[2020] UKUT 0001 (TCC)

Appeal numbers: UT/2018/0121, 0077, 0078, 0079 & 0122

LANDFILL TAX – Finance Act 1996, ss 40, 64 – disposal of materials "as waste" – first and last layers of waste selected and laid to avoid damage to cell liner – layer of shredded waste called "EVP" incorporated as a "protection layer" beneath the regulating layer immediately below engineered cap of landfill cell - whether waste or EVP disposed of "with the intention of discarding it"

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DEVON WASTE MANAGEMENT LIMITED (1) **Appellants**
BIFFA WASTE SERVICES LIMITED (2)
VEOLIA ES LANDFILL LIMITED (3)
VEOLIA CLEANAWAY (UK) LIMITED (4)

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

BIFFA WASTE SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: The Hon Mr Justice Fancourt
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4A 1NL on 21, 22, 25 and 26 November 2019

Roderick Cordara QC and Zizhen Yang, instructed by Ernst & Young LLP for the First and Second Appellants on the first appeal

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Roderick Cordara QC and Zizhen Yang, instructed by Ernst & Young LLP for the Appellant on the second appeal

Melanie Hall QC, Brendan McGurk and David Gregory, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents on both appeals

DECISION

I. INTRODUCTION

1. This is a decision on appeals by taxpayer companies against decisions of the First-tier Tribunal (Tax Chamber) ("FTT"). The appeals are against the FTT's dismissal of the taxpayer companies' appeals against assessments for landfill tax and were heard consecutively.

2. There are in substance two separate appeals. The first ("the Companies' Appeal") is by four companies – Biffa Waste Services Limited, Devon Waste Management Limited, Veolia ES Landfill Limited and Veolia Cleanaway (UK) Limited – against the first decision of the FTT dated 11 April 2018 (the "First Decision"). The second ("Biffa's Appeal") is by Biffa Waste Services Limited alone against the second decision of the FTT of that date (the "Second Decision"). Both decisions of the FTT were made by Judge Kevin Poole and John Agboola FCCA.

3. The claims that are the subject of the Companies' Appeal cover various periods between November 2006 and December 2013, when the taxpayer companies were operating landfill sites. There are in fact nine underlying claims made by the taxpayer companies, all dealt with indistinguishably in the First Decision. It is not necessary for us to distinguish between the separate claims and the different taxpayer companies.

4. The claims that are the subject of Biffa's Appeal cover various periods between March 2010 and May 2012. No distinction was drawn by the FTT in the Second Decision between the separate claims made.

5. All the taxpayer companies are well-known and operate in the field of waste management and disposal. In so far as they dispose of materials as waste by way of landfill at landfill sites, they are liable to pay landfill tax. In most cases, the site operators will seek to pass on any tax liability in the prices that they charge businesses, local authorities and others to accept waste and dispose of it at their sites. The site operators are substantial businesses and can be expected to operate commercially but lawfully.

6. Landfill tax was introduced by Part III of the Finance Act 1996 ("FA 1996"). Minor changes were made to the tax regime by the Pollution Prevention and Control Act 1999, but a more significant change was made with effect from 1 September 2009, as a result of the decision of the Court of Appeal in *HMRC v Waste Recycling Group Limited* [2008] EWCA Civ 849; [2009] STC 200 ("*WRG*"), to which it will be necessary to refer in some detail later in this decision. The 2009 changes were made by the Finance Act 2009 ("FA 2009") and the Landfill Tax (Prescribed Landfill Site Activities Order) 2009 (SI 2009/1929). With effect from 1 September 2009, these treated certain activities that were not caught by the pre-2009 regime as taxable disposals under the 1996 Act.

7. The landfill tax regime was then wholly re-calibrated with effect from 1 April 2018 by the Finance Act 2018. The statutory provisions in issue in the First Decision and the Second Decision were the FA 1996 and the FA 2009 provisions. There is no continuing dispute in these appeals about the applicability of the provisions introduced by FA 2009. The pre-FA 2009 regime continued to apply until 1 April 2018, supplemented by the additional provisions in FA 2009. The issues in these appeals therefore have no continuing relevance, save for claims in relation to landfill tax relating to periods before 1 April 2018.

8. It is convenient to deal with the Companies' Appeal first. It raises exactly the same legal issues as the Biffa Appeal, but the facts of the Biffa Appeal are different from the facts of the Companies' Appeal. We will turn to the Biffa Appeal after having explained the reasons for our decision on the Companies' Appeal.

II. THE COMPANIES' APPEAL

Introduction

9. The issue raised on this appeal is whether "black bag" waste material that is disposed of at landfill sites in a particular way is subject to landfill tax. "Black bag" waste, emanating from households, shops and offices, as distinct from manufacturing, construction or industrial waste, is commonly disposed of at landfill sites. But some of it is deployed, or made use of, in a particular way by the site operators. At this stage, we refer to "waste" being "used" or "deployed" in a non-technical sense, without prejudice to the issues of construction of the relevant provisions of FA 1996.

10. Instead of being cast into the landfill cells and crushed together with any other types of waste that are disposed of there, some black bag waste is selected and carefully emplaced, then only lightly compacted, in order to provide protection, as a buffer layer, for the all-important geomembrane liner and geotextile protection layer at the bottom and on the sides of the cell and the cap at the top of the cell. These layers contain the waste, prevent leakage of harmful leachate[1] into the earth and prevent escape of landfill gas.[2] The black bag waste so deployed is known in the industry as "fluff", deployed either as "base fluff" and "side fluff" or as "top fluff", and is intended (in the case of base and side fluff) to absorb the impact of any sharp objects that are later disposed of and crushed above it, thereby ensuring the integrity of the liner and layer beneath or (in the case of top fluff) to accommodate differential settlement in the waste disposed of below it and to ensure a smooth and consistent base layer to accept the regulating layer. Deployed in this way, the black bag waste performs a function in the cell, but is also waste that is disposed of there.

11. The dispute between the Commissioners and the taxpayer companies is whether, under the terms of FA 1996, the black bag waste so used is a taxable disposal, because

[1] Leachate is a highly polluting liquid which is produced as a result of the decomposition of biodegradable waste.

[2] Landfill gas is a mixture of mostly carbon dioxide and methane, generated from the decomposition of biodegradable waste.

it is discarded by the site operator (and so is disposed of "as waste"), or whether it is not taxable because, although disposed of, it is not discarded, since some use is made of it in connection with the design and operation of the cell.

12. We will come shortly to the findings of the FTT about the typical construction of a landfill site cell and the way in which the taxpayer companies disposed of black bag waste at their sites during the relevant periods of time.

13. It is, however, convenient first to set out the very limited and self-contained provisions of FA 1996 which are relevant to this appeal. The exact nature of the questions that arise and the significance of the factual findings of the FTT can then be appreciated.

Legislation

14. Section 40 of FA 1996, as it was in force at the times relevant to the claims, provides:

> "(1) Tax shall be charged on a taxable disposal.
>
> (2) A disposal is a taxable disposal if –
>
> (a) it is a disposal of material as waste,
> (b) it is made by way of landfill,
> (c) it is made at a landfill site, and
> (d) it is made on or after 1st October 1996.
>
> (3) For this purpose a disposal is made at a landfill site if the land on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal."

