill site as a registerable person**. This could include for example, a liquidator where a company has gone into liquidation.

This person will therefore be liable under legislation for complying with payments, sending Returns, and other requirements under the regulations. If someone else comes and buys the business, they must **tell Customs within 30 days** of taking over the landfill site.

The liability of the liquidator will come to an end when another person takes over the business, or if a buyer cannot be found, when the liquidation ends, or they cease to carry on the business at the landfill site.

28.12 Returns

reg.2 SI 1996/1527

Returns are made for accounting periods and an accounting period is defined in Regulation 2 of the Landfill Tax Regs. Just like VAT, IPT and a few other taxes, they are **3 months** in length. The Return must be made by the **end of the month following the period** to which it relates.

Illustration 1

For an accounting period covering January – March, the Return must be in by the end of April.

In order to be able to complete the Return the operator must keep a **landfill tax account**. This will be a quarterly summary of total landfill tax due, detailing any credits of tax and any adjustments that need to be made.

28.13 Errors

If an operator discovers that he has made an error on a previous Return then, subject to some rules, he can make the **correction on a subsequent Return** without having to separately declare it to Customs. If he has made an over declaration of tax, for example, he has paid too much tax by overstating the tax due, or under-declaring the amount of any credit he is entitled to, then there is **no limit** to the amount of the error that can be entered on the next Return.

The reason that there is no limit is because the error has been to Customs benefit. If however, you have made an **under-declaration**, you can only adjust amounts up to the greater of £10,000 or 1% of turnover (subject to a maximum of £50,000) on your return. If the error exceeds the limit this needs to be separately notified to Customs.

reg.13 SI 1996/1527

Once we are happy with our Return then payment of the tax is also required by the same deadline for sending in our Return.

28.14 Record keeping

What records need to kept in case Customs want to check that we are accounting for the correct amount of tax?

reg.16 SI 1996/1527

The types of records include **business and accounts**. These must also include the **Landfill Tax Account,** which remember, is our quarterly summary of tax that is due, including any credits or adjustments that have had to made. An operator also needs to keep **transfer notes**, or other records that show material brought on to the site, and any material removed from the site. **Invoices** issued also need to be kept, and any **credit or debit notes**.

Most records should be kept for minimum **six years** just like for VAT and a lot of other indirect taxes that we have looked at.

28.15 Penalties

As for IPT, a **new single penalty regime** is being introduced for incorrect returns and failure to notify a taxable activity. Turn back to chapter 26 and look at sections 26.8 and 26.10 to see details of the new regime.

28.16 Waste Recycling Group v HMRC [2008] All ER(D)300(Jul) and [2007] EWHC 3014(CM)

We'll now take a look at the case of Waste Recycling Group and Her Majesty's Revenue & Customs. **HMRC appealed against the decision of the High Court and the decision of the Court of Appeal has been released**. In essence the Court of Appeal has concurred with the taxpayer (and mostly therefore the decision of the High Court) that **landfill tax is not due where material is used to cover waste at the end of each day and material is used for engineering at a landfill site e.g. for road building.**

However, don't forget that as a result of this case the legislation was changed to make daily cover and use of materials in temporary structures deemed disposals and liable to landfill tax.

The facts and details which follow are taken from the High Court case.

The disposal – if indeed there was one at all – was made by the landfill site operator himself, on his own behalf. Therefore, it was his intention that was relevant. **He did not discard the material – i.e. this means 'rejecting' or abandoning it – he was retaining the material to use**. Just because the original producer might throw the material away – there is no principle that once something is waste it will always be waste.

The judge dismissed HMRC's appeal but varied the order of the High Court which remitted disposals back to the tribunal for re-consideration.

Immediately after this you will see in more detail the facts and circumstances of the Waste Recycling Group case. But remember now that we have the decision of the Court of Appeal there is to be no remission back to the tribunal. The taxpayer has won – **that material used to cover the waste at the end of the day and material used for site engineering purposes such as road building is not discarded as waste.** It is the landfill site operator's intention that is relevant and if he does not intend to discard of the material as waste landfill tax will not be due.

The reason why this case has arisen is because landfill tax is due when there is a taxable disposal. This means that there is a disposal of material as waste. This is then defined further - that the person making the disposal does so with the intention of discarding the material. The reason why we have had a few cases already on this one aspect of the legislation is because we need to find who made the disposal. Why is this so important?

