



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 99

P34/20

OPINION OF LORD TYRE

In the cause

FIFE RESOURCE SOLUTIONS LLP

Pursuer

against

ROBERTSON METALS RECYCLING LIMITED

Defender

**Pursuer: R Mitchell, solicitor advocate; Brodies LLP
Defender: Manson; Davidson Chalmers Stewart LLP**

15 December 2020

Introduction

[1] The pursuer carries on business as a waste disposal and landfill operator at various sites in Fife, under operating agreements with Fife Council who own the sites. The defender carries on a metal recycling business. According to the pursuer's averments, the pursuer and defender entered into various contracts whereby the defender regularly sent waste from a fragmentiser machine for disposal at a landfill site operated by the pursuer at Lochhead, Dunfermline ("Lochhead").

[2] Scottish landfill tax ("SLFT") is chargeable on "taxable disposals", ie on disposals of material as waste by way of landfill at landfill sites. Different rates of tax apply to

“qualifying material” (non-hazardous and low polluting) and to other material. Liability for payment of tax on a taxable disposal made at an authorised landfill site rests on the landfill site operator, defined as the person holding the authorisation for disposals at the site. Part of the policy behind SLFT is to discourage the use of landfill as a means of waste disposal and to encourage instead the development of sustainable waste management options such as recycling and anaerobic digestion. The policy envisages that the landfill site operator will pass the burden of the tax on to the waste producer by including it in the price charged for the waste disposal.

[3] The person with statutory liability to pay SLFT on disposals at Lochhead is Fife Council. The pursuer avers that in terms of its agreements with Fife Council, it undertook to pay that tax to Revenue Scotland. The pursuer further avers that it was a term of its contracts with the defender that the defender would make payment to the pursuer of: (i) a charge for the waste disposal service on a per-tonnage basis, and (ii) the SLFT payable in respect of the waste disposed of.

[4] Between 1 April 2015 and 31 December 2015 the defender sent about 7,000 tonnes of waste known as “fines” for disposal at Lochhead. The defender issued the pursuer with process notes which described the waste as being comprised of stone and concrete, and further as coming from the defender's "inactive waste stream". The pursuer invoiced the defender on the basis that the disposals were of material subject to the lower rate of SLFT, and filed a return with Revenue Scotland on that basis. The pursuer avers that in January and February 2016, a sampling exercise was carried out by representatives of the Scottish Environment Protection Agency on the defender's fragmentiser waste. It was found to consist predominantly of non-qualifying material: this meant that it was to be categorised as hazardous. Disposals of such waste attract the standard (and much higher) rate of SLFT.

On 29 March 2018, Revenue Scotland issued notices of assessment to tax. The pursuer and Fife Council appealed against the assessments to the First-tier Tribunal. An agreement was subsequently reached with Revenue Scotland that an additional payment of £287,216 was due. That sum represented the difference between the SLFT payable as a result of the standard rate being applicable to the disposals and the lower rate originally paid. In accordance with the contractual arrangements between Fife Council and the pursuer, the tax was paid to Revenue Scotland by the pursuer.

[5] The pursuer now seeks to recover that sum from the defender, together with VAT chargeable thereon, amounting to £57,443. The pursuer founds upon a section of the Landfill Tax (Scotland) Act 2014 which provides for adjustment of the sum payable under a contract for disposal of waste where, after the making of the contract, there is a change in the tax chargeable on the disposal.

[6] The pursuer's claim is defended on various grounds, including a denial that waste produced by the defender consisted predominantly of non-qualifying material. The action was set down for debate of the defender's preliminary contention that the section of the 2014 Act founded upon by the pursuer affords no relevant basis in law for recovery of the additional tax from the defender.