15. Thus, section 40 requires four separate conditions to be satisfied before a disposal is a taxable disposal. The structure of the section therefore contemplates that there may be disposals that are not taxable disposals, even if they are disposals made at a relevant time by way of landfill at a landfill site. That is because a further condition to the charge to tax arising is that the disposal is a disposal of material "as waste".

16. Section 41(1) provides that the person liable to pay tax charged on a taxable disposal is the landfill site operator. Section 42 provides for the calculation of the amount of tax charged.

17. What is meant by a disposal of material "as waste" is explained by section 64 of FA 1996, which is in the following terms, so far as material:

> "(1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material.
>
> (2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

…….”

18. Thus, the central question, when determining whether a disposal was made of material “as waste”, is whether the person making the disposal (in this appeal, the site operator) does so with the intention of discarding the material in question. Contrary to the initial impression created by s 40(2)(a), the focus is not on whether the material was waste but on the intention of the person making the disposal, whatever the material was. This is reinforced by s 64(2), which states that the potential usefulness of the material discarded is irrelevant.

19. The meaning of the condition that there be a disposal of material “by way of landfill” is explained by section 65, which provides (so far as material):

> “(1) There is a disposal of material by way of landfill if –
> (a) it is deposited on the surface of land or on a structure set into the surface, or
> (b) it is deposited under the surface of land.
>
> (2) Subsection (1) above applies whether or not the material is placed in a container before it is deposited.
>
> (3) Subsection (1)(b) above applies whether the material –
> (a) is covered with earth after it is deposited, or
> (b) is deposited in a cavity (such as a cavern or mine).
>
> (4) If material is deposited on the surface of land (or on a structure set into the surface) with a view to it being covered with earth the disposal must be treated as made when the material is deposited and not when it is covered.
>
> …….
>
> (8) In this section “earth” includes similar matter (such as sand or rocks).”

20. By the time that the appeal was heard, there was no issue about whether the disposal of the fluff in the taxpayers’ landfill cells was a disposal made by way of landfill at a landfill site. The taxpayers accept the FTT’s finding that there was such a disposal. The only issue was whether the disposal by the taxpayers was made with the intention specified in section 64 (1), namely with the intention of discarding the fluff.

The Facts

21. The FTT’s factual findings are set out at [8] to [44] of the First Decision. So far as relevant they can be summarised as follows (references to numbers in square brackets are to numbered paragraphs of the First Decision):

> (1) The taxpayer companies’ landfill sites were operated under a detailed regulatory regime. Pollution Prevention and Control Permits (“PPC Permits”) were issued by the Environment Agency. These were re-named Environmental Permits in 2010. The regulatory regime is outcomes-focused, leaving it to the

site operator to provide detailed documentation in support of its application for a permit. The site operator must comply with the detailed processes and procedures set out in the application documents: [9] and [10].

(2) A key objective of the regulatory regime is to minimise the environmental impact of landfill sites, in particular the risk of contamination by the escape of landfill gas and leachate. As a result, a landfill site is a carefully managed location in which the design, construction and operation of the site all play a part in reducing its environmental impact: [11].

(3) Construction of a typical landfill cell requires preparation of the underlying ground; the application of a layer of compacted clay, and then the laying of a plastic geomembrane. This is made of high-density polyethylene and is brought onto the cell in large rolls, with strips being welded together to form an impermeable sheet over the entire floor and sides of the cell. This is an extremely skilled and expensive process. The impermeability of the membrane is crucial to the effectiveness of the cell in performing its functions: [14 (1) to (3)].

(4) A drainage layer of gravel or natural stone is then applied on top of the membrane, with drainage pipes, to facilitate the drainage and collection of leachate. A further synthetic filter layer is then sometimes placed on top of the drainage layer: [14 (5) to (7)].

(5) The first layer of actual waste is then laid. This is the layer of "base fluff" that we referred to above. It commonly comprises ordinary domestic waste, deriving from regular collections direct from householders. As recycling has improved, the volumes of this waste (commonly called "black bag waste") have declined and operators have on occasion resorted to using other materials in its place. A key consideration in laying this first layer is to reduce the risk of puncture to the all-important liner. Where black bag waste is used, it is inspected as it is in the process of being laid, to ensure it contains no large, hard, sharp objects (though by its nature, it is extremely unlikely to do so) or significant amounts of mobile fine particles that might block the drainage blanket; it is spread carefully across the whole base of the cell and "lightly" compacted into a layer of between 1 and 2.5 m deep - using a low ground pressure bulldozer (in contrast to the later layers of waste, which are compacted much more heavily by a specialised heavy machine). It is also placed against the sides of the cell, in a ring around the main body of waste, and compacted in the same way (in which location it is sometimes referred to as "side fluff"). It is said that this "light" compaction improves its drainage characteristics (allowing leachate to flow through to the drainage blanket without perching), though there is less evidence to support this supposed secondary purpose: [14(8)].

(6) Once the first layer of waste has been laid, the cell is ready to receive more heterogenous waste of all types. This waste is tipped and compacted in layers, using heavy compactor vehicles with toothed wheels which are designed to break up and compress the waste as it is laid so as to utilise the expensive void efficiently, maximise the stability of the waste body and make it as homogenous as possible. At the end of each day's operations, there is a regulatory requirement for "daily cover" (usually of inert soil-like material) to be laid over the freshly deposited waste: [14(9)].

(7) The sides of a cell are also engineered to minimise leakage, though less elaborately than the base. There may not be a plastic membrane or geo-synthetic clay liner extending all the way up the side walls, compacted clay instead providing the required degree of impermeability. Some protection is provided for the sidewalls by the layer of lightly compacted black bag waste referred to above: [14(10)].

(8) Best practice for landfill site operators and regulatory requirements were combined in detailed guidance contained in the Department of the Environment's "Waste Management Paper No 26 - Landfilling Wastes", published in 1986. This was updated as "Waste Management Paper 26B - landfill design, construction and operational practice" in 1995. These emphasise the risk of damage to the liner and that no bulky items should be present in the first lift of waste deposited in a site, and that precautionary measures may include Construction Quality Assurance procedures for the initial waste infilling, to minimise the risk of damage: [15] and [19].

(9) Landfill Operational Guidelines issued in 2010 by the International Solid Waste Association Working Group on Landfill emphasise the importance of the first layer of waste. Among other things, these guidelines stated:

> "… The first layer of waste placed in a cell is crucial for the landfill operation. This layer needs to be placed as a loose cushioning layer, sometimes referred to as a 'fluff' layer…
>
> The correct procedure for the construction of the first waste layer is as follows:
>
> …Depending on the waste type, the first waste should be deposited at a vertical layer thickness of at least 50 cm (often up to 1 m or more if bagged street collection of waste is used), and this layer must not be compacted, so it then constitutes a protection layer to the liner and leachate drainage system.
>
> The above procedure ceases when the whole area of the landfill cell base is covered with waste to a depth of at least 50 cm (1 m recommended), so that no landfill equipment can track in close proximity to the liner or the base drainage system of the landfill.": [23].

(10) The taxpayer companies' site licences and working plans for their sites contain specific conditions and detailed requirements for the type of waste to be used as "fluff" and the way in which the layer of fluff should be laid and supervised, under a Quality Assurance regime. Applications for PPC Permits required the site operators to confirm specifically that procedures are in place to ensure that the first layers of waste in a new cell are selected and inspected during placement to prevent damage to barriers and liners: [26] to [34].

