[2020] UKFTT 0124 (TC)

TC07618

AGGREGATES LEVY – exemptions and credits – whether activity an exempt process within s18(2) FA 2001 – whether an industrial process within Reg 13 and Code 018 of the schedule to the Aggregates Levy (General) Regulations 2002 – held not – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03495

BETWEEN

AGGREGATE INDUSTRIES UK LTD **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE PHILIP GILLETT
IAN PERRY

Sitting in public at Taylor House, London on 24 and 25 February 2020

Rupert Baldry QC, instructed by Pricewaterhouse Coopers, for the Appellant

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal by Aggregate Industries UK Ltd ("AI") against the decision of HMRC to refuse AI's claims for a repayment of Aggregates Levy ('AL').

2. The decision which is the subject of the appeal is dated 23 April 2018 and refuses a repayment claim of £2,296,406. This covers the period 30 September 2013 to 31 December 2016, but is subject to adjustment to reflect purchases of aggregate from third parties and to update the sum claimed to include the period up until the end of December 2018.

3. This decision does not address the issue of quantum, merely the issues involved.

THE FACTS

4. We received witness statements and oral evidence from Philip Sabin, Technical Director of AI, and Robert Allen, Head of Research and Development and Technical Services of AI. We found both to be highly experienced in the asphalt industry and to be reliable and honest witnesses. We also received a statement of agreed facts. Based on this evidence we make the following findings of fact.

5. AI is a UK incorporated company which operates quarries and manufactures and supplies construction and building materials, and provides national road surfacing services. In particular, it manufactures and supplies asphalt products which are used in the construction of roads, airfields, ports, sports surfacings and other surfaces.

6. Asphalt production is governed by both British and European standards, the most relevant being:

(1) British Standard ("BS") EN 13108, (Parts 1-9) Bituminous Mixtures, Material Specifications;

(2) BS EN 13043, Aggregates for Bituminous Mixtures and Surface Treatments for Roads, Airfields and other Trafficked Areas; and

(3) BS EN 13179, Test for Filler Aggregate for Bituminous Mixtures – Delta Ring and Ball.

7. "Asphalt" is defined by BS EN 13108-1 as an "homogenous mixture typically of coarse and fine aggregates, filler aggregate and bituminous binder which is used in the construction of a pavement". It should be noted that the word "pavement" for these purposes in this context refers to a road surface, not a footpath.

8. The standards are set at a British and European level and are intended to ensure property conformance and consistency between different asphalt ingredients and products. European Standards form the basis of the European "CE" certification, with the British Standards providing interpretation and application guidance for UK producers.

Different Types of Aggregate

9. Aggregate is a collective term for the mineral materials such as crushed stone, sand and gravel that are used in the production of compound materials such as asphalt or concrete. Aggregate is defined in standard BS EN 13043 as "a granular material used in construction, which can be natural, manufactured or recycled". Natural aggregate refers to aggregate from mineral sources which has been subjected to nothing more than mechanical processing.

10. Aggregate is the largest constituent element in asphalt products, usually comprising around 92 to 96% of asphalt products. The type, mineralogy, physical and chemical properties of aggregate significantly affect the performance of an asphalt product. The role performed by

aggregate in asphalt production varies according to the size of the aggregate and where in the road construction the asphalt product is to be used.

11. BS EN 13043 sets out the definitions of the different types of aggregate for "bituminous mixtures and surface treatments for roads, airfield and other trafficked areas" as follows:

(1) “coarse aggregate” is “larger aggregate sizes with D less than or equal to 45mm and d greater than or equal to 2mm” (“D” refers to the upper sieve size and “d” refers to the lower sieve size”);

(2) “fine aggregate” is “smaller aggregate sizes with D less than or equal to 2mm and containing particles which mostly are retained on a o.063mm sieve” and

(3) "filler aggregate" is "aggregate, most of which passes through a 0.063mm sieve, which can be added to construction materials to provide certain properties".

12. Further, BS EN 13043 also provides the following definitions:

(1) "fines" are the "particle size fraction of an aggregate which passes the 0.063mm sieve";

(2) "added filler" is "filler aggregate of mineral origin, which has been produced separately"; and

(3) “all-in aggregate” is defined as “aggregate consisting of a mixture of coarse and fine aggregates”.

