[2016] UKFTT 568 (TC)

TC05317

Appeal number: TC/2014/01856

AGGREGATES LEVY – relief from - section 17(3)(c) Finance Act 2001

FIRST-TIER TRIBUNAL
TAX CHAMBER

P J THORY LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Rachel Mainwaring-Taylor
Ms Amanda Darley

Sitting in public at the Royal Courts of Justice on 30th September 2015

Mr Adam Rycroft of KPMG for the Appellant

Mr James Pursey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. By letter dated 19th April 2013, the Appellant submitted a claim ('the Claim') to the Respondents ('HMRC') for repayment of aggregates levy ('AGL') that HMRC held was due in respect of aggregate material ('the Aggregate') arising from the construction of the Lilford Marina project site ('the Marina'). The Claim was in the sum of £171,379.32 and related to AGL for the period 1st July 2011 to 31st December 2012 inclusive.

2. The Claim was for exemption from AGL under section 17(3)(c) of the Finance Act 2001 ('section 17(3)(c)').

3. Following a series of correspondence between the parties, HMRC, by a letter dated 4th September 2013 ('the Contested Decision'), rejected the Appellant's Claim on the grounds that neither of the conditions for exemption was met.

4. Following a review, HMRC upheld the Contested Decision by letter dated 7th March 2014.

5. By assessment dated 17th March 2014 the Appellant was assessed in respect of aggregate declared as exempt on its returns for periods 03/13 to 12/13 in the sum of £289,237. Further assessments were issued on 10th June 2014 (period to 03/14 - £58,655), 13th August 2014 (period to 06/14 - £62,697) and 11th December 2014 (period to 09/14 - £36,159). These further assessments are not part of the appeal, but will be dealt with following the outcome of the appeal.

6. The Appellant extracted the Aggregate from a site which previously consisted of open fields and a river inlet. The site was adjacent to the River Nene in Northamptonshire. The river inlet, referred to as the 'dogleg', was accessed via a channel from the main River Nene. The Aggregate was extracted in the course of the creation of the Marina. The Marina will be used for the mooring of pleasure boats. The completed Marina will have open access to the River Nene.

Evidence and agreed facts

7. The following evidence was introduced:

   (1) The Witness Statement of Mr Samuel Wightman Cowan, incorporating various documents including plans and photographs of the site, was admitted as evidence, undisputed by HMRC (except as to what was said at meetings between Mr Cowan and visiting officers of HMRC, at paragraphs 23 to 28, which both parties agree to be irrelevant to the outcome of this appeal).

   (2) Correspondence between the Appellant/KPMG and HMRC during the period 19th April 2013 to 7th March 2014 ('the Correspondence').

(3) Various photographs, plans and maps of the site before, during and (projected) after the works.

(4) HMRC Notice AGL1.

(5) The Appellant's aggregates levy return of 28th January 2013.

(6) Environment Agency statements/articles and a Western Daily Press Article relating to the dredging of the Rivers Parrett and Tone.

(7) An extract from HM Treasury Budget March 2001.

8. The following facts are taken from Mr Cowan's witness statement (and agreed by both parties).

9. The Appellant operates sand and gravel quarries in the local area which supply the local concrete industry. The Appellant also uses the quarries to feed its own concrete business known as Gem Mix.

10. Planning permission for the development was obtained prior to the Appellant's involvement.

11. During the planning process it became apparent that there were deposits of sand and gravel at the site that would have to be excavated during construction.

12. It is a duty of local authorities to ensure that exploitable aggregate is removed before a site becomes sterilised (meaning such that "minerals cannot be extracted because of surface level development e.g. buildings on top of reserves which prevent access").

13. A local authority also has an obligation to ensure a sufficient and steady supply of aggregate material to the construction industry in the local area. The local planning authority imposed a condition that sand and gravel should be extracted as a condition of the planning permission. Utilising the resource of aggregates in this way has an added benefit of reducing the need for quarrying from other sources such as the Appellant's own quarrying operations.

14. The sand and gravel at the site are valuable resources in particular as it is a relatively high quality aggregate known as Nene Riverbed Aggregate.

15. The Appellant was engaged as a sub-contractor to undertake the removal of aggregate from the site, in accordance with the planning requirement.

16. Plans showing (a) the proposed layout for the completed site ('Plan 1') and (b) the site as it stood prior to development ('Plan 2') were provided and annexed to the witness statement. Plan 2 shows an existing river inlet ('the dogleg'). The channel leading to the dogleg was the main channel of the River Nene until the river was re-profiled by the environment agency in the 1980s to take out a problematic kink. A further plan ('Plan 3') shows the previous site of the river.

17. The site was developed by initially sealing the existing link between the dogleg and the river with clay material dug from the site. The water within the dogleg was then drained. The drained site lay below the water table and pumping was constant during the development due to the natural ingress of water. The sand and gravel itself was saturated as it spent the whole time under water.