(11) The FTT was satisfied on the evidence that all the taxpayer companies, in line with standard industry practice, followed reasonably strict procedures in laying the first layer of waste in a new cell, so as to minimise the risk of damage to the lining system: [35].

(12) At two sites owned by one of the taxpayer companies, domestic waste was sometimes stockpiled and covered, ready for later deposit as the first layer of waste in a new cell: [37].

(13) The taxpayer companies took similar care in laying fluff against the sides of the cells and at the top of the body of landfill waste. The purpose of the layer of "top fluff" was more to do with accommodating differential settlement and ensuring a smooth base layer, so there was no issue with the final layer being fully compacted, though the top surface would generally be smoothed using a tracked vehicle: [38].

(14) So far as the detailed procedure for laying the fluff was concerned, the precise logistics were sketchy but the materials used were first deposited for inspection, either adjacent to or in the cells, and were only finally emplaced in the cells after that inspection had taken place: [41] and [42].

(15) The taxpayer companies intended that all the waste (whether domestic or commercial) received at their sites that was suitable for use as fluff would be placed in the landfill cells. The waste not actually used as fluff would be deposited as part of the main body of waste. Contracts with customers did not differentiate between material suitable for use as fluff and other material: [43].

The First Decision

22. In the light of the factual findings summarised above, having set out the relevant legislation and the authorities that had some bearing on the question to be decided (to which we will come shortly), the FTT concluded that the disposal of black bin waste was a disposal made by way of landfill within the meaning of s 40(2)(b) of FA 1996, as defined in s 65, and was also a disposal "as waste" within the meaning of s

40(2)(a), as defined in s 64 of FA 1996. It concluded, as a matter of law, that use made of the material disposed of was only an indicator of whether or not there was an intention to discard the material, and use was not conclusive that it was not discarded. "Use" was not the antonym of "discard". Not everything that could be characterised as "use" was sufficient to negate an intention to discard.

23. Applying that legal approach to the facts of the claims before it, the FTT concluded that although the black bag waste was used to protect the lining system of the cells, it was destined for landfill in any event, if not used as fluff. The materials that were destined for disposal as landfill were merely carefully disposed of, in accordance with regulatory requirements. Black bag waste by its nature does not usually contain items that represent a risk to the liner or cap of the cell, but any residual risk is removed by visual inspection as the fluff is laid. The fact that the materials in question continued to serve a useful function after disposal did not negate the fact that the taxpayers intended to discard them.

24. Accordingly, the FTT dismissed the taxpayer companies' appeals.

Grounds of Appeal and the Respondents' Notices

25. The taxpayer companies were granted permission to appeal against the First Decision by Judge Poole on 27 June 2018 on three grounds.

26. The first ground is that the FTT was wrong as a matter of law to conclude that use was not determinative of the absence of an intention to discard. The argument is that *WRG* decides, as a matter of principle, that use for the site operator's own purposes means that there is not, at the moment of depositing fluff in the cell, an intention to discard it. The FTT misunderstood the ratio of *WRG* and therefore misapplied it to the facts as found. Had the true ratio of *WRG* been correctly applied, the decision would necessarily have been that there could have been no intention to discard the fluff.

27. The second ground of appeal is that even if use is not *per se* determinative of the question of intention, the FTT erred in failing to recognise the close factual similarity between *WRG* and these claims, in various respects, and therefore erred in reaching a different conclusion from that in *WRG*. There is no challenge to the facts as found by the FTT for this ground of appeal: the taxpayer companies submit that the FTT drew the wrong evaluative conclusion from those facts.

28. The third ground of appeal, which was not vigorously pursued on the hearing of the appeal, is that the FTT failed to give due weight to other facts that it found, and failed to draw other conclusions of fact that it should have drawn, in reaching a conclusion that their use of fluff was insufficient to negate an intention to discard it.

29. In response to the taxpayer companies' Notices of Appeal, the Commissioners served Respondents' Notices on each of the taxpayer companies. The Commissioners' primary submission is that the First Decision was right for the reasons given, but in addition they raised the following further arguments:

(1) The conditions in section 40(2) of FA 1996 can be satisfied at the moment of initial unloading of waste material and not only when it is finally emplaced;

(2) the decision of the Court of Appeal in *Patersons of Greenoakhill Ltd v HMRC* [2016] EWCA Civ 1250 was of greater relevance than the FTT thought;

(3) section 64(2) of FA 1996 provides a "knock-out blow" for the appeals; and

(4) the decision in *WRG* was based on s 65(4) of FA 1996, which draws a clear distinction between deposited material and the cover placed over it.

30. No notice was given, by way of Respondents' Notice or otherwise, that the Commissioners wished to seek to uphold the FTT's decision on any other basis, including the following argument that Mrs Hall QC, on behalf of the Commissioners, tried to advance at the hearing. She submitted that a finding of intention to discard was supported by the legislative policy underlying Part III of FA 1996. The FTT concluded that applying "policy" in attempting to interpret the legislation was of extremely limited usefulness and it gave little or no weight to it. Mr Grodzinski objected to the Commissioners raising this argument.

31. Of the points that were properly taken by way of Respondents' Notice, ground (1) was explained in the Commissioners' skeleton argument to some extent, on the basis that a relevant "taxable event" could be the point in time at which the black bag waste was removed from the garbage truck at the site, and not only when the black bags were emplaced in the cell. However, the skeleton then said that, on the basis of the FTT's findings, the Commissioners were not going to make further submissions but might resurrect the point. The FTT in its decision had in fact recorded, at [63], that none of the parties had argued that the statutory test should be applied at any time other than the moment of deposit of the fluff in the landfill cells.

32. The skeleton argument then stated that the Commissioners proposed to take the same approach in relation to grounds (2) and (3), and did not need to pursue ground (4), as the taxpayer companies were accepting the conclusion of the FTT that the fluff was disposed of by way of landfill, within the meaning of sections 40(2)(b) and 65 of FA 1996.

33. In the event, none of the grounds were resurrected or further deployed in the Commissioners' oral argument, save that Mrs Hall repeatedly stressed that a "disposal" within the meaning of s 40 of FA 1996 was a continuing process, not a moment in time, and that the acceptance of waste at the taxpayer's weighbridge at the entrance to the site could amount to a disposal or be part of a more protracted disposal. Since it was accepted on behalf of the taxpayer companies that there had been a disposal at a landfill site by way of landfill, with the only question being whether the fluff had been disposed of "as waste", this point did not address the real issue on the appeal. It was also accepted on the hearing of the appeal that it was only the landfill site operators who were to be treated as having made a disposal of the relevant materials. In view of authority that binds this Tribunal on the question of when the four preconditions in s 40(2) need to be satisfied, which we refer to later, the possibility of there having been a disposal within the meaning of s 40 of FA 1996

when the garbage trucks unloaded black bag waste on the site was of no relevance to the disposition of the appeal.

34. It is unnecessary to say more about grounds (1), (2) and (3) in the Respondents' Notices. We will address ground (4) when considering the decision in *WRG*.