13. Coarse aggregate is the largest sized aggregate used in asphalt product production and usually consists of stones. Coarse aggregate is used in all asphalt products. It provides strength, impact resistance, skidding resistance (when used at the surface of a road) and durability.

14. Fine aggregate usually consists of crushed rock or sand. In the context of asphalt products, fine aggregate increases the surface area of the aggregate and fills open voids in the structure of an asphalt mixture.

15. Filler aggregate represents the smallest aggregate size grading, with a particle size of less than 63 microns, ie, 0.063mm.

16. Fines refers to the particle size fraction of an aggregate of less than 63 microns, ie, filler aggregate. In more simple terms, fines are essentially stone dust, which is extracted from fine aggregate and coarse aggregate at the start of the asphalt production process or during the quarrying process through bag filters. Fine aggregate and coarse aggregate both have a fines content available for extraction.

17. Added filler is filler aggregate of mineral origin, which has been produced separately and is added back into the asphalt production process.

18. “Filler” is the overarching term used to describe filler aggregate, including both fines and separately added filler, which are predominantly less than 63 microns in size.

19. During the process of making asphalt, the filler aggregate, but not the fine aggregate, combines with the bitumen in an asphalt mixture, creating what is referred to in the industry as a mastic, which imparts the properties of waterproofing and impermeability to an asphalt mix. The filler extends the durability and life expectancy of an asphalt pavement. It does this by stabilising or increasing the viscosity of the bitumen, reducing bitumen drainage and creating an impermeable and waterproof surface.

20. The further addition of fine aggregate to this mastic produces what was referred to as a mortar by Mr Sabin.

The production and use of filler

21. Both filler aggregate and fine aggregate are produced by first crushing natural quarried aggregate, or washing, grading and screening quarried aggregate in the case of natural sand. AI carries out this process at its quarries. The aggregate is then screened and classified into the size grades as set out above.

22. Some types of filler aggregate and fine aggregate used within the asphalt manufacturing process are purchased from third parties by AI because it is not able to produce those types of aggregate from its own quarries. The process involved in producing those materials to the required specifications is, however, substantially the same and the same standards are required to be met.

23. All of the principles and arguments in respect of the availability of aggregates levy relief in respect of those purchased materials apply equally as to material which the Appellant produces itself. The only difference is that it is the third parties which account for the aggregates levy rather than AI and AI would need to issue a certificate to the third party to claim relief from aggregates levy under Code 018 rather than claiming the relief directly from HMRC.

24. The pre-sorted aggregate is loaded onto a conveyor belt via cold feed hoppers, in controlled proportions, before being fed into a dryer where it is loosened, dried and heated to a temperature between 150 - 250C. The dryer is a rotating drum with a large burner at one end heating the aggregate and an extraction system at the other end that enables the filler aggregate, ie, the fines, to be drawn out from the different types of aggregate and stored separately. To a small extent the fines content increases during this process due to the attrition/erosion of the larger aggregates being tossed in the dryer.

25. The remaining aggregates which leave the dryer are then, in the case of a Batch Plant, re-screened, weighed and fed into a batch mixer in the required proportions (depending on the type of asphalt being produced). The bitumen, the fines which have been extracted at the drying stage, and any bought-in added filler aggregate, such as limestone filler, are then added into the mixer in the appropriate proportions in order to produce the asphalt product which is created by the final mixing process, as described below. The process is essentially the same in the case of a Drum Mix Plant.

The production of asphalt

26. The manufacture of an asphalt product is a process which requires the controlled blend of the constituent materials of coarse aggregate, filler and a binder, which is usually bitumen. The asphalt product may also include additives and recycled products, depending on the type of asphalt product and asphalt production plant.

27. The production process is the same for 99% of asphalt products, including the products included in the Claim, with the different constituent elements and the proportions of these elements being varied to produce different asphalt products. As the apportioning and temperature of the constituent elements are critical to quality, asphalt products are manufactured to strict tolerances using a range of British standards and industry specifications.

28. Asphalt products are produced in either a continuous batch mix plant ("Batch Plant") or a drum mix asphalt plant ("Drum Mix Plant"). Batch Plants are more suited to producing small production runs of many different types and grades of asphalt, whereas a Drum Mix Plant is more suited to producing a greater tonnage per hour of a limited number of mixtures. 95% of all asphalt plants in the UK are Batch Plants, though Aggregate Industries have two high volume Drum Mix Plants located at Bardon Hill and Purfleet.