18. Most of the excavation was done above water. The site flooded four times during the process of excavation as the water level in the river breached the banks.

19. The top soil and subsoils were stripped off and stockpiled on site.

20. The Aggregate was extracted using 360 excavators with buckets. The entire reserve of aggregate (approximately 300,000 tonnes) was to be removed, to a depth of 5 metres, as a condition of the planning consent (to prevent sterilisation of the resource). After its removal the aggregate would be used in the manufacture of concrete. The site would be filled in with inert material to give the Marina a depth of 2 metres.

21. Once completed, pontoons were installed.

22. The Marina depth had been set at 2 metres to allow for the safe navigation of boats and for other environmental and health and safety reasons. Whilst most of the Marina is navigable there are small parts where the gradient is profiled. The boat owners would be expected to navigate away from the profiled areas.

Matter in dispute

23. The question before the tribunal is whether the exemption in section 17(3)(c) applies to the aggregate extracted by the Appellant in the course of its work at the Marina site.

24. The burden of proof falls on the Appellant to show, on the balance of probabilities, that it is entitled to claim the relief afforded by the exemption.

25. The facts as set out above are not in dispute.

Law

26. Section 17(3)(c) of the Finance Act 2001 provides an exemption from AGL if:

> "it consists wholly of aggregate won –
>
> (i) by being removed from the bed of any river, canal or watercourse (whether natural or artificial) or of any channel in or approach to any port or harbour (whether natural or artificial); and
>
> (ii) in the course of the carrying out of any dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach."

27. Section 17(3)(b) of the Finance Act 2001 provides an exemption from AGL if:

> "it consists wholly of aggregate won by being removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out–
>
> (i) in connection with the modification or erection of the building; and
>
> (ii) exclusively for the purpose of laying foundations or of laying any pipe or cable."

28. Section 40 of the Finance Act 2001 provides a framework for review and appeal of a decision by HMRC and section 42 sets out the tribunal's powers on hearing such an appeal. It is not necessary to recite these provisions in full here.

HMRC Guidance

29. HMRC Notice AGL1, paragraph 3.4 defines "watercourse" as follows:

> "A watercourse is a body of water that has the following characteristics:
>
> - Natural course of surface or underground water
> - Flow under the action of gravity
> - Reasonably well-defined channel of bed and banks
> - Confluence with another watercourse or tidal waters
>
> However, the properties of a watercourse can vary, particularly with regard to artificial structures".

30. HMRC Notice AGL1, paragraph 3.2.2(b) is headed "Anything that consists completely of the following substances is exempt from the levy" and includes, at the third and fourth bullet point of the list that follows:

> "Aggregate necessarily arising from the footprint of any building and its pipes or cables (if you obtain material consisting wholly of aggregate arising from the site of any building, this is exempt if you lawfully extract it with the terms of any planning consent. However, for it to be exempt it must have come entirely from the laying of foundations or of any pipe or cable).
>
> Aggregate necessarily arising from navigation dredging (if you obtain material that consists wholly of aggregate removed from inland waterways, such as the bed of any river, canal or watercourse (whether natural or artificial), this is exempt, even if you obtain it from the banks of canals and rivers. You may also remove it from any channel in, or in the approach to, any port or harbour (whether natural or artificial). It must have been dredged exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach within the terms of any licence or other planning consent))."

Submissions

31. The Appellant identified four issues:

(1) Does the exemption apply only to the extraction of materials from an existing body of water (as described/defined in section 17(3)(c))?

(2) Was the material extracted in the "carrying out of any dredging" within the meaning of section 17(3)(c)(ii)?

(3) Does the completed Marina fall within the description of any of the bodies of water described in the legislation? In particular, is the Marina a "watercourse" or, alternatively, is any part of it a "channel in or approach to any port of harbour"?

(4) In connection with the area identified as the channel and dogleg, are the references to various bodies of water in section 17(3)(c) to be taken as being references that are exclusive to one such body of water?

32. HMRC were happy with the formulation of the four issues identified by the Appellant and addressed these points in the same order.

33. HMRC identified a fifth issue, referred to below as the 'final issue': was the aggregate won wholly in the course of creating a body of water?

The first issue

34. The Appellant's first ground of appeal was that it was expressly recognised in the terms of section 17(3)(c) that the exemption applies to the **creation** of a river, watercourse, canal, port or harbour in the terms of subsection (ii). It must therefore apply to the creation of such a body of water from what was previously a field forming dry land.