The Authorities

35. Having had the benefit of excellent and lengthy skeleton arguments from the parties, it appeared to the Tribunal at the outset of the appeal that the principal issues could be shortly stated: (1) what is the true construction of ss 40(2)(a) and 64 of FA 1996 and the ratio of *WRG*, which as a decision of the Court of Appeal binds this Tribunal; and (2) does the ratio of that case applied to the facts of these claims mean that the disposal is a taxable disposal. Accordingly, we invited the parties to address the Tribunal first on the true construction of the statutory provisions and what *WRG* (and any other relevant authority) decides in this regard.

36. We analyse *WRG* in further detail later, but in brief the issue in the case was that the taxpayer sought from the Commissioners a refund in respect of landfill tax paid on inert materials disposed of at its landfill sites, either to provide "daily cover" for active waste, as required by its licence, or for the construction of roads on the site. It contended that the materials had not been disposed of "as waste" within the meaning of s 40(2)(a) of FA 1996. The Court of Appeal agreed.

37. The taxpayer companies argued that *WRG* is authority for the proposition that making use of materials for the site operator's purposes connected with regulatory compliance, when they are deposited in the cell, is use that is necessarily inconsistent with an intention to discard the materials, and so they cannot have been disposed of "as waste". That is so even though the materials have been disposed of by way of landfill at a landfill site, within the meaning of the statute. That is because a disposal that satisfies only conditions (b), (c) and (d) in s 40(2) of FA 1996 is not a taxable disposal: it is so only if the disposal was made with an intention to discard the materials.

38. The Commissioners argued that *WRG* establishes that use of material for some beneficial purpose is only an indicator, and not determinative of the question of whether there was an intention to discard, "use" not being the antonym of "discard" for these purposes. It was necessary to look at all the circumstances, including economic circumstances, to see whether there was such an intention.

39. In order to understand the issue in *WRG*, it is necessary to consider briefly two earlier judgments relating to landfill tax, to which the Court of Appeal was referred in *WRG*.

40. In *Customs and Excise Commissioners v Darfish Ltd* [2000] Env LR 3 ("*Darfish*"), Moses J held that the VAT and Duties Tribunal had erred in determining that the intention of only the landfill site operator was relevant in considering whether the materials in question were disposed of as waste. He accordingly sent the case back to the tribunal to consider whether the original consignors of the materials had the

requisite intention. In so deciding, he held that the process of "disposal" within the meaning of FA 1996 was not confined to the moment of deposit of the materials on the landfill site. Although the moment of deposit triggered the tax liability, the concept of "disposal" was wider, and would include (but not be confined to) the processes of removal, transport and deposit.

41. In explaining his conclusion, Moses J said at [18]:

> "Since it appears that the Tribunal found that the deposit (and possibly the transport) were made on behalf of Darfish, it is argued that its intention was the only intention which the Tribunal was required to consider. I disagree. I have construed *disposal* as the antonym of retention. The focus of the provisions is upon the person getting rid of something, not upon the person retaining or acquiring something. DNS was not making a disposal, on my construction, on behalf of Darfish. It was assisting in the acquisition and retention of the material on behalf of Darfish. But it was making a disposal on behalf of Wilson Bowden and Hallamshire, and it is their intention which should have been determined by the Tribunal."

42. Moses J added that he considered the mere transfer of title to materials to be of little assistance on the question. It was therefore clear to him, as a matter of interpretation of the statute, that someone who is retaining something cannot be disposing of it.

43. In *Customs and Excise Commissioners v Parkwood Landfill Ltd* [2002] EWCA Civ 1707; [2003] 1 WLR 697 ("*Parkwood*"), the VAT and Duties Tribunal overturned an assessment by the Commissioners for landfill tax on aggregates and fines that were disposed of by a landfill site operator on its landfill site for road making and landscaping purposes. The materials had been recycled from waste by another company and purchased by the site operator.

44. On appeal, the Judge (Sir Andrew Morritt V-C) held that the operator was liable for landfill tax, on the basis that it was not necessary for the same disposal to fulfil all the conditions in s 40(2) of FA 1996. It therefore did not matter if the site operator did not have an intention to discard the material. Following the reasoning of Moses J in the *Darfish* case, Sir Andrew Morritt held at [35] that:

> "Provided that the material can be identified as having been subject to a disposal as waste I can see no basis on which it is possible to exclude material which was waste but has been recycled before a disposal by way of landfill."

45. The Court of Appeal allowed the taxpayer's appeal, Aldous LJ, with whom the other members of the Court agreed, said:

> "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 clear indication in the relevant sections.
>
> 21. The crux of the dispute between the parties does not turn upon construction of the word 'disposal'. It depends upon what is a taxable disposal. Is it a disposal made at one time?
>
> 22. I am of the view that the natural meaning of section 40(2) requires a disposal which is a taxable disposal to satisfy the conditions in paragraphs (a), (b), (c) and (d) at the same time. Those paragraphs use the word 'it' to refer back to the 'disposal' which suggests that the disposal has to be made at a landfill site by way of landfill and also to be a disposal of material as waste.
>
> 23. The tax is a landfill tax, not a landfill and recycling tax. The tax is to be paid when waste material is disposed by way of landfill in a landfill site: not on waste material (eg fines) which has been recycled (eg into blocks) which may be used in a landfill site (eg to build a wall or hard standing). The disposal referred to in section 40(2) is a particular disposal."

46. The decision of the Court of Appeal in *Parkwood* requires inquiry into the intention of the disposer to be focused on the time at which the materials are disposed of by way of landfill at a landfill site, not on the time at which they are delivered to the site and unloaded. The question of whether the materials were disposed of "as waste" therefore has to be addressed at the later time, and the fact that the same materials might previously have been disposed of by someone else as waste is irrelevant. The question of whether materials are disposed of "as waste" does not focus on the characteristics or quality of the materials but on whether there was, at the relevant time, an intention to discard them. The reasoning of Aldous LJ that recycled materials that are required for use are unlikely to be disposed of reflects the antithesis that Moses J identified of disposal on the one hand and retention on the other.

47. In *WRG*, the Commissioners had refused a refund in respect of materials used by the taxpayer to provide "daily cover" and the construction of roads on the landfill site. The VAT and Duties Tribunal upheld their decision. Barling J allowed the taxpayer's appeal. The Commissioners appealed further to the Court of Appeal.

48. The Chancellor, Sir Andrew Morritt, with whom the other members of the Court agreed, rehearsed the facts that had been found by the Tribunal. These included that a condition of the licence to operate the site was that the operator must keep sufficient stocks of inert material or suitable substitutes for use as daily cover, to lay over the waste material that had been deposited during the day's operations in order to contain it until the operations resumed. Sheeting could be used for this purpose, but operators preferred to use soil or builders' rubble that was not suitable for re-use as aggregate, because it was cheaper. Inert material was also used by the operator for site engineering purposes, particularly the construction of roads within the site that lorries should use in order to reach the discharge point. The taxpayer ran elsewhere facilities at which waste was accepted before it was sorted and either sent for recycling or sent to one of its landfill sites.

49. The Chancellor recorded that the Tribunal had accepted that the operation of landfill sites was closely and strictly regulated, and that the regulations were onerous. These included the requirement for daily cover to be placed on the waste that had been deposited. The Tribunal had accepted that the taxpayer endeavoured to take no more waste than it needed for these purposes, because it was able to charge significantly greater sums to those who were depositing active waste. If more inert waste than it needed was offered, the taxpayer charged a high price as a discouragement. If there was a shortage of inert material, the taxpayer would have to offer advantageous terms, or even actively seek a supply of material, in order to be able to comply with its daily cover obligations.