Well, let's imagine the following illustration:

A local authority are doing road improvements and wish to get rid of the waste arising from it and therefore it passes it on to a landfill site operator, who uses it at their site for site improvements. Who has made the disposal? Is it the local authority? Or is it the landfill site operator? And why does it matter?

Well, remember we said that a disposal is a taxable disposal if the person making the disposal intends to discard of the material as waste. In our situation the local authority intended to discard of the waste – it had no use for it.

But if it is the site operator that makes the disposal – then they don't intend to discard of it as waste but intend to use it on the site for site improvements. So you can see that it is vitally important that we can first of all identify who made the disposal. This has been the issue in a number of cases so far including the case we are looking at.

Facts of the case

The facts of this case were: The operator of the landfill site submitted a claim to Customs for a refund of landfill tax for certain disposals that they believed were incorrectly treated as taxable. Customs refused to pay the claim as they believed the disposals were taxable.

There were eleven different types of disposals that the High Court originally had to consider. They were the following:

One – inert materials (such as brick/rubble) bought by the taxpayer when used for engineering purposes or to cover the material at the end of the day.

Customs have conceded that this is not a taxable disposal – so although it is listed as one of the disposals it is not then considered further.

Two – material dumped for free.

There is no payment by either party and if landfill tax is due, the operator pays it and raises an invoice to the customer showing the tax but offsetting it with a negative tipping charge so that the material is in effect dumped for free.

Three – material dumped, where the customer pays but if tax is due the payment doesn't cover it. So the invoice shows the tax and a negative tipping charge between £1.99 and 1p so that the net amount on the invoice represents what the customer actually pays.

Four – the same situation in three above, but what the customer pays is exactly the tax charge of £2 per tonne. (This was the applicable rate of tax at the time).

Five – again the same situation in three above – where the customer pays. In this case they pay more than the tax charge of £2 per tonne but it is an amount below the prevailing market rate.

Six – members of the public deposit waste at an amenity site and it is segregated into recyclable material – which is taken away for recycling and waste that is removed to the landfill site. The local authority pays the appellant for its services.

Seven – a variation of six in that the customer pays to deposit the material and there is no payment from the local authority.

Eight – the appellant pays a supplier of inert materials (e.g. bricks/rubble) where the material is used to cover the waste at the end of the day.

Nine – material that has been sorted into active and inert material. The disposer pays but as the waste is already sorted they receive more favourable disposal charges. – remember landfill tax is payable at £2 per tonne on inactive/inert material and £24 per tonne on other material or mixed loads.

Ten – inert material used at the landfill site for engineering e.g. road making purposes.

Eleven – material used to cover the waste at the end of each day to avoid the waste blowing away or smelling!

Although these last two are listed as separate types of disposals – they aren't really. They link to categories 1-9. The essence of the dispute is that materials from categories 1-9 were used for site engineering purposes or to cover the waste at the end of the day – and it is when they are used in this manner that the appellant considers them to not be disposals of material as waste and Customs consider that they are disposals of material as waste.

Before we get into the law, one matter was resolved up front. **Customs conceded that no landfill tax was due on inert material purchased by the appellant for site engineering purposes or to cover the waste at the end of the day**.

Now I've already mentioned that there have been a number of cases concerning taxable disposals and who makes the disposal and whether they do it with the intention of discarding the material. The two main cases, which were referred to in this case were Parkwood and Darfish. We need to briefly look at these cases before we turn to the present case.

Parkwood

Parkwood was heard in the Court of Appeal. In brief, the local authority delivered waste to a recycling company (a member of Parkwood's group) and paid for the disposal. The recycling co. recycled some material (by crushing/mixing) and sold it to external customers and Parkwood. Parkwood used the material for road making/landscaping on their landfill site.

Customs had argued that the local authority made the disposal and as they intended to discard of the material as waste then landfill tax was due. Parkwood argued that they were disposing of the material and as their intention was to use it and not discard of it as waste, then no landfill tax was due.

The Court of Appeal agreed with Parkwood. Part of the reason was the intention of the Act itself. Landfill tax was not aimed at taxing recycled materials but the aim was to encourage the recycling of materials. If Parkwood had gone and bought new materials to use in their road making etc there would never have been any question of the tax being due – because the seller would have no intention to 'discard' the material. So this would not encourage recycling at all but encourage people to buy new materials! The appellant in our case relied on Parkwood so that in their opinion no tax should be due on any materials used for road making etc.