35. The Appellant sought to apply the principle of interpretation that presumes against an anomalous or illogical result (citing Lord Oliver of Aylmerton in *Canterbury City Council v Colley [1993] AC 401* as authority for that principle), arguing that it was not possible, in circumstances within ordinary contemplation, to create a river, watercourse, canal, port or harbour without breaking new ground. Therefore, it would be anomalous for Parliament to have expressly referred to the "creation" of a body of water if that had no practical application. Consequently, the legislation and terms used within it, whether that be reference to the "bed" of a river or to "dredging" must be construed accordingly to give effect to the clear intention of Parliament that the exemption should apply not only to the restoration and improvement of such a body of water but also to its creation. The Appellant contended that the anomaly was easily resolved by construing "bed" so as to cover not only material extracted from the bed of an existing body of water, but all material sitting below the waterline.

36. We were referred to Notice AGL1, paragraph 3.2.2(b), emphasising the reference in the fourth paragraph to the "bank" of any river or canal, and to the Correspondence, which illustrated the Appellant's position, that the aggregate was extracted from what would shortly be the bed of the Marina, as opposed to HMRC's view, that it was extracted from a field adjacent to a river and therefore not from the bed of a body of water, no body of water being in existence at the site before the work began. Later in

the Correspondence, HMRC acknowledged that whilst some small areas of the site might have been construed as the bed of a river or watercourse (specifically, the dogleg) and thus subsection (i) might be met in respect of those areas, nonetheless subsection (ii) was not met since the aggregate was not removed "exclusively for the purpose of creating, restoring…or maintaining **that** river…[or]…watercourse"; it was removed to create the Marina, which had nothing to do with the existing river or watercourse. HMRC stated: (a) that the body of water referred to in subsection (i) must be the same as that in subsection (ii); and (b) that a marina did not qualify as a watercourse (as to which see below at ***Third issue***).

37. The Appellant contended that HMRC's arguments were contradictory: on the one hand they asserted that the word "creating" was not redundant as a new watercourse could be created from an existing one, presumably such as a canal created from a river; on the other, they insisted that subsections (i) and (ii) must refer to the same body of water, in which case the exemption could never apply as the new watercourse would necessarily be different from the original. For example, dredging the bed of a river exclusively for the purpose of creating a canal: following HMRC's argument, the river and canal are not the same watercourse so the exemption could never apply. The Appellant concluded that in including the word "creating" in the terms of the exemption, Parliament must have contemplated the digging of a new waterbody from what was previously fields, farmland etc.

38. HMRC asserted that it was apparent from section 17(3)(c) that there were two requirements for the exemption to apply and that they were cumulative not alternative. The first, in subsection (i), defines the place from which the aggregate must be obtained: the bed of a river, canal or watercourse or the bed of a channel or approach to any port or harbour. The second, in subsection (ii), refers to the activity which is being undertaken during which the aggregate is won: in the course of carrying out any dredging for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse etc. The exemption requires that the aggregate so obtained is wholly won from that location and in the course of that activity. The Appellant, HMRC said, could not bring itself within the first part of the test and therefore sought to remove meaning from key words within the statute ("bed" and "dredging") and to construe the exemption as applying to "all material sitting below the waterline" so that aggregate dug up by excavator from a field qualified as aggregate dredged from the bed of a body of water and came within the terms of the exemption.

39. As to the Appellant's suggestion that HMRC's interpretation of the provision did not give meaning to the word "creation", HMRC countered that this was not the case, and that it was possible to dredge an existing waterway to create a new one. For example, to create a new channel into a large port on a river, one might dredge an existing river.

40. For the exemption to apply, HMRC said, the material extracted must be wholly from the bed of the waterbody so it does not help to look at different parts of the site, such as the small area at the mouth of the Marina, because it is part of a much larger site that is not the bed of any watercourse.

41. HMRC also clarified, for the avoidance of any doubt, that the exemption does not apply to the creation of a harbour or port (in case the Appellant was suggesting this), but only to the creation of a channel or approach to a harbour or port.

Second issue

42. The Appellant's third ground of appeal (identified as the second issue) was that the use of the term dredging in section 17(3)(c) was not intended to limit the exemption only to material which has been extracted using a dredge, and must properly be construed in the context used as applying to any excavation of materials that could be gained by a dredge whether or not that dredge has in fact been used. It would be perverse to read the legislation as recognising that materials won in a dry excavation of a secured area prior to the area being flooded from the main body of water would be any different to those won using a dredge used in an unsecured area into which the main body of water could freely flow.

43. 'Dredging' is not defined in the Finance Act 2001. The Shorter Oxford English Dictionary defines it as to "bring up or collect, clear out or away, using a dredge". It defines a dredge as "an apparatus for collecting and bringing up objects or material from the bed of a river etc by dragging or scooping; a dragnet; a boat or machine for dredging". The Appellant suggested that ordinary usage of the word 'dredge' went beyond extraction using a dredge and that it was in fact not necessary to use a dredge to dredge. We were directed to the Environment Agency's statement of February 2014 titled 'Rivers Parrett and Tone Dredge', which showed dredging being done by various machines called excavators, stated that "all dredging works will be undertaken by mechanical plant form the river banks or from pontoons within the rivers" and referred to "dredging with an excavator".