50. Having considered in some detail the relevant parts of *Darfish* and *Parkwood*, the Chancellor set out the arguments of the parties. He recorded that the taxpayer contended that, at the moment of disposal at the landfill site, it was not its intention to discard the material but to use it for the purposes of daily cover and road construction. He noted that whether there was a liability to landfill tax depended on the proper interpretation and application of the statutory provisions, the meaning of which was informed by the binding decision in *Parkwood*. He said that the right approach was not to attempt to apply the decision on the facts of *Darfish* or *Parkwood* to the facts of the case under appeal.

51. The Chancellor questioned whether the concession made by the taxpayer that the material was disposed of by way of landfill was appropriate, and he explained why he expressed some doubt about that. However, he clearly did not decide that issue and did not decide the appeal on the basis of his own view: he said that whether the concession was rightly made was left to another case. On the assumption that there was a disposal by way of landfill, the Chancellor then addressed the question of whether the condition imposed by s. 40(2)(a) of FA 1996 was satisfied. The core of his reasoning is in the following paragraphs of his judgment:

> "[33] In those circumstances, in my view, it is clear that, assuming there to have been a disposal at all, the disposal relevant for the purposes of s 40(2)(a) was made by WRG on its own behalf. So the question posed by s 64(1) is whether WRG then intended to discard the materials. The word 'discard' appears to me to be used in its ordinary meaning of 'cast aside', 'reject' or 'abandon' and does not comprehend the retention and use of the material for the purposes of the owner of it. I agree with counsel for WRG that s 64(2) does not apply in such circumstances because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material.
>
> [34] It follows from this conclusion that the relevant intention may well not be that of the original producer of the materials. There is no principle that material once labelled as 'waste' is always 'waste' just because the original producer of it threw it away. That is not the relevant time at which the satisfaction of the conditions imposed by s 40(2) is to be considered. Recycling may indicate a change in the relevant intention but is not an essential prerequisite; re-use by the owner of the material for the time being may do likewise. Thus although the passing of title is not conclusive, it is, in my view, of greater relevance than Moses J, the tribunal or Barling J were prepared to attributed to it.

> [35] It may be that the economic circumstances surrounding the acquisition of the materials in question by the ultimate disposer of them will cast light on his intention at the relevant time. They cannot, as I see it, affect the decision on this appeal because the use of the relevant materials by WRG is clear and such use is conclusive of its intention at the relevant time by whatever means and on whatever terms WRG acquired them."

52. At [33], the Chancellor was construing the meaning of the expression "with the intention of discarding the material". That expression defines what is meant by a disposal of material "as waste". It is clear that the Chancellor held that the word "discard" meant the opposite of retain and use. An owner of material does not discard it, within the meaning of the statutory provisions, if he keeps and uses it for his own purposes.

53. In considering this paragraph in this case, the FTT considered that the Chancellor must have had in mind that material intended for use as daily cover would generally be stockpiled; and that given the intended use of the materials they were likely to have been stockpiled. It said at [96] of the First Decision that "he clearly contemplated the relevant material generally being in some way held back or set aside before it was actually used (or re-used) for its intended purpose" and that that explained the use of the word "retained" at [33] of the Chancellor's judgment. That did not, in the FTT's view (expressed at [98] of the First Decision):

> "… establish (or even support) the proposition, as the appellants argue, that 'use' is the antonym of 'discard'; it merely emphasises that 'retention and use' of material in the manner under consideration in *WRG* does not amount to 'discarding' such material."

54. We disagree with that conclusion. At [33], the Chancellor was using the word "retention" as being the opposite of "disposal", as Moses J had done in *Darfish*. The suggestion that the Chancellor was influenced at that stage by the particular facts of *WRG* is also wrong. He was clearly identifying the general meaning to attribute to the words of s 64(1) of FA 1996 in the context of the disposal of materials at a landfill site. If the Chancellor had considered that retention was a separate and distinct requirement from use of the material, he would obviously have said specifically what the element of retention was when he applied the principle derived from the statute to the facts of the case at [35]; but he did not do so.

55. At [34] the Chancellor held that there did not have to be recycling of waste for one to be held not to be discarding it, and said that re-use just as much as recycling may show that there was no intention to discard. Dealing with the facts, which were the use of inert material that was not fit for recycling as cover for active waste at the end of daily operations and for road building, all or some of which material would remain in the landfill void, he held the use of the relevant materials by WRG to be clear and that such use was conclusive of the issue of intention, whatever the economic circumstances surrounding the acquisition of the materials might be.

56. In our view, the Commissioners' argument at ground (4) of the Respondents' Notice, that the Chancellor's judgment decided the case on the basis of s 65(4) of the 1996 Act, is plainly wrong. Section 65 of FA 1996 defines the circumstances in which there is a disposal of material by way of landfill. Subsection (4) provides that the fact that the material is not covered with earth until a later time does not mean that it is not disposed of when the material is deposited. It is therefore concerned with the time at which a disposal by way of landfill takes place. It has nothing to do with the separate question, with which *WRG* was concerned, of whether the material was disposed of "as waste".

57. We derive support for our analysis of *WRG* from the judgment of Rose J, sitting in the Upper Tribunal, in *Patersons of Greenoakhill Limited v HMRC* [2014] UKUT 226 (TCC); [2014] STC 2178. That case concerned how the landfill tax regime applied where some of the material deposited in a landfill site decomposes and produces landfill gas, which is then captured and used by the operator of the site to generate electricity. The central question in the appeal was whether the taxpayer company had disposed of the biodegradable element of the materials it acquired from customers as waste if at the time of deposit on the landfill site it intended to extract methane from those materials when they had decomposed.

58. Rose J decided that appeal in favour of the Commissioners on the basis that the material deposited by the taxpayer company was not used by it to generate electricity and that it was disposed of by the taxpayer company with the intention of discarding it: see [40] of the decision. She said at [42]:

> "I do not read the Court of Appeal's decision in *WRG* as requiring that some act of 'retention' or separation out of a part from the rest of the whole must be identified before an operator can be said not to be discarding the waste for the purposes of s 64."

59. Rose J also held that analysis of whether anything distinctive was "produced" by the site operator from the waste received was not part of the Court of Appeal's deliberations, and that nice distinctions about work done or not done to separate material is likely to be unhelpful as a test. However, she said at [43] that if there is separation and retention, that is an indication that there is an intention to use the retained matter for a different purpose. She added at [45]:

> "In my judgment, the concept of intending to use something, as the antithesis of intending to cast it aside or abandon it, involves some action to harness the properties of an item and direct them towards a purpose of the user".

60. It is clear, therefore, that Rose J considered that the ratio of *WRG* was that if there was an intention to make use of the properties of material and turn them to a purpose of the site operator, there could be no intention to discard them.

61. The Court of Appeal dismissed the appeal of the taxpayer company from the decision of Rose J. Their decision is reported at [2017] 1 WLR 1210. Although passages in the judgments of their Ladyships are somewhat more ambiguous on the question of use, the case was not decided on the basis of whether use of landfill waste

precluded a conclusion that it had been discarded, but rather on the basis that the material that the operator was seeking to use (landfill gas) was not the same material that had been disposed of.