The Landfill Tax (Scotland) Act 2014 ("the Act")

[7] The charging section of the Act is section 3, which provides *inter alia*:

- “(1) Tax is to be charged on a taxable disposal made in Scotland.
- (2) A disposal is a taxable disposal if—
 - (a) it is a disposal of material as waste (see section 4),
 - (b) it is made by way of landfill (see section 5), and
 - (c) it is made at a landfill site (see section 12).”

In the present case, the defender made taxable disposals whenever it deposited waste materials at Lochhead.

[8] In terms of section 13 of the Act, the amount of tax charged on a taxable disposal is to be found by multiplying the weight in tonnes by the standard rate specified in an order by the Scottish Ministers. Where, however, the material consists entirely of qualifying material (as listed in such an order), the amount of tax charged is to be found by multiplying the weight in tonnes by the lower rate specified in such an order. In 2015-16 the standard rate was £82.60 and the lower rate was £2.60.

[9] Section 16 provides that the person liable to pay the tax charged on a taxable disposal made at an authorised landfill site is the landfill site operator. In terms of section 12(2), the operator of a landfill site is the person who at the time holds an authorisation in relation to the land which authorises disposals on or under that land. In the present case, the person holding an authorisation in relation to Lochhead was Fife Council.

[10] Section 27, the provision with which this action is primarily concerned, provides as follows:

“27 Adjustment of contracts

- (1) This section applies where—
 - (a) material undergoes a landfill disposal,
 - (b) a payment falls to be made under a disposal contract relating to the material, and
 - (c) after the making of the contract there is a change in the tax chargeable on the landfill disposal.
- (2) In such a case, the amount of any payment mentioned in subsection (1)(b) is to be adjusted, unless the disposal contract otherwise provides, so as to reflect the tax chargeable on the landfill disposal.
- (3) For the purposes of this section a disposal contract relating to material is a contract providing for the disposal of the material, and it is immaterial—
 - (a) when the contract was made,
 - (b) whether the contract also provides for other matters,

- (c) whether the contract provides for a method of disposal and (if it does) what method it provides for.
- (4) The reference in subsection (1) to a change in the tax chargeable is a reference to a change—
 - (a) to or from no tax being chargeable, or
 - (b) in the amount of tax chargeable.”

In the present case, the pursuer avers that the “disposal contract” is the contract entered into between it and the defender, permitting disposal of the defender’s waste material at Lochhead in exchange for payment.

[11] The Explanatory Note prepared by the Scottish Government at the time of enactment of the Act had this to say about section 27:

“Section 27 provides that, when a contract is in place for the disposal of a waste in a landfill and the tax changes with regard to that waste, then the payment for that waste in the contract must increase to reflect the tax increase unless the contract says otherwise. This ensures that operators do not suffer as a result of tax increases not being reflected in historical contracts.”

It is common ground that in so far as Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, they are admissible aids to construction: see *R (Westminster CC) v Secretary of State for the Home Department* [2002] HLR 1021, Lord Steyn at paragraph 5.

[12] The Scottish Government’s expectation that although liability for payment of SLFT would rest upon the landfill site operator, the burden of the tax would be borne by the waste producer was also reflected in the Financial Memorandum which accompanied the bill that became the Act. At paragraph 58, it was noted that

“Landfill site operators will be responsible for paying the Scottish Landfill Tax. However, operators pass the cost on to businesses and local councils on top of normal landfill gate fees...”

Argument for the defender

[13] On behalf of the defender it was submitted that on the facts as averred by the pursuer, section 27 did not create a relevant basis to contend that an obligation was incumbent upon the defender to make payment to the pursuer. The principles governing statutory interpretation had been usefully summarised by Lewison LJ in *Pollen Estate Trustee Co Ltd v HMRC* [2013] 1 WLR 3785 at paragraph 24. Regard should be had to the purpose of the particular provision; and its language should be interpreted, so far as possible, in a way which best gives effect to that purpose. The court was not confined to a literal interpretation of the words used, and had to have regard to the context and scheme of the relevant Act as a whole. Reference was also made to the presumptions against unworkability and against retrospectivity.