44. The Appellant contended that there was no basis for applying a limited meaning to the term dredging by restricting its application to the removal of aggregate from an existing body of water, particularly since the legislation expressly contemplates the creation of a body of water.

45. To resolve any anomaly that might otherwise occur, the Appellant argued, the term dredge must be construed so as to encompass the activity involved both in removing material from an existing body of water and in excavating material in the creation of a new body of water.

46. Referring to KPMG's letter to HMRC of 28th November 2013, the Appellant pointed out that 'bed' is not defined in the Finance Act 2001, so, in the absence of legal definition, the common understanding must apply. It suggested that in this context, 'bed' is commonly understood to mean that part of a water body or channel that lies beneath the normal waterline. The Aggregate was, it said, extracted from an area of the site which will be below the waterline when the site is flooded – and in fact would be so already were the naturally occurring water not being pumped away constantly.

47. The Appellant argued that this approach was consistent with that of the courts in other cases concerning aggregates, citing in particular Rimer J in *Commissioners of Customs and Excise v West Midlands Aggregates Limited* [2004] EWHC 856 (at para 24), concluding that the site of the proposed building in section 17(2)(b)(i) Finance Act 2001 "must be given a sensible, workable meaning, and is one that corresponds to what would ordinarily be regarded".

48. The Appellant argued that it was apparent from section 48(3) of the Finance Act 2001 that 'dredging' was not intended to have a restricted meaning. That provision defines the winning of aggregate as follows: "(a) quarrying, dredging, mining or collecting it from any land or area of the seabed; or (b) by separating it in any manner from any land or area of the seabed in which it is comprised". Where a word has uncertain meaning it must be construed in light of the surrounding words. This reference to dredging is in the context of a comprehensive definition of normal extraction activities. Whilst the terms "quarrying" and "mining" describe the activity of excavation on and below land, "dredging" must have been intended to cover the remaining broad category of material sitting below water or won in the course of creating a new body of water.

49. The Appellant stated that it would be perverse to recognise that material extracted using certain techniques was exempt whilst the same material extracted from the same place but using different techniques was not. The term dredging, therefore, could not be construed narrowly so as only to include extraction using a dredge or dredger. The ordinary meaning of the word would encompass extraction using a 360 excavator. The Appellant chose to carry out the extraction by sealing the area, digging it out and then letting the water back in. It could instead have dug into the banks and used a dredge. It did not make sense within the context of the tax legislation to make a distinction between these methods and to allow relief for one but not the other.

50. HMRC summarised the Appellant's argument as being that 'dredging' should be interpreted to include any excavation of materials that could be gained by a dredge whether or not in fact a dredge has been used, so that digging out a field by excavator should be construed as dredging. This argument, HMRC said, was supported by reference to the case of *CEC v East Midlands Aggregates Limited* [2004] EWHC 856 concerning a different exemption in section 17 Finance Act 2001, which did not concern the terms currently debated. The point taken from that case, that statutory language must be given a sensible workable meaning corresponding to what would ordinarily be regarded was uncontroversial: the problem was that the Appellant's proposed meaning of 'dredging' ventured far from any sensible interpretation.

51. HMRC did not accept the Appellant's assertion that "quarrying" and "mining" describe "the activity of excavation on or below land" or that the logical result of this was that dredging must have been "intended to cover the remaining broad category of material sitting below water". HMRC argued that the fact the hole made by extracting aggregate from a field filled with water (due to the field being low lying and the water table high) did not transform the excavation of land into the dredging of a body of water, and that to extend the meaning of dredging further to cover anything

extracted in the course of digging a hole which will in the future be filled with water was, likewise, several steps too far.

52. In HMRC's view, the Appellant had not dredged, but rather excavated a field. This project involved the removal of soil, sand and gravel with a view to ultimately creating a marina from a site consisting of a field. HMRC referred to photographs and plans in the bundle as evidence that the site originally consisted of a field (with sheep grazing in it). Referring to Mr Cowan's witness statement, HMRC said that although the constant use of pumps might give the impression that the site was already underwater, this was not the case: in fact, the site flooded only four times during construction. HMRC concluded that on no sensible interpretation could the word dredge encompass the excavation of a field using an excavator; whilst it may not be necessary to use a dredge to dredge, digging up a field was not dredging the bed of a watercourse.