62. Arden LJ gave the leading judgment in that regard. None of their Ladyships stated that *WRG* required there to be a retention of material as well as use of it, and none of them disapproved Rose J's interpretation of what the Chancellor had held in *WRG*. Arden LJ said at [1] that a landfill site operator who uses materials, rather than placing them into the landfill site as waste, is "in general" not liable to landfill tax. She said that was because a person is treated as disposing of material "as waste" if and only if he disposes of it "with the intention of discarding the material".

63. Black LJ was a little doubtful that the difference in relevant material was a complete answer to the appeal, so she expressed very shortly a view about the use argument. She held at [72] that the taxpayer company could not be said to use the waste material by the later harvesting of landfill gas derived from it because it intended to get rid of the material by way of landfill and the gas came naturally, as a later by-product of the disposal. It is clear, therefore, that Black LJ regarded "use" as an antonym of "discard" and that if the taxpayer company could have been said to use the waste material she would have reached a different conclusion.

64. King LJ agreed with Arden LJ's judgment and accordingly held that the relevant material was the waste, which was discarded, not the landfill gas that was later used. She said at [75] that, in so agreeing, she would not wish it to be thought that she did not recognise that use may in some circumstances be a valuable pointer in determining whether a disposal has been made "with the intention of discarding it", citing *WRG* as an example of the importance of that.

65. In our judgment, an *obiter* comment of this character cannot and should not be taken as encapsulating the true ratio of *WRG* decision, which, as we have explained, is not to the effect that use for particular purposes of the operator may be a "pointer" or "indicator" or "factor". Similarly, in using the words "in general" in para [1] of her judgment, Arden LJ was not restating the ratio of *WRG*; she was providing a general summary of the position while identifying the statutory criterion as whether the material is disposed of "with the intention of discarding [it]".

66. The only relevant question is whether, at the time of disposing of the material by way of landfill at a landfill site, the operator intended to discard it. In our view, *WRG* decides, as a matter of principle, that if a site operator disposes of material at a landfill site, but in doing so intends to and does make use of its properties for his own purposes, including compliance with regulations, licenses, permits or any other requirements for the site, that use means that the operator does not make the disposal with the intention of discarding the material. That is so regardless of whether the material is recycled or sorted before being deposited on the landfill site, and even though the disposal is acknowledged to be "by way of landfill" within the meaning of s 65(1) of FA 1996.

67. We reject the Commissioners' arguments that the Court of Appeal in *WRG* decided only that what amounted to use would vary from case to case. Although the Chancellor did not define "use" – because it is not a word found in any relevant statutory provision – he did decide what "discard" meant. He said that its meaning did not comprehend retention and use. The effect of that decision is that use of the properties of materials for the operator's own purposes will not be a disposal with the intention of discarding them, and so not a disposal of the materials "as waste".

68. Mrs Hall tried to persuade us that opening the door to that extent would have the result that no waste that is disposed of by way of landfill at a landfill site would be discarded and taxable. That was because, she said, all waste is carefully emplaced, not just the fluff layers, and all waste disposed of can be considered to serve a purpose of the operator. However, the fact that all waste is carefully emplaced, not simply tossed into the cell, does not mean that the operator intends to use such waste for his own purposes. On the contrary, he intends to cast it away and abandon it. That is quite different in principle from making particular use of the properties of some of the waste to satisfy a need the operator has, such as regulatory compliance. If waste was not used for that purpose, the operator would still need to comply, by some other means; that is not true of materials that are disposed of as waste into the cell. It cannot therefore be said that materials that are cast away as waste are being used to perform a function simply because they become part of the filled cell, e.g. because purely passively they support the layer of waste above.

Conclusions on the facts of this case

69. Having found that there were errors of law on the FTT's part we have to consider whether to exercise the power in s 12 of the Tribunals, Courts and Enforcement Act 2007 to set aside the First Decision and either remit the case to the FTT or remake it.

70. Clearly, as the errors were fundamental to the FTT's conclusions in the First Decision, we should set it aside. As this is a case where there is no dispute on the facts and all the relevant facts (that is those contained at [8] to [44] of the First Decision as summarised at [21] above) have been found, there is no reason for the case to be remitted to the FTT. We propose therefore to re-make the First Decision.

71. Given the conclusion that we have reached about the ratio of *WRG* and the meaning of ss 40(2)(a) and 64 of FA 1996, we need to consider whether, on the facts as found by the FTT, it was wrong to conclude that the taxpayers had the intention of discarding the materials which formed the fluff layers.

72. The FTT reached the decision that it did because it wrongly held that *WRG* established only that re-use of materials was an indicator of use to be taken into account, but no more than that, and that what the Chancellor said at [33] of his judgment was said and has to be understood in the context of the facts of that case: see [116] and [119] of the First Decision. In our view that is wrong: the Chancellor construed the statutory provisions and then applied that construction to the facts of the case at [35].

73. On the basis that all circumstances were relevant and despite the Commissioners' agreement that fluff was used to protect the cell lining, the FTT concluded at [119] of the First Decision that the taxpayers were nevertheless simply disposing of the black bags carefully, as the regulatory regime required them to do. In concluding that the use of fluff to protect the cell lining was not enough to negate an intention to discard it, the FTT relied on two points. First, that the black bag waste was "destined for landfill in any event, in the main body of landfilled waste if not as 'fluff'": see [117] of the First Decision. Second, that there was no physical difference between the material used as fluff and the rest of the similar material that was simply landfilled along with all other general waste in the cell, albeit that it was emplaced in a different way: see [121] of the First Decision.

74. In relying on these points, despite protestations at [121] of the First Decision that it was not doing so, the FTT was falling into the "once waste, always waste" trap that the Court of Appeal in both *Parkwood* and *WRG* had warned against. Material is not disposed of by the site operator "as waste" because it had previously been discarded as waste by someone else. Whether it is disposed of as waste at the critical time depends on the intention of the person who deposits the material on or under the land at a landfill site. It is not the character of the material that is determinative but the intention with which it is so deposited. It is therefore wrong in principle to conclude that there was an intention to discard because the black bags were waste destined for landfill in any event and in so concluding the FTT made a further error of law.

75. Applying the ratio of *WRG* to the facts of this case, the clear conclusion is that the taxpayer companies, when disposing of fluff at their landfill sites, intended to and did make use of the properties of the fluff for their own purposes, namely providing a layer of protection for the geomembrane and drainage layer in the cell and the cap of the cell, thereby complying with the regulatory requirements for use of the landfill cell. The careful inspection of the fluff layer (to ensure that no sharp or large objects were contained in the bags) and the different compaction used on the fluff emphasise that the fluff is being used by the taxpayer companies in a particular way, in contradistinction to other black bags that are disposed of as waste. The fact that the black bags were not recycled and only sorted to a limited extent at the time of emplacement makes no difference in principle. As in the *WRG* case, the use that is made of the fluff is clear and compels the conclusion that the taxpayer companies did not intend to discard it. There is no distinction in this respect between base or side fluff and top fluff.

76. This Tribunal will not make the mistake that the Chancellor criticised in *WRG* of applying the facts of that case to the facts of this appeal. However, it is instructive to consider to what extent the Commissioners were able to identify material differences between the use of daily cover by WRG to achieve regulatory compliance and the use of fluff by the appellants to achieve regulatory compliance. In both cases, the operators disposed of waste material into the landfill cell.