29. Filler aggregate, such as limestone filler, which is bought in by AI is stored in a separate silo to the reclaimed filler aggregate and is added at the mixing stage in accordance with the required quantities in the same manner as fines.

30. In a Batch Plant, the heated aggregate leaving the dryer is loaded into a hot elevator and released onto the top of a mixing tower fitted with layers of different sized screens. This allows for the aggregate to be separated again according to size, this time by the screens as it moves down the mixing tower. The screens feed down into silos (also known as hot bins) which hold the aggregate according to grade. The aggregate must remain hot during this process. The tower and the silos therefore provide sufficient insulation for the heated aggregate.

31. The silos sit above a weighing platform/weigh hopper. Each grade of aggregate is separately released from its respective silo for weighing according to the applicable recipe which is coded into the plant. The weighed aggregates are then emptied in sequences into a batch mixer (the "dry mix").

32. A Drum Mix Plant follows an identical process up until the blended aggregates leave the dryer. In the Drum Mix Plant, as the intention is only to produce a more limited number of similar mixes, there are less variations in the required proportions of aggregate. The combined aggregates are therefore not re-screened as the proportions are taken into account at the start of the process when the cold aggregate is fed in. The process for fines remains the same.

33. The Batch Mixer contains specially configured agitating arms which ensure thorough blending, giving a homogenous mixture. The dry coarse and fine aggregate mix is added first, before any additives (such as cellulose fibres for stone mastic asphalt products) are incorporated. The mixer evenly disperses the additives amongst the dry mix as not doing so would result in an end product that is not homogenous.

34. The binder (ie, the bitumen) and filler aggregate are then added to the mixer via separate "weigh kettles". These component elements of asphalt are then blended together in the batch mixer.

35. As set out above, the manufacture of an asphalt product is an industrial process which requires the controlled blend of the constituent materials of coarse aggregate, filler and a binder. However, the process during which the various constituents of asphalt are combined and mixed is a very rapid process. All the ingredients, coarse aggregate, fine aggregate and filler aggregate, both that which is bought in and that which is recovered from the processing of the other aggregates, are added into the mixing drum within a matter of seconds, but in a distinct order, with the bitumen being added last. Mr Sabin estimated that the whole mixing process would take 45 seconds, of which 10 seconds would be the actual mixing process.

36. A typical asphalt plant comprises a cold aggregate supply system, drum dryer and burner, dust collector, hot stone aggregate elevator, vibrating screen, filler supply system, weighing and mixing system, asphalt mixed material storage, bitumen supply system and may also include recycled asphalt, where old road materials are recycled into asphalt products, and other additional systems.

37. The present claim concerns aggregates used in the production of each of three main 'families' of asphalt products, namely asphalt concrete ("AC"), hot-rolled asphalt ("HRA") and stone mastic asphalt ("SMA"). Aggregate is the largest constituent element in all such asphalt products, usually comprising around 92 to 96% of the product.

38. Mr Sabin estimated the proportion of the various sizes of aggregate in these products as follows:

HRA	Coarse	15 - 65%

	Fine	25 - 70%
	Filler	8 - 12%
SMA	Coarse	up to 60/65%
	Fine	20%
	Filler	4 - 8%
AC	Coarse	60%
	Fine	35%
	Filler	2 - 6%

39. The primary ingredient which acts as the binder in asphalt is bitumen, a crude oil-derived substance. The function of binder is to glue and cohesively combine the constituent ingredients of asphalt and provide a waterproof product. Bitumen on its own, however, does not have the necessary properties of a binding medium within an asphalt product. Accordingly, it is necessary to combine bitumen with smaller particles of aggregate, the filler. The filler both combines with and extends the volume of the bitumen in order to form a binding medium known in the industry as a "mastic", which is capable of performing the functions of coating, waterproofing and binding the whole mix, including the coarse aggregate.

40. The claim which is the subject of this appeal incudes a claim for all filler aggregate used in the production of HRA, SMA and AC and for fine aggregate used in the production of HRA and SMA but not fine aggregate used in the production of AC, because the company determined during the formulation of its claim that the prime purpose of fine aggregate in AC was more structural in nature, and not part of the binder.

41. AI uses filler and fine aggregate to form the binding medium in the production of all the asphalt products with which this appeal is concerned, except as noted above as regards fine aggregate. Both "filler aggregate" and "fine aggregate" are used to modify the properties and extend the volume of the bitumen. Fine aggregate both increases the surface area to which the mastic in the asphalt mix attaches and fills void spaces within the mixture, enabling densification of the mixture which strengthens the asphalt and reinforces the waterproofing function.