Third issue

53. The Appellant's second ground of appeal (identified as the third issue) was that the Marina would, following construction, form part of a river, watercourse, canal, port or harbour, both within the ordinary meaning of those terms and also within the meaning afforded to those terms used in the context of this particular legislation. It contended that there was no basis for adopting a restrictive interpretation of those terms, as the central objective of the legislation was to tax virgin aggregate won through quarrying and not aggregate produced as a by-product of other activities.

54. The Appellant narrowed this argument, stating that the Marina would be a watercourse or, alternatively, a port or harbour, following its construction. If the Marina was a port or harbour then the "channel" as referred to in section 17(3)(c) should be taken to be a reference to all of the navigable parts of the Marina. The Appellant referred to the Shorter Oxford English Dictionary definition of 'channel' as "a navigable passage between shallows in an estuary or other waterway". The Appellant referred us to plans showing that most of the Marina would be navigable once construction was completed. It contended that a few years into the existence of the Marina, dredging the navigable areas would be dredging a channel within the terms of the legislation, that that this would apply to all navigable parts of the Marina.

55. The Appellant argued that HMRC was wrong in concluding (in the Contended Decision) that the Marina did not meet the definition of watercourse because water would not flow through the Marina under action of gravity. It acknowledged that there was no separate inlet and outlet through which water flowed. Mr Cowan's witness statement explained that at the end of the process of extraction the clay seal would be removed and the water would flood back into the Marina. The Appellant argued that water would flow into the site under action of gravity and pressure created by the river would operate to push and pull water in and out of the Marina. The river itself flows under action of gravity. When the water level rises in the river, it will cause the water level in the Marina to rise. The Appellant noted that the reference to flow of water in the definition was not irrational as it was intended to exclude bodies of water such as ponds and lakes, but argued it should not operate to exclude bodies

of water which are subject to the direct influence of flow and water levels of adjoining bodies of water, nor to impose a requirement for there to be a distinct downhill flow in order for a body of water to be recognised as a watercourse.

56. In support of this argument, the Appellant cited other definitions of "watercourse" in legislation (there being no express definition in the Finance Act 2001). Section 104 of the Water Resources Act 1991 defines a watercourse as "including all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers…and passages, through which water flows". The reference to a "cut" is to a body of water created from a cut in the existing banks of a body of water. The Appellant noted that this was an appropriate description of the Marina and could also be applied to the dogleg. Nothing in the term "cut" implied a requirement for water to flow downhill.

57. The Appellant asserted that the terms 'river', 'watercourse', 'port' and 'harbour' were naturally overlapping: a port can be within a harbour, which can be on a river, which is itself a watercourse. The Marina is, in addition to being a watercourse, a harbour in the ordinary sense of being a safe haven for mooring and embarkation of boats. The navigable area within the Marina will be a channel in the sense that boats may safely pass through or over it. The diagram identifying the navigable areas attached to Mr Cowan's witness statement shows that the majority of the Marina consists of a channel, that is, navigable areas.

58. The term marina is a neutral one, referring to a place often with pontoons where boats may be safely moored. The use of the term marina does not exclude the body of water from being recognised as either a harbour or a watercourse. The Shorter Oxford Dictionary defines 'marina' as: "1. A harbour or seaside area; 2. A specially designed harbour with moorings for pleasure yachts and small boats".

59. HMRC noted that the Appellant's argument, at times, came close to the claim that the creation of ports and harbours was, of itself, an exempt activity under section 17(3)(c)(ii) and that the terms of the Act do not permit that. This in turn, HMRC argued, was why the Appellant sought to interpret "channel" to include all navigable parts of the Marina. HMRC contended that there were two issues here: the meaning of "watercourse" and "channel".

60. Addressing the definition of "watercourse" in the Water Resources Act 1991, HMRC noted the requirement for a flow of water through the specific water-body and argued that there was no flow through the Marina. A small part of the Marina area had been a backwater before construction began, separated from the river by a short inlet, but nothing flowed through it then. The Marina, HMRC contended, was no different to a pond or lake which is separate from but joined to a river or stream at a single point: there is no flow through.

61. HMRC disputed the assertion that the Marina would be a watercourse once completed. All of the bodies of water listed in section 17(3)(c) experience a flow of water. A watercourse is a body of water that is flowing. HMRC disputed the Appellant's contention that it was possible to have a flow of water that was not directional. The Marina will rise and fall when the river is in spate or drought, they

said, but that was not the same as water flowing in and out; nothing would flow through the Marina. The statutory definition included the words "through which water flows". The definition in AGL1 was accepted in *Humberside Aggregates* as a workable definition. In HMRC's view, the definitions referred to at paragraph 25 of the same case, taken from Australian and Bengali cases, were consistent with this. HMRC said Parliament could have included within the exemption any inland waterbody, but it did not.