[14] Applying these principles, section 27 did not apply to the contracts entered into between the pursuer and the defender. The primary purpose of the Act was to impose a tax liability on the landfill site operator, ie Fife Council, who was not a party to those contracts. Section 27(1)(c) had to be taken to refer to a change in tax chargeable on the landfill site operator. The Act had no application to contracts which did not involve the operator because such contracts have no tax charged on them. The taxable landfill disposal here was effected between the pursuer and the Council. The defenders' deliveries were not disposals on which tax was charged. This accorded with the purpose of the section according to the Explanatory Note, which was to ensure that site operators did not suffer if their tax liability increased without a concomitant change in the contract they had entered into.

[15] The pursuer's interpretation of section 27 would mean that it applied to any contract meeting the description in subsection (1), ie to every contract in a chain of contracts up to or following a waste disposal. Parliament could not have intended such a broad interference

with private rights. Such an interpretation would give rise to absurdity in the form of unworkable, impracticable and inconvenient consequences. A requirement for a party to have to revisit its performance of historic contracts at any time when the tax position of a third party changed would create manifest uncertainty. Parliament could not have intended that contracts made and performed many years before were to be capable of being opened up and amended by section 27 with the result that persons such as the defender could have new obligations imposed upon them many years later. Such an interpretation would also give the section a very substantial retrospective effect, contrary to the presumption against retrospectivity. The better interpretation was that only contracts to which the authorised landfill site operator was a party were within its scope.

[16] Moreover, there was no legal link between the settlement agreement between Fife Council and Revenue Scotland and the contracts between the pursuer and the defender. Even if the contractual arrangements between the pursuer and the Council were such as to render the pursuer liable to make payment in respect of any additional tax liabilities of the Council, that did not serve to affect the obligations of the defender.

Argument for the pursuer

[17] On behalf of the pursuer it was submitted that section 27, properly construed in accordance with modern principles of statutory interpretation, applied to the contracts between it and the defender, given that the contracts related to the disposal of materials at the landfill site at Lochhead and that payment was to be made in respect of those contracts. As a result of the notices of assessment issued by Revenue Scotland, there was a change in the tax chargeable on the disposals. The ordinary and natural meaning of section 27 was clear. It applied to the circumstances arising in this action where material had been

disposed of, the lower rate of SLFT had been charged on the disposal, and there was a subsequent change in the tax charged on that disposal, which change was not the responsibility of, and could not be attributed to any action or the part of, the landfill operator.

[18] The defender's construction of section 27 as only forward looking required a strained reading of subsection (1). An ordinary reading of "material undergoes a landfill disposal" was that the material had already been disposed of prior to the change in tax on that disposal. If the defender's construction were to be preferred, that would result in the pursuer as the landfill site operator bearing the burden of the SLFT, contrary to the policy objects of the legislation.

[19] Section 27 was also intended to address the practical realities and difficulties of taxing waste at landfill sites that would be subject to different rates of SLFT. Landfill site operators would require to be certain of the composition of waste before assuming that the lower rate would apply. It would be impractical and contrary to commercial common sense for landfill site operators to be expected to test materials in their entirety at the point of disposal. To do so would be particularly difficult in circumstances, such as those that arose here, where the waste came from a fragmentiser machine and so contained waste from multiple different sources attracting differing rates of SLFT. That practical difficulty was compounded by the fact that SEPA might, at a later date, test waste that had been disposed of, leading to the issue by Revenue Scotland of a notice of assessment adjusting the categorisation of, and the SLFT due on, the waste. The pursuer's construction of section 27 recognised these difficulties and ensured that where there was a subsequent change in the amount of tax payable on a landfill disposal, the landfill site operator was able to recover the difference from the producer of the waste.