42. Once mixed, the asphalt mix is discharged either into a storage hopper or directly on to an insulated vehicle for site delivery.

Procedural background to this claim

43. Historically, and with the agreement of HMRC, AI claimed credit for aggregates levy, under Regulation 13 of the Aggregates Levy (General) Regulations 2002 ("the Regulations"), in respect of filler aggregate used in the production of asphalt.

44. On 27 November 2015 HMRC announced that they had taken the view that credit was no longer to be available for filler used in the production of asphalt. This was done in Revenue and Customs Brief 20/15 "Aggregates Levy: liability of filler used in the manufacture of asphalt" ("Brief 20/15"). Taxpayers were given a three-month transitional period before they were required to implement the change in practice.

45. With effect from 1 March 2016 AI therefore ceased claiming credit in respect of filler used in the production of asphalt and accounted for aggregates levy on filler, in accordance with HMRC's revised practice. However, following a review, AI concluded that HMRC were wrong to deny tax credits in respect of fillers used in the production of asphalt and therefore, on 31 October 2017, the company submitted claims, in respect of both filler aggregate and fine

aggregate, used in the production of asphalt for the periods ending 30 June 2013 to 31 December 2016. There was a later revision of those claims to:

(1) exclude the claim for the period ending 30 June 2013 (on the basis this was accepted to be out of time), and

(2) to include further claims in respect of AI's Midlands and Scotland sites.

46. The claims pursued under this appeal are broken down into two elements. First, a claim in respect of filler aggregate for the periods ending 31 March 2016 to 31 December 2016, and second, a claim in respect of fine aggregate for the periods ending 30 September 2013 to 31 December 2016. The detailed breakdown and method of computation are set out in a claim made by Pricewaterhouse Coopers dated 31 October 2017, as updated by their letter of 20 April 2018, and is summarized below:

Type of asphalt	Filler aggregate	Fine aggregate
AC	£479,071	Nil
HRA	£38,932	£1,179,105.80
SMA	£72,918	£526,367.86
Total	£590,924	£1,705,482

47. AI is in the process of finalising an adjustment to the quantum claimed:

(1) to reflect a deduction in respect of aggregate purchased from third parties, and

(2) to "top up" the claim to the end of December 2018, at the request of HMRC.

48. As explained above, the tribunal was not asked to address the subject of quantum in this appeal.

THE LAW

The charge to aggregates levy

49. A charge to aggregates levy arises whenever a quantity of "taxable aggregate" is subjected to "commercial exploitation" in the United Kingdom. This is provided by s16(2) Finance Act 2001 ("FA 2001").

50. "Aggregate" is defined in s17(1) FA 2001 as:

> "any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it."

51. Section 17(2) provides that any aggregate is, in relation to any occasion on which it is subjected to "commercial exploitation", "taxable aggregate.

52. A quantity of aggregate is subjected to "exploitation" if, inter alia, it is "removed from its originating site", as provided in s19(1)(a) and (2) FA 2001, or it is "used for construction purposes", as provided in s19(1)(c).

53. Section 19(3) provides that aggregate is taken to be subjected to "commercial" exploitation if it is subjected to exploitation in the course or furtherance of a business carried on by the person responsible for subjecting it to exploitation.

54. Section 48(2) then provides that the use of aggregate "for construction purposes" refers to:

> "(a) using it as material or support in the construction or improvement of any structure;

(b) mixing it with anything as part of the process of producing mortar, concrete, tarmacadam, coated roadstone or any similar construction material."

55. It is common ground that all the relevant aggregate in the present case was subjected to commercial exploitation. AI therefore accepts that a charge to aggregates levy arose when the aggregate was either:

(1) first removed from its originating site, i.e. the quarries from which the relevant aggregate was won, where the asphalt plant is not located on the site (being commercial exploitation under s19(1)(a)); or

(2) used "for construction purposes", i.e. in the asphalt production process, where the asphalt plant is located on the originating site, being commercial exploitation under section 19(1)(c)/section 48(2)(b).