77. The only identified points of distinction are that: (i) the waste in this case is biodegradable rather than inert; (ii) the fluff would otherwise have been discarded as

landfill; (iii) it was not differentiated from other black bags for landfill until the time of emplacement; and (iv) the processes associated with disposing of fluff were different from the process of disposing of daily cover.

78. The first of these points is of no significance, since nothing in *WRG* turned on the daily cover being inert waste: it was simply waste that, for regulatory compliance, was required to be inert and which had no other use. The second and third points are legally irrelevant, for reasons already given.

79. The fourth point was advanced rather ambitiously by Mrs Hall as a ground in itself for distinguishing *WRG*, on the basis that it was not (or not only) the properties of the fluff that made the black bags useful to the taxpayer companies but the process of emplacing and compacting the bags. In our view, the fact that a process was applied to make use of the fluff only supports the taxpayer companies' case that they did not intend to discard the fluff but make use of it. The fact that the materials could not be used beneficially without some process being applied to them is neither a point of significance in itself nor a point of distinction from *WRG*. There is nothing of legal significance in the point that the process required to make use of fluff was needed and was different from the process required to make use of daily cover.

80. For all these reasons, we conclude that the appeal must succeed on ground 1. As a matter of law, the FTT erred in misinterpreting the ratio of *WRG* and in seeking to apply it. If the true ratio of that authority is applied, the conclusion clearly follows that the taxpayer companies did not at the time of depositing the fluff on their landfill sites do so with the intention of discarding it. It is therefore not necessary for us to consider ground 2, that is whether, if use in the way that the taxpayer companies used fluff was merely indicative, the FTT erred in holding that the use was insufficient to negate an intention to discard it. As mentioned above, ground 3 was not pursued before us.

Disposition

81. The Companies' Appeal is allowed.

III. THE BIFFA APPEAL

Introduction

82. The issue raised on this appeal is whether "black bag" waste material (or similar material) that is disposed of at landfill sites which is part of the "cap protection layer" of the cell is subject to landfill tax. We are concerned in this appeal with the same type of black bag waste that we were concerned with in the Companies' Appeal. The material in question is known as "EVP" in the industry, which stands for "engineered into the void permanently" and is a layer of non-compacted waste that is laid on top of landfill waste when the cell is almost full but before the regulating layer referred to below is laid and the cell is capped. EVP consists of material, shredded to various

sizes, but which is otherwise essentially the same as the "fluff" which was the subject of the Companies' Appeal.

83. This appeal is concerned with whether the disposal of the EVP was a taxable disposal, not with the disposal of materials used for the regulating layer. Therefore, the dispute between the Commissioners and the taxpayer company ("Biffa") on this appeal is essentially the same as that on the Companies' Appeal, namely whether the black bag waste so used is a taxable disposal because it is discarded by the site operator (and so is disposed of "as waste"), or whether it is not taxable because, although disposed of, it is not discarded, since some use is made of it in connection with the design and operation of the cell.

84. Accordingly, our analysis of the relevant legislation and the authorities, as set out at [14] to [20] and [35] to [68] above in relation to the Companies' Appeals, applies equally to the Biffa Appeal.

The Facts

85. The facts found by the FTT in the Second Decision overlap substantially with the factual findings made in the First Decision, though the FTT issued a separate and self-contained decision. The findings are set out at considerable length at [6] to [56] of the Second Decision. It is unnecessary to repeat here the facts relating to landfill sites generally set out at [21] above. The particular facts found relating to Biffa's use of EVP can be summarised as follows (references to numbers in square brackets are to numbered paragraphs of the Second Decision):

(1) When the level of waste in the cell is nearing its final required height and profile (due allowance being made for settlement over time), consideration is given to "capping" it in order to insulate the restored earth surface above from contamination by the waste below, in order to minimise the flow of rainwater into the main body of waste (which would increase the amount of leachate generated by it which is then required to be drained away and treated) and to impede the escape of landfill gas (which is often captured and used for electricity generation): [13 (11)].

(2) Commonly, between one and two metres of fully compacted black bag waste is placed on top of the final layer of general waste and smoothed flat, before a 300 mm "regulating layer" of "fines" (a soil-like material) is generally placed on top. This acts to fill cavities and even out irregularities in the surface and provide a smooth top surface to receive the next element in the capping system. The parties' experts agreed (and the FTT clearly accepted) that the protection layer underneath the regulating layer could be up to 2m in depth, was a standard operating procedure and was required to comply with Environmental Permit conditions (and PPC Permit conditions before that): [13 (12)], [30] and [52].

(3) The next element is a further plastic membrane, or geosynthetic clay liner, or even a compacting layer of clay. There may be other layers of protection

above, involving geo-textiles, geo-composites or fine soils. Finally, the top surface is restored with subsoil and topsoil: [13 (14) and (15)].

(4) Paragraph 6.26 of the original Waste Management Paper No 26 – Landfilling Wastes said that to maintain its integrity, the membrane should be protected on its upper and lower surfaces, and recommended a buffer layer to be installed to provide a firm base to allow for compaction of the waste. The updated version of that paper (26B) contain nothing specific, only a general reference to the fact that "construction methods, materials, specifications, testing and QCA procedures are essentially the same as those used for construction of the landfill liner…": [14] to [20].

(5) Biffa's working plans for its sites require the final layer of waste to be free from bulky items or other materials likely to give rise to damage to the capping layer. Its PPC permit applications required it to confirm that waste deposits and emplacement procedures were in place, to ensure that the final layers of waste are selected and inspected during placement to ensure that they do not cause damage to the final capping: [23] to [26].

(6) Biffa followed reasonably strict procedures over the relevant period in laying material at the top of the body of landfill waste. Its concern was to ensure a smooth and consistent base layer to accept the regulating layer above: [30].

(7) At certain times of the relevant periods for this appeal, Biffa substituted EVP for some or all of the black bag waste in the cap protection layer:

> (a) From March 2010 to November 2010, a 700 mm layer of EVP, shredded to dimensions not exceeding 75 mm, was placed immediately below the regulating layer and a further 1 m layer of un-shredded black bag waste was beneath this layer.
>
> (b) From November 2010 to May 2012, a layer of 1700 mm of EVP, shredded to dimensions not exceeding 100 mm, was placed immediately below the regulating layer and immediately on top of the general body of waste. This therefore meant that 2 m of EVP (variously shredded) was used, rather than 1 m of EVP and 1 m of unshredded black bag waste.
>
> (c) From March 2010 to May 2012, Biffa used EVP, shredded to a maximum dimension of 20 mm, as the 300 mm regulating layer too: [32] and [33].

(8) For part of the period with which this appeal is concerned, Biffa used a different product, known as "Leicester Floc", pursuant to a 25-year contract with Leicester City Council. It was trialled at their Skelton Grange landfill site in late 2009 and the trial was successful, but there was insufficient Floc to provide a regulating layer and a protection layer at all their sites, so Biffa decided to produce material with similar characteristics. The shredded material was initially obtained from Biffa's own transfer station; from July 2010, greater volumes were required and Biffa also obtained shredded material direct from customers: [34].

(9) Biffa considered that Leicester Floc would also be suitable for the regulating layer and sought clarification from HMRC in relation to statutory changes that affected the tax liability: [35].