[20] There was no statutory requirement for a legal link between the settlement between Fife Council and Revenue Scotland and the disposal contract between the pursuer and the defender. The basis of the pursuer's claim was that section 27 adjusted the amounts payable under disposal contracts where there was a change in tax on the material disposed of. The section contained no requirement that either of the parties to the contract was the party directly liable for payment of the SLFT. It was simply concerned with whether there had been a "change in the tax chargeable on the landfill disposal". Under the defender's interpretation, the protection of section 27 would be lost wherever there was a sub-contracting arrangement of the kind entered into between Fife Council and the pursuer.

[21] There was no absurdity in the pursuer's construction. There was nothing unworkable in requiring the defender to make an additional payment in respect of the additional tax charged in circumstances where the defender's own waste was found to have contained non-qualifying material. Whether the defender could in turn pass the burden on to someone else would depend on the terms of its own contractual arrangements; those contracts would not be disposal contracts for the purposes of section 27. The contractual arrangement entered into between Fife Council and the pursuer did not undermine the pursuer's argument because that contract was not a disposal contract.

Decision

[22] A distinction falls to be drawn between, on the one hand, liability for payment of tax and, on the other hand, incidence or burden of tax. Every statute imposing a tax contains provisions specifying the person or persons liable for making payment of the tax to the tax authorities. So, for example, liability for payment of value added tax is imposed upon a person who makes a taxable supply (Value Added Tax Act 1994, section 1(2)). However,

especially in the case of indirect taxes, the person liable to make payment of the tax will not necessarily be the person who will bear the financial burden of that tax. In the case of VAT, it is expected that the person making a taxable supply (and thereby incurring liability) will pass the burden of the tax on to the recipient of the supply by increasing the price of the supply by the amount of the VAT. The incidence of the tax will therefore generally fall upon the consumer at the end of the supply chain.

[23] Tax legislation contains much less regulation of incidence or burden of tax than it does of liability for payment of tax. This is unsurprising: the primary concern of the tax authorities is to collect the tax that has been charged, and the choice of the person liable for payment is often dictated by practical considerations such as ease of collection. It may be a matter of indifference to the tax authorities who bears the economic burden: in the case of VAT, the trader is not obliged to pass on the burden, although he remains liable for payment whether he chooses to pass it on or not. It is relatively unusual to find questions of incidence regulated by statute, although inheritance tax legislation does, for example, contain certain provisions regulating incidence of tax as between the beneficiaries interested in a deceased person's estate.

[24] In the case of SLFT, liability for payment of tax is imposed by section 16 of the Act on the authorised landfill site operator. But, as already noted, the policy underlying SLFT envisages that the economic burden will be passed on by the site operator to the producer of the waste, by increasing the charge for the disposal by the amount of the tax. Section 27 is therefore one of those unusual provisions that concern themselves with incidence of tax, but it does so only to a limited and specific extent. The principles of statutory interpretation summarised in *Pollen Estate Trustee Co Ltd v HMRC* are now well recognised. In my opinion, the purpose of section 27, properly construed in accordance with those principles, is to

ensure (unless the parties have agreed otherwise) that any change in the tax regime is neutral so far as the landfill site operator is concerned. In other words, its purpose is to secure that any economic burden of tax falling upon the landfill site operator is not increased by an increase in the tax chargeable on landfill disposals (or indeed decreased by a decrease in the tax chargeable). The section envisages that parties may have entered into a contract, whether before or after the passing of the Act, in terms of which the waste producer is contractually bound to pay a specified amount, inclusive of tax, per tonne of material disposed of in a landfill disposal. The effect of the section, unless parties have agreed otherwise, is that if subsequently the amount of tax charged per tonne in terms of section 13 of the Act is increased, the amount payable by the waste producer to the landfill site operator is correspondingly adjusted. Section 27(4) makes clear that the section also covers decreases in the amount of tax charged per tonne, and circumstances in which a category of disposal upon which no tax was previously charged becomes chargeable, or vice versa.