56. However, s30 FA 2001 provides for a tax credit to be given where, after a charge to the levy has arisen, the aggregate is used for certain industrial or agricultural processes. Such a tax credit, where available, operates to reduce the aggregates levy due and payable. Section 30 provides:

"**30. Credit for aggregates levy**

(1) The Commissioners may, in accordance with the following provisions of this section, by regulations make provision in relation to cases where, after a charge to aggregates levy has arisen on any quantity of aggregate-…

(d) any of that aggregate is used in a prescribed industrial or agricultural process;

(2) The provision that may be made in relation to any such case as is mentioned in subsection (1) is provision-

(a) for such person as may be specified in the regulations to be entitled to a tax credit in respect of any aggregates levy charged on the aggregate in question;

(b) for a tax credit to which any person is entitled under the regulations to be brought into account when he is accounting for aggregates levy due from him for such accounting period or periods as may be determined in accordance with the regulations; and

(c) for a person entitled to a tax credit to be entitled, in any prescribed case where he cannot bring the tax credit into account so as to set it against a liability to aggregates levy, to a repayment of levy of an amount so determined."

57. In exercise of their powers under s30 FA 2001 HMRC have made the Regulations. Their effect, inter alia, is to entitle persons to a tax credit in respect of aggregates levy. Specifically, Reg 13 provides:

"**13 Other tax credits: entitlement**

(1) This regulation applies to a person who has commercially exploited taxable aggregate and who has accounted for the AL chargeable on that commercial exploitation.

(2) Such a person is entitled to a tax credit in respect of any AL accounted for in respect of that commercial exploitation where the taxable aggregate in question –

(c) is used in any of the industrial or agricultural processes listed in the Schedule;

(3) This regulation is subject to the provisions of this Part including those provisions relating to the making of a relevant claim to the Commissioners and the keeping of records including any records that are directed by the Commissioners or stipulated in a published notice.

(4) For the purposes of subsection (6) of section 17 of the Act, all the processes listed in the Schedule are prescribed for the purposes of that subsection."

58. The industrial processes listed in Part A of the Schedule include the following:

"**Code Description**

018 Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media."

59. Regulation 14 requires the person entitled to a tax credit to make a claim under regulation 13, subject to the 4 year time limit imposed by section 32 FA 2001.

60. We were also referred to the cases of:

Aggregate Industries UK Ltd v HMRC [2017] UKFTT 391 (TC)

British Aggregates Association v HM Treasury [2002] EWHC 926 (Admin) and

British Aggregates Association v European Commission T-210/02 RENV

DISCUSSION

61. The issue in this case is whether the aggregate in respect of which the repayment claim is made qualifies for a tax credit on the basis it was "used in any of the industrial processes" listed under Code 018 of the Schedule to the Regulations. Specifically, the issue is whether the relevant aggregate was used in the "Manufacture of fillers for coating, sealants…mastics… and other binding or modifying media".

AI's submissions

62. AI's primary case is that the filler aggregate and the fine aggregate were fillers which were manufactured by AI and then used as "fillers" for the "mastic … and other binding … media" used in the production of asphalt.

63. It was common ground that the fine and filler aggregates were "manufactured" for the purposes of Code 018. Where the parties diverged however was in the meaning of the words "mastic" and "other binding or modifying media".

64. For AI, Mr Baldry argued that both in its ordinary meaning and in its use in the industry, the word "mastic" describes the particular binding medium used in the production of asphalt, ie, the mastic that is formed by the interaction of the filler aggregate with the bitumen as part of the asphalt production process. In Mr Sabin's evidence, he described the consequences of mixing the mastic produced by combining fines with bitumen with the fine aggregates as producing a mortar, which, Mr Baldry suggested, should fall within the words "other binding or modifying media" in Code 018.

65. As a secondary, alternative, argument Mr Baldry submitted that the finished asphalt product itself can be considered as either a "coating" or "sealant" or "binding medium" within the terms of Code 018, on the basis that each category of asphalt product effectively creates a waterproof sealant and/or coating when applied to a road or other surface, such as the structure of a bridge, thereby providing protection for the underlying ground or structure from damage, including specifically water damage.

66. He suggested that neither the words "coating" nor "sealant" are specifically defined in the legislation, and that they should therefore bear their ordinary meanings. On this basis, where an asphalt product is used as a coating for a surface area, such as when it used as the upper layer of a roof, or a road, it falls within Code 018. Likewise, he argued, where asphalt acts as a waterproof covering it naturally falls within the ordinary meaning of a "sealant", defined by the OED as "material used to make something airtight or watertight".