62. HMRC argued that the Marina was not a "channel" any more than an entire port or harbour was a "channel". The terms "channel" and "marina" were not overlapping. Even if some part of the Marina could be said to contain a channel, the statutory requirement was for the aggregate to consist wholly of that which was won from the place, and in the manner, set out in section 17(3)(c)(i) and (ii).

Fourth issue

63. Addressing HMRC's assertion that the use of the word "that" to precede "river, canal, watercourse, channel or approach" at the end of subsection 17(3)(c)(ii) refers back to the body of water identified in subsection (i), so that, for aggregate to be exempt, it must be removed from the bed of any (for example) channel in the course of any dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that (i.e. the same) channel, the Appellant noted that such a reading would exclude material dredged in the course of converting one particular body of water into another. In addition, applying this interpretation, the exemption could never apply to the creation of a new body of water as any newly created body of water as identified in subsection (ii) would necessarily be different to that referred to in subsection (i). Given that the word "creating" is expressly used, alongside "restoring, improving and maintaining", Parliament must have envisaged the exemption applying to the creation of a new body of water, so this interpretation cannot be correct.

64. HMRC maintained that the body of water referred to in subsection (i) must be the same as that in (ii) because of the phrase "that river, canal, watercourse…" in subsection (ii). However, it said that the difficulty the Appellant raised was illusory: a river could be created from a stream, a canal from a river, a channel within a river.

65. HMRC's view was that the statute must be construed so as to allow exemption for the creation of a body of water only if the work undertaken is exclusively for the exempted purpose. So work on the inlet and dogleg did not qualify for exemption because it was not exclusively for the purpose specified in (ii); it was for the creation of a marina which is not an exempt activity and was in fact a wholly new and distinct body of water.

Purpose of the legislation

66. The Appellant concluded that the construction of the Marina fell within the ordinary boundaries of the legislation read in context. If there were any ambiguity as to the terms of the legislation, the Tribunal should have regard to the object and

purpose of aggregates levy. The Appellant cited the dicta of Aldous LJ in *Customs and Excise Commissioners v Parkwood Landfill Ltd* [2002] STC 1536, at paragraph 20, as authority for adopting a purposive approach in interpreting tax legislation intended to advance specific environmental objectives.

67. The environmental objectives pursued by the levy as announced in the Budget 2001 were to "ensure that the environmental impact of aggregates extraction are more fully reflected in prices and encourage a shift in demand away from primary aggregates towards alternatives such as recycled construction and demolition waste and china clay waste".

68. The Government imposed the levy on aggregates which are used in engineering and building with the aim of trying to incorporate the environmental costs of securing aggregate from natural rock within the market price paid for aggregates and to promote the use of such material as aggregate. Moses J in *British Aggregates Association and Others v Her Majesty's Treasury* [2002] EWHC 926 (Admin) summed up the purpose of the levy as follows (at paragraph 108):

> "to see that the costs of aggregate reflect not just market costs but the cost to the environment…This it seeks to achieve by taxing virgin aggregate (an expression used in the Budget Statement of 2000 but not in the statute) and thereby shifting demand to the use of alternative materials such as industrial waste…The exemptions increase the incentives to use waste material, which is not subject to the levy."

69. The Appellant referred to the case of *Customs and Excise Commissioners v Parkwood Landfill Ltd* [2002] EWCA Civ 1707 where Aldous LJ said at paragraph 20:

> "The Act must, in my view, be construed against the background of its purpose. There is no dispute that one of the purposes of the Act was to promote recycling and to reduce the amount of waste going to landfill. To tax recycled material used for road making and the like at landfill sites would be contrary to that purpose. If that had been part of the scheme of the Act, then I would have expected there to be a clearer indication in the relevant sections".

70. The environmental objective is primarily given effect, in the terms of the exemption in section 17(3)(c), through the requirement that material be removed exclusively for the purpose of creating a watercourse. By virtue of that requirement, the exemption cannot apply to primary aggregate; it must only apply to secondary aggregate, created as a by-product of another process. That requirement is met in this case as the extraction is required by the planning consent. It is advancing the environmental aims to meet demand for high quality products by using resources that would otherwise become sterilised. The release of those secondary aggregates to the market effectively meets demand that would otherwise have been met through quarrying.

71. Whilst the purpose should not override the terms of the legislation, there was no need to interpret those terms narrowly (in particular watercourse, dredge and riverbed). They should be given meaning consistent with the objects of the legislation.

72. We were referred to the case of *Canterbury City Council v Coolley and another* [1993] AC 401, which, citing Lord Simon of Glaisdale in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 W.L.R. 231, set out the limited circumstances in which a court would "be justified in departing from the plain words of the statute" as being where the court is:

> "satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and draughtsmen could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly".