Darfish

Customs however, preferred to rely on the case of Darfish. Now this case only went as far as the High Court. In Darfish, Darfish instructed its subsidiary to obtain soil, which it did so from 2 unrelated companies. The 2 companies paid the sub for taking the soil away. The soil ended up at Darfish's landfill site and was used for engineering on the site. Again the issue is who made the disposal. If it was the 2 unrelated companies, then it was their intention to discard the material. If however, it was Darfish, then they did not intend to dispose of it as waste.

The High Court reversed the tribunal's decision and said that the unrelated companies were the ones that made the disposal and therefore landfill tax was due.

Now if you put the two cases we've just looked at side by side, you'll see that they bear an uncanny resemblance to each other. However, in the Court of Appeal, the disposal was held to be made by Parkwood and no landfill tax was due. But in the High Court, the disposal was made by the 2 unrelated companies and landfill tax was due.

So we can see why the appellant was relying on Parkwood and why Customs were relying on Darfish! One problem is that although Darfish was heard before Parkwood, Parkwood did not specifically overrule it. So we appear to have two possibly conflicting precedents…or do we?

There are subtle differences between the two cases – one of which is that **in Parkwood the material was changed/recycled by the company in the middle. In Darfish the material never changed at all**. The subsidiary took soil from the two unrelated companies and delivered it in the same state to Darfish.

So is this distinction important?

High Court Findings

Well let's look at the High Court judge's findings in our case and how he interpreted the two cases of Parkwood and Darfish. The judge said that in his opinion the Court of Appeal in Parkwood equated 'recycling material' as meaning that useful material was produced by whatever means from waste material – whether that be by crushing/mixing as in Parkwood itself or by sorting or separating it out. He rejected Customs contention that you had to physically change the product in some way to come within the Parkwood decision. The judge also said that he didn't think that the Court of Appeal's judgement should be limited to circumstances where goods were sold.

They never implied that a sale was a prerequisite to the recycling. The very fact of recycling provides strong if not conclusive evidence that there is no intention to dispose as waste regardless whether he charges for the goods or not. He went onto say that the tribunal had misunderstood the effect of the Court of Appeal's decision as to what 'recycling' included.

They should have asked if any process had taken place – which included sorting/separating to produce useful material from waste. And if so this came within Parkwood. The judge also clarified that it didn't matter who did the recycling. The judge commented that Darfish was different. In that case there was no recycling at all of the soil – it arrived at the landfill site in the same state it had left the 2 companies. The appellant had argued that as long as the material had been re-used this would amount to recycling – even if nothing at all had been done to it.

The judge also raised one of the tribunal's contentions that the economic consequences of the disposal were irrelevant. The tribunal had said that it was irrelevant whether the supplier received or made a payment for the goods or whether the recipient paid for the transport. The high court judge said that no factors should be excluded from consideration if it indicated whether or not someone was discarding something.

The evidence in each case should be assessed. The tribunal had erred in this matter.

Bearing these points in mind, the judge then went on to comment on each of the 11 scenarios at issue. If you remember the first scenario was the 'free tips' i.e. where no money changed hands between the parties. Customs had accepted that if the landfill operator paid for the transport of the material to the site then no tax would be due this was because it was in effect a purchase of material by the operator.

The judge said that in his view this was correct. Where there is a net cost to the operator i.e. the operator waives the charge and pays for the transport of the material, the material is not disposed of as waste.

He also commented that in accordance with the Parkwood decision it seemed to him to show that the site operator is the person 'disposing of the material' as they are the ones who want the material on site – so it is their intention that is important.

He did however go on to distinguish 'free tips' where the operator doesn't pay for the transport of the material. He said that if the site operator has not specifically requested the material then it would be less likely that it is them that makes the disposal and therefore it is the intention of the person getting rid of the material that is important.

This did not necessarily mean that it became a taxable disposal, the harder the commercial bargain of the person disposing of the material the less likely they intend to discard the material. He finished off by saying that all the circumstances have to be considered – and that the tribunal had misdirected itself and that this category should be remitted to the tribunal for determination on the evidence.

The above analogy was also applied to scenarios 3, 4, and 5.

If you remember these were: The 'uneconomic tips' where the customer paid for the disposal but this was less than the tax charge, the break-even tips where the customer paid the £2 – to cover the tax charge and the 'discounted tips' where the tipping charge is below market rate but above the tax charge.

So in essence the judge is remitting these disposals back to the tribunal for them to consider in the light of all the circumstances where there is an intention to discard the material as waste.