HMRC's Submissions

67. For HMRC, Mr Puzey submitted that there were five reasons why the fine and filler aggregates did not qualify:

(1) The only "binding medium" in the manufacture of asphalt was the bitumen, which AI bought in from other suppliers.

(2) The filler aggregates are added at the end of the mixing process, just before the bitumen, but all the ingredients are added within a matter of seconds of each other. It is therefore impossible to isolate the production of a mastic or other binder from what is a single manufacturing process which produces asphalt. The product of the process is asphalt not a mastic or other binding medium.

(3) What is produced in the mixing process is not in any case a mastic within the meaning of Code 018. Code 018 incudes a list of products of a similar nature and the word mastic should not be given a broad meaning but should be interpreted in the context of the words around it. In the context of Code 018, mastic, he suggested, means a sealant, such as is used in bathrooms and other areas to provide a waterproof sealing. In the same vein of argument, all the other items in the list are finished products, not an intermediate product which exists only momentarily, as part of another process.

(4) Fine aggregate is present in all the asphalt products and is used to bulk up the asphalt and AI acknowledges that in AC its purpose is primarily structural and has not therefore claimed relief for fine aggregate used in AC. However, Mr Puzey argued that from the evidence it was clear that fine aggregate played a structural role in all products. Mr Baldry had argued that the primary purpose of fine aggregate in HRA and SMA was as a binding medium as well as being structural, but, said Mr Puzey, there was no concept of primary purpose in the legislation.

(5) The word "mastic" does not appear in any of the definitions in the British Standards for HRA and AC and it only appears in the name of SMA (Stone Mastic Asphalt). It is not therefore defined in any of the British Standards documents.

68. As regards AI's alternative argument, Mr Puzey submitted that asphalt was not a sealant or coating as contemplated by the words in Code 018. Section 48(2)(b) specifically taxes "mortar, concrete, tarmacadam, coated roadstone or any similar construction material". It would be illogical if, having specifically stated that mortar, tarmacadam and coated roadstone are to be taxed, they were then all removed from taxation by Code 018. If this argument were correct then everything in s48(2)(b) would be taken out of taxation by Code 018, thus rendering s 48(2)(b) otiose.

Policy rationale for Aggregates Levy

69. We were also referred to the two *British Aggregates* decisions which contain some helpful passages on the policy objectives of the Aggregates Levy and the exclusions therefrom. More importantly, following the second case, in the ECJ, which was concerned with State Aid, the European Commission issued a decision dated 31 July 2013 in which it decided not to raise

any objections to the various exclusions and exemptions from the Aggregates Levy contained within the legislation.

70. In that decision, at [13] the Commission said:

> "Materials that are suitable for use as aggregates can also be used to manufacture other products. In that sense, the industry distinguishes between aggregate uses of sand, gravel and crushed rock materials and non-aggregate uses of sand, gravel and crushed rock materials. Non-aggregate uses are, for instance, the production of cement, glass and other industrial or agricultural uses."

71. At [26] of their decision, the Commission went on to say:

> "Finally, the UK authorities note that the AGL is not conceived as a general tax on mineral extraction but as a tax on the extraction of rock, sand and gravel used as aggregates and subject to commercial exploitation in the UK. The UK authorities have explained that while the extraction of other materials may have similar environmental impacts, not all have suitable options for lessening the intensity of extraction through the use of alternative materials such as recycled materials and spoil. … The scope of the tax was defined in order to achieve the greatest environmental benefit in the form of a reduction in the extraction of aggregates and in terms of the preservation of strategic resources, while at the same time not imposing a dead-weight tax burden on materials for which an alternative does not exist."

72. Although this is very helpful as regards providing a general policy rationale for Aggregates Levy and the various exclusions, it, not unexpectedly, does not contain a specific rationale for the exemptions provided in Code 018.

Consideration

73. As regards AI's primary argument we believe that the two key issues raised by Mr Puzey are:

> (1) Is the industrial process which we are considering a single process which produces asphalt or can it be argued that the intermediate process which produces a "mastic", which then becomes an intrinsic part of the asphalt, qualifies for the exemption in Code 018?
>
> (2) Is this intermediate product a "mastic or other binding medium" within the meaning of the words in Code 018?