73. At HMRC's request, we read the following paragraph of the judgment too, which cautioned against anything more than a purposive construction of legislation to obviate an anomaly and noted that the addition of language to that of the statute or its substantial rewriting could not be justified:

> "That involves more than a mere purposive construction. It involves substantially rewriting the section on the supposition that the legislature, had it thought about the particular case, would have expressed itself in substantially different terms from those which it in fact chose to use…I cannot, for my part, regard this as a legitimate approach to constructing the statute."

74. HMRC said that it was clear from the *Canterbury* case that unfairness was not the same as absurdity: if the meaning is clear is cannot be ignored. Even if one accepted the purposive approach the Appellant advanced, HMRC said, giving it effect required one to ignore the words of the statute.

75. As a further aid to interpretation, the Appellant referred to *Customs and Excise Commissioners v East Midlands Aggregates Ltd* [2004] EWHC 856 where a specific issue in relation to the availability of relief from aggregates levy was what constituted the site of a building: the footprint of the building only or the larger construction area which included a lorry park. It was found that the phrase should be given a "sensible, workable meaning" corresponding to "what would ordinarily be regarded as "the building site" for the proposed works, that is the entire area on which the builders would be working for the purposes of constructing the building and laying any services serving it".

76. We were also referred to *Northumbrian Water Limited v Revenue and Customs Commissioners* [2015] AER (D) 275 in which the purpose of the legislation was considered, albeit in the context of a different exemption from aggregates levy. The principle, the Appellant submitted, was that the use of recycled aggregate or that won

as a by-product of another process should be encouraged over the use of virgin aggregate and that this was the purpose of the exemptions from the levy.

77. The Appellant referred to *Humberside Aggregates and Excavations Limited v Customs and Excise Commissioners* (L00021) where the definition of 'watercourse' was considered and the tribunal found that the definition in ALG1 was "perfectly adequate for the purposes of aggregates levy", including the requirement for water to flow under the action of gravity. (In that case the appellant had sought, unsuccessfully, to argue that a lake was a watercourse.)

78. In conclusion, the Appellant stated that, since its activities in relation to the Marina fell within the wider objectives of the tax, it was right that the legislation should be construed, so far as possible and to the extent necessary, so as to relieve such activities from the tax.

79. HMRC acknowledged that the purpose of the legislation may be to promote the use of secondary aggregate over virgin aggregate. However, HMRC argued that to take the approach suggested by the Appellant to construe the legislation to relieve the activities of the Appellant, being the extraction of "secondary aggregate created as a by-product of another process" depended upon the words of the statute being overridden in pursuit of what is said to be the underlying statutory purpose. It would have been straightforward for Parliament to enact an exemption for all secondary aggregate produced in the course of any building or construction project. That did not happen. Instead, the statutory exemptions within section 17 Finance Act 2001 are very carefully and precisely drawn. The Aggregate does not come within the plain terms of section 17(3)(c) which is why the Appellant is contending for a construction which is said to fulfil the underlying aim rather than the actual words of the provision.

80. HMRC said the Appellant's argument required considerable violence to be done to the words of the statute. Subsection (c)(i) tells us the place from which the aggregate should be obtained: "the bed of…". Not a field even if it could potentially be submerged, nor a port or harbour, nor lakes, ponds etc unless they constitute a watercourse. Subsection (c)(ii) tells us the activity that must be undertaken to yield exempt aggregate: "dredging…for the purpose of creating, maintaining…". Thus, HMRC said, the legislation was clear on the place and the activity needed to qualify for the exemption. For the Appellant to argue that, in order to give effect to the word 'creating' one must allow extraction from a place that it not already "the bed of…", meant ignoring (c)(i) and substituting it with "all material sitting below the waterline".

Final issue (HMRC)

81. HMRC noted that the terms of the planning permission required the removal of full depth of the aggregate deposit, but asserted that that removal was not within the terms of the exemption in section 17(3)(c) because it went well beyond what was required for the creation of the Marina, as evidenced by the fact that after excavating aggregate to a depth of 5 metres the Marina was then infilled to a depth of 2 metres. The imposition of the planning condition was necessary as a matter of planning policy

but was not required for the purpose of creating, restoring, improving or maintaining a river, canal, watercourse etc. Consequently, the aggregate so won was not wholly for an exempt purpose.

82. The Appellant's activity was the commercial exploitation of aggregate excavated from a field next to the River Nene and as such was not within the terms of section 17(3)(c).

83. The Appellant referred to the *East Midlands* case, which considered the meaning of the word 'exclusively' in the context of the exemption under section 17(3)(b) (where aggregate is removed in the course of construction of a building). The Appellant noted that the relief was different but the wording the same and therefore the same principle should apply here. There, the court found that the exemption extended to the aggregate that was "necessarily removed for the purpose of laying…foundations, pipes and cables".