The judge commented on category six. This was where members of the public deposited waste at an amenity site which was segregated into recyclable material – which was taken away for recycling and waste that was removed to the landfill site. The judge said that 'it will be for the parties to consider whether in the light of this judgment there is any need for the matters to be remitted to the tribunal for reconsideration or whether the result can be agreed'.

Well talk about sitting on the fence! – what exactly does that mean? Does he mean that he's asking Customs to accept that they're wrong and need to change their view? - Or what?! – I think we're going to have to wait and see on this one...

The judge also applied this same analogy to category 7 – which was the same scenario as above except in that case the customer paid to deposit the material and to category 9 – which was where material had been sorted into active and inert material. The disposer pays for the disposal but as the waste is already sorted they receive more favourable disposal charges. The reason that the judge lumped all these scenarios together is because of the element of recycling/sorting/separating etc…

In relation to category 8 – which was where the site operator paid a supplier of inert materials (e.g. bricks/rubble) where the material is used to cover the waste at the end of the day. The judge said that as the site operator needed the inert waste for engineering purposes and therefore approached suppliers in order to obtain the right amounts, he found it difficult to see that this type of material was being disposed of 'as waste' or disposed of on behalf of anyone other than the site operator. He also said this was the case even in the absence of a sale or payment for transport.

This is a clear part of the judgment – there should be no landfill tax due on material procured by the site operator for engineering purposes. They are the ones 'making the disposal' but their intention is not to dispose of it as waste but use it engineering on the site. I think this is the right approach and exactly what Parkwood meant.

So where are we with this judgment? Well to summarise the decision, we can take the following points: If material has been recycled by any means – which does not have to include crushing or mixing but can be something as simple as sorting or separating and the material is used for site engineering or to cover the waste at the end of the day – this should not be a taxable disposal.

This is also not limited to situations where the goods are sold.

The economic consequences of a disposal were a relevant factor (i.e. if money changed hands or if someone negotiated a discounted rate or their transport was paid etc). No factors should be excluded from consideration.

If the site operator had not specifically requested the material then it was less likely they were the ones making the disposal and therefore it would be the intention of the person getting rid of the material.

However, the harder the commercial bargain of the disposer than the less likely they would have an intention to discard.

And if the site operator needed the inert waste for engineering purposes and therefore approached suppliers it is difficult to see that this type of material is being disposed of 'as waste' or disposed of on behalf of anyone other than the site operator. This was the case even in the absence of a sale or payment for transport.

Remember that this is what the High Court judge said – we now have the decision of the Court of Appeal which said that all of these disposals were not taxable. But also remember that SI 2009/1929 has subsequently overturned some of the WRG decision and made 'daily cover' and uses for 'temporary' structures deemed taxable disposals.

Answer 1

	Disposal	£32 per tonne	£2.50 per tonne	Exempt
1.	Material dredged from a canal.			✓
2.	Soil containing a small amount of grass.		✓	
3.	Domestic pets at a pet cemetery.			✓
4.	Household waste.	✓		
5.	Building site waste.	✓		
6.	Foundry sand.		✓	
7.	Clear glass bottles.		✓	
8.	Glass reinforced plastic.	✓		
9.	Fly ash from clinical waste incineration and	✓		
10.	Naturally occurring material from mining.			✓

1 Material dredged from a canal is exempt by virtue of Section 43 of the Finance Act 1996.

2 Soil containing a small amount of grass would fall within Group 1 of the Qualifying Material Order of 1996.

3 Disposal of domestic pets at a pet cemetery is specifically exempt by virtue of Section 45 of the Finance Act 1996.

4 Household waste, if none of it has been sorted into qualifying material will be liable to tax at the normal rate.

5 Building site waste, if none of it has been sorted into qualifying material will be liable to tax at the normal rate.

6 Foundry sand is liable at the £2.50 per tonne rate, it falls within Group 3 by virtue of Extra Statutory Concession Notice 48.

7 Clear glass bottles fall within Group 2 of the Qualifying Material Order and are therefore liable at £2.50 per tonne.

8 Glass reinforced plastic however, is excluded from the definition in Group 2 by virtue of Note 3 and therefore liable to the full rate.

9 Fly ash from clinical waste incineration is specifically excluded from Group 5 of the Qualifying Material Order and therefore is liable to the full rate.

10 Finally, naturally occurring material from mining is specifically exempt under Section 44 of the Finance Act 1996.