74. The mixing process which creates asphalt was described to us as taking place in "a matter of seconds", around 45 seconds for the process as a whole, of which the final mixing process took only 10 seconds. If there is an intermediate product, as argued by AI, then this cannot exist as a separate product for more than a few seconds, even more so because the two constituent parts of this "mastic" are added at the end of the mixing process rather than at the beginning.

75. In addition, we believe it is totally artificial to try to split this production process into two separate elements. In our view, this is a single process designed to produce asphalt. This is not a process designed to produce a "mastic", which is then used in a subsequent process.

76. Looking at the second leg of Mr Puzey's argument, we were encouraged by Mr Baldry to consider the normal everyday usage of the word "mastic". It is not defined in the legislation and we should therefore, he suggested, start with its normal dictionary meaning. Not surprisingly this produces a very wide range of meanings, including "any of several putty-like substances used as a filler adhesive or seal", which is somewhat circular.

77. Nevertheless, even though the word "mastic" is not defined in the legislation, we consider that it must be interpreted not only in its normal everyday sense but also in the context of the other words around it. Those other words are "coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media".

78. Mr Baldry argued that the word "mastic" was widely used in the asphalt industry to mean the combination of fines and bitumen but, as Mr Puzey pointed out, the BS definitions of asphalt did not make any reference to the word "mastic" apart from in the name of SMA. Nowhere else was there any reference to the word let alone a definition.

79. Mr Puzey also argued that the context in which the word "mastic" was used was in a list of what might be termed "finished products". We can only agree. It would be totally outside the context of Code 018 to include a substance which is only in existence as a separate substance for a matter of seconds, if indeed it ever is in existence as a separate substance.

80. Given the context in which it appears therefore we can only come to the conclusion that the word "mastic" in this context means the type of mastic in domestic usage, as might be understood by the proverbial man on the Clapham omnibus, ie, a waterproof sealant as might be used in bathrooms and kitchens and similar environments. It does not in our view refer to the combination of fines and bitumen for which Mr Baldry argued.

81. Mr Baldry then went on to argue that the combination of fine aggregate with this mastic to produce mortar should be regarded as a product within the words " other binding medium". We cannot agree with on this for the same reasons. "Other binding media" must we believe be read and interpreted in the context of the other words in Code 018, and this was not we consider intended to refer to a mortar.

82. In this regard we also note that s48(2)(b) refers to "the production of mortar, concrete, tarmacadam, coated roadstone or any similar construction material". Mr Puzey suggested that if the mortar in question in this case were to be regarded as "other binding medium" for the purposes of Code 018 then this interpretation would apply to all of the products listed in s48(2)(b), thus rendering s48(2)(b) totally otiose. It is certainly not unusual in the tax legislation for there to be a general taxing provision followed by specific exemptions from the general charge. In this case however, a broad interpretation of Code 018 would indeed render s48(2)(B) totally meaningless.

83. We therefore find against AI on its first argument.

84. We must now consider AI's alternative argument, that asphalt itself might fall within the definition of being "coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media" because of its weather sealing properties.

85. Again, as we have discussed above, s48(2)(b) specifically brings "tarmacadam and coated roadstone or any similar construction material" into the charge to tax, and to remove it, via the mechanism of Code 018, would be to render the whole sub-section meaningless. We do not believe that this can have been the intention of the draftsman. In addition it seems to be totally contrary to the policy behind aggregates levy of taxing the use of aggregates where it is acting as an aggregate.

86. Looking at the context of the words "sealants" and "coating" in Code 018, we do not consider that asphalt falls within this.

87. Mr Baldry referred us to what he termed HMRC's muddled thinking on this issue as illustrated by their published view, in Excise Notice AGL2, on Code 018:

"**3.18.6 Mastic asphalt and roofing felt**

Any mineral powder, such as finely ground limestone used in binding and sealing, will be eligible for relief. Any aggregate which is bound by that medium and is used for its aggregate bulk-filling properties will not be eligible for relief. Relief is also available for silica sand used as a release agent in the manufacture of roofing felt"

88. We agree that this demonstrates that in some contexts there may be a fine line between qualifying and non-qualifying fines. However we are not here concerned with the interpretation of HMRC's guidance but with the interpretation of the underlying legislation and, in our view, asphalt does not fall within the words in Code 018.

DECISION

89. In summary therefore we reject both AI's primary and alternative arguments, and, for the reasons set out above, we decided that this appeal should be DISMISSED.

90. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 02 MARCH 2020