84. The Appellant submitted that, following this conclusion, aggregate to a depth of 5m was 'necessarily removed' for the purpose of creating the Marina, since the planning permission for the Marina's construction required it.

Discussion

85. We agree that the purpose of the legislation is to encourage the use of secondary aggregate over primary. However, had Parliament intended the exemption to cover all secondary aggregate it would have drafted the legislation accordingly. It did not. Instead, it set out specific circumstances in which the exemption would apply. It is therefore necessary to look closely at the provisions of that legislation.

86. Section 17(3)(c) provides an exemption from AGL for aggregate wholly won by being removed from the bed of any river, canal, watercourse, or channel in or approach to any port or harbour in the course of dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach.

87. The questions for the Tribunal to address are therefore:

(1) Was the Aggregate removed from the bed of a river, canal, watercourse or channel in or approach to a port or harbour?

(2) Was the Aggregate removed by dredging?

(3) Was the Aggregate removed exclusively for the purpose of creating, restoring, improving or maintaining the river, canal, watercourse, channel or approach?

88. It is clear from the plans and photographs submitted in evidence that the Aggregate was removed from a site that, before the work began, consisted of a body of water (the dogleg) and a field. It is also clear that the area would constitute a marina after the work was completed. So the Aggregate was removed from what

would be wholly the bed of the Marina but was, at the outset, only partially a body of water.

89. It seems to us that the key to the first questions is therefore whether the Aggregate must be removed from the bed of an existing body of water or whether it may be removed from an area that will be the bed of a body of water once the work is complete.

90. We were directed to the dictionary definition of 'to dredge', which referred to an activity using "a dredge". The definition of 'a dredge' described the kind of machine or apparatus that may be used for "collecting and bringing up objects or material from the bed of a river etc". It is clear to us from the evidence submitted that a machine called a dredge need not be used to dredge; a 360 excavator of the kind used to remove the Aggregate in this case could be used to dredge. The question then is not whether the use of a particular machine prevents the activity carried out from being dredging but whether the activity undertaken was in and of itself 'dredging'.

91. The activity of dredging implies removing material from under a body of water. The definition cited refers to "bringing up…from the bed of a river etc". We understand this 'etc' to encompass other bodies of water than rivers. In order for one to dredge, therefore, there must be a body of water in existence. If there is not, one is digging rather than dredging even if one is digging what will later be the bed of a river etc.

92. It may be that the activity undertaken in the area of the dogleg was dredging. However, we do not think it could be said that the removal of material from the area of the field was dredging. Removal of material from dry land would seem to us to be more properly described as digging or excavating. That the area might or indeed does flood (as it did in this case) does not change the fact that at least at the outset the activity is digging dry land.

93. As to whether the Aggregate was removed exclusively for the purpose of creating the Marina: we find that it was. HMRC argued that it was not, on the basis that aggregate was removed to a deeper level than was required purely for the creation of the Marina, pointing, as evidence, to the fact that it was necessary to fill in the area to provide an appropriate depth after the removal of the Aggregate. Whilst it may not have been physically necessary to remove all of the Aggregate in order to build the Marina, it was legally necessary to do so as it was a term of the planning permission.

94. However, we must still consider whether the Marina can be described as a watercourse or channel, in order for its creation to come within section 17(3)(c)(ii). We find that it is appropriate to use the definition of 'watercourse' in AGL1, which requires there to be a flow under the action of gravity, and that there will be no such flow in the Marina. That the water level in the Marina will rise and fall with the level of the river is not in our opinion sufficient to constitute a flow for these purposes.

95. The Appellant advanced the argument that the Marina could be a 'channel' on the basis that almost all of it would be navigable when completed (citing the definition of

channel as "a navigable passage between shallows in an estuary or other waterway"). It seems to us that it may be a stretch to interpret 'a navigable passage' as 'any navigable part' of a body of water. However, even accepting this, the Marina is not in and of itself a channel. A marina is more analogous to a port or harbour. It may have channels within it but it is not a channel in its entirety.

Conclusions

96. The requirements of section 17(3)(c) are cumulative. All must be met in order to qualify for the relief. Whilst they must all be looked at separately, having done so it is helpful to look at them collectively. First, to qualify, the Aggregate must "consist wholly of aggregate won" from a particular place (the bed) and in a particular way (by dredging) and for a particular purpose (the creation, restoration, improvement or maintenance of a watercourse or channel). Some of the requirements are wholly or partially met in this case, but that is not sufficient; they must all be wholly met. Even if we could say that the Aggregate was won from the (future) bed, it does not seem to us that the word 'dredging' can be used to describe the whole of the activity, but even if it could, the Marina is not in our view a watercourse or channel.

97. We therefore conclude that the relief from AGL afforded by section 17(3)(c) is not available in this case.

98. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 11 AUGUST 2016