(10) As for economic matters, the Leicester contract required Biffa to use a certain amount of the material it received in ways that did not incur landfill tax or suffer a penalty under the contract. Biffa did not charge landfill tax to customers from whom it acquired shredded EVP and the tipping fee charge was below the standard rate of landfill tax applicable at the time. This gave Biffa a significant competitive advantage, even if they continued to charge landfill tax on unshredded waste that they would then shred themselves to form EVP: [35] and [55].

The Second Decision

86. In the light of these facts, the FTT identified at [79] the two relevant questions as being whether the EVP was disposed of "as waste" (i.e. was the disposal made "with the intention of discarding" the EVP); and whether the disposals were made "by way of landfill".

87. The FTT then went through the process of considering the significance (if any) of the policy of the legislation and EU law before analysing the intention of Biffa when the EVP was deposited. It conducted the same analysis of the relevant authorities as it had done in the Companies' Appeal and reached the same conclusions about what the authorities established. It is unnecessary to rehearse those conclusions because they have been addressed in detail above.

88. The FTT set out its conclusions at [130] to [135] of the Second Decision. Those paragraphs correspond precisely with paras [116] to [121] of the First Decision, as referred to at [72] to [74] above. The FTT accepted that the material disposed of – this time, shredded black bag waste or Leicester Floc rather than intact black bag waste – was used to protect the lining system, but it emphasised that all the material was destined for landfill in any event, in the main body of landfill waste if not as EVP. It stated, as it stated in the First Decision, that the black bag waste is, in effect, pre-sorted by reason of its source, so that it almost never contains items that present a risk to the integrity of the cell, and then added: "this appellant has simply gone one step further, and arranged for the material to be shredded before it is deposited, affording (it says) the advantages identified at [72] above".

89. As in the Companies' Appeal, the FTT concluded that "use" is only an indicator to be taken into account, and that Biffa was simply disposing of the material carefully, as the regulatory regime required, and the fact that it continued to serve a useful function after such disposal did not affect the FTT's conclusion.

90. In respect of the reasons given for the conclusion that the use was insufficient to negate an intention to discard, the FTT stated that all the waste was destined for landfill in any event and that there was no physical difference between the material used as EVP and the rest of the material, except that it was shredded. Notwithstanding

the shredding and the different way in which the EVP was emplaced, the FTT did not consider that "the otherwise obvious intention to discard the material" was negated.

Grounds of Appeal and the Respondents' Notice

91. Biffa obtained permission to appeal on essentially the same three grounds as in the Companies' Appeal: see [26] to [28] above. The Commissioners filed a Respondents' Notice raising the same four grounds for upholding the Second Decision as it had done in the Companies' Appeal, and not raising any further grounds (such as economic considerations or legislative policy) on which the Second Decision might be upheld by this Tribunal: see [29] and [30] above.

92. No notice was given, by way of Respondents' Notice or otherwise, that the Commissioners wished to seek to uphold the FTT's decision on any other basis, including the following two arguments that Mrs Hall QC, on behalf of the Commissioners, tried to advance at the hearing. First, that a finding of intention to discard was supported by conclusions to be drawn from the commercial and financial arrangements surrounding the acquisition and deployment of black bag waste. Second, that it was supported by the legislative policy underlying Part III of FA 1996. The FTT placed no reliance in reaching its conclusion on any commercial arrangements that the taxpayers had in place to acquire black bag waste and made no detailed findings in that regard. It also concluded that applying "policy" in attempting to interpret the legislation was of extremely limited usefulness and it gave little or no weight to it.

93. Mr Cordara QC, on behalf of the appellant taxpayers, objected to Mrs Hall raising these further arguments without notice. Mrs Hall suggested in the end that the commercial background would only be relied on by the Commissioners in circumstances relating to ground 3 of the appeal, if this Tribunal were to decide that the fact finding of the FTT was flawed to such an extent that it should substitute its own decision for that reached by the FTT. In any event, no application was pursued by the Commissioners for permission out of time to rely on these additional arguments and we therefore did not grant permission for them.

Conclusions on the facts of this case

94. In our judgment, the FTT erred as a matter of law in identifying the ratio of *WRG* and in applying it to the facts that it found. The reasons for our conclusion are exactly the same as in the Companies' Appeal. The FTT also erred, in giving its reasons for considering that the use made did not negate an intention to discard, in treating the material as all being waste destined for landfill – the "once waste, always waste" heresy. Oddly, considering the emphasis that it placed on stockpiling as explaining the Chancellor's decision in *WRG*, it made nothing of the fact that EVP was pre-ordered or prepared for use at Biffa's other sites by shredding and delivered for use at the landfill sites.

95. Having found that there were errors of law on the FTT's part, we have to consider whether to exercise the powers in s 12 of the Tribunals, Courts and

Enforcement Act 2007 to set aside the decision on these points and either remit the case to the FTT or re-make it.

96. Clearly, as the errors were fundamental to the FTT's conclusions in the Second Decision we should set it aside. As this is a case where there is no dispute on the facts and all the relevant facts (that is those contained at [6] to [56] of the Second Decision as summarised at [85] above) have been found, there is no reason for the case to be remitted to the FTT. We propose therefore to re-make the Second Decision.

97. In our judgment, the ratio of *WRG*, as we have stated it at [66] above, applied to the facts of Biffa's Appeal, produces exactly the same result as in the Companies' Appeal. It is clear that in preparing and using EVP (or Floc) for the layer immediately below the regulating layer, Biffa intended to make use of the properties of the EVP (or Floc) for its own purposes, and so did not intend to discard the material. By using the EVP (or Floc) as a top fluff layer, Biffa was complying with Environmental Permit (or PPT Permit) conditions. That being so, the economic circumstances are of no materiality, and in any event the FTT made nothing of them.

98. The facts are if anything clearer in this appeal, whatever may have been the motive of Biffa in making use of EVP for the layer immediately below the regulating layer, in that suitable material was prepared for and intended to be used to perform that function. Mrs Hall submitted the opposite, on the basis that the use was all commercially driven, but that is no answer. In the first place, the Commissioners disavowed any case based on colourable use, or tax avoidance. Second, the FTT did not rely on the commercial factors referred to at [85(10)] above and there was no Respondents' Notice on the point. Third, the fact that a particular use makes commercial sense is not an answer to the question whether the EVP was deposited with an intention to discard it. The fact that EVP is of the same origin as other waste material that is deposited "as waste" is legally irrelevant, since the only intention that matters is the intention with which the EVP is deposited in the cell.

99. As we have said, even though there was no Respondents' Notice on the importance of the legislative policy, as the Tribunal pointed out in argument, Mrs Hall proceeded to make submissions on it regardless. Like the FTT, we do not consider that it assists, even if legitimately in issue. While the broad policy of reducing waste, reducing landfill and encouraging recycling can easily be identified, as the Court of Appeal did in *Parkwood* and *WRG*, more fiscal aspects of policy beyond that are less clear. The policy of what amounts to a taxable disposal can be discerned from s 40 of FA 1996 itself, in that a disposal of material at a landfill site by way of landfill is not a taxable disposal unless there is an intention to discard the material. Consistently with the broad policy of the legislation, material which instead is re-used is not taxed. If Biffa did not use black bag waste materials as fluff, it would be obliged to put something else into landfill in order to create the requisite buffer layers. That would increase the materials put into landfill. It is