[25] This interpretation is consistent with the explanatory note set out above. The note explains that the section applies where “the tax changes” with regard to waste in respect of which a contract is in place for its disposal, and that the purpose of the provision is to ensure that landfill site operators do not suffer as a result of tax increases not being reflected in historical contracts. It is also consistent with the “polluter pays” policy in terms of which it is envisaged that the incidence of the tax will fall upon the person who produces the waste, rather than upon the person who provides the facility for disposing of it.

[26] It follows, in my opinion, that section 27 has no application to the circumstances of this case as averred by the pursuer. Taking those averments *pro veritate*, there has been no change in the tax regime applicable to the landfill disposals made by the defender. I accept

the pursuer's submission that the "disposal contract" with which section 27 is concerned is the contract entered into between the pursuer and the defender and not, as the defender submitted, the contractual arrangement between the pursuer and Fife Council. It is the contract between the pursuer and the defender which provides, in terms of the definition of "disposal contract" in section 27(3), for the disposal of the defender's waste material. But the difficulty for the pursuer is that there has been no change in the tax chargeable on the defender's landfill disposals. All that has happened is that the investigations carried out by SEPA have revealed that the wrong amount of tax was paid at the time when the pursuer submitted its return to Revenue Scotland. Assuming (as the pursuer avers) that the material disposed of in fact consisted predominantly of non-qualifying waste, it was at the time of disposal chargeable to tax at the standard, ie higher, rate of SLFT. That was the amount for which Fife Council, as landfill site operator, was liable under section 16, and which Fife Council had a contractual entitlement to recover from the pursuer. The fact that the error was discovered and additional tax has had to be paid does not, in my view, constitute a change in the tax chargeable; it is simply a belated payment of tax that was chargeable from the outset and ought to have been paid when the return was submitted.

[27] In the course of his submissions, the solicitor advocate for the pursuer referred to the practical difficulty of accurately determining, at the time of disposal, whether the material disposed of consists entirely of qualifying waste so as to attract the lower rate of SLFT. I see no reason to doubt that such a difficulty exists, but it does not mean that these uncertainties could not be addressed by the terms of the disposal contract. If the waste producer wishes to obtain the advantage of a lower price by assuring the landfill site operator that the material he is bringing to the site is qualifying waste, it would be open to the parties to agree that if this turns out to be wrong, the price payable for the disposal will be increased to

reflect the additional tax payable when the true composition of the material is discovered. If on the other hand the landfill site operator fails to protect himself against that eventuality, it is not the function of the taxing statute to rewrite the parties' contract, and in my opinion section 27 does not do so. It deals only with a single matter over which neither party has any control, namely changes in the tax regime to which landfill disposals are subject.

[28] For these reasons, rather than the reasons advanced on behalf of the defender, I hold that the pursuer's claim based upon section 27 is irrelevant. I should add for the avoidance of doubt that I do not accept that section 27, properly construed, could have no application to the defender's contract because of the interposition of the pursuer between the defender and the landfill site operator with the statutory liability for payment of the tax. The contract with which section 27 is concerned is the contract which provides for disposal of material; in the circumstances of this case, that is the contract between the defender and the pursuer. An upward change in the amount of tax chargeable on landfill disposals would have two direct consequences: the amounts which Fife Council were liable to pay to Revenue Scotland in respect of future disposals would increase, and (subject to contrary agreement) the price payable by the defender to the pursuer for future disposals under the disposal contract would be adjusted to reflect the tax increase. A third, indirect, consequence would be that the pursuer would be bound in terms of its contract with Fife Council to pay the increased amounts of tax to Revenue Scotland, which it would be able to do because the price payable to it by the defender had been adjusted. The interposition of the pursuer is therefore of no consequence in this regard.

Disposal

[29] I shall sustain the defender's fourth plea in law (a general plea to relevancy) and dismiss the action. Questions of expenses are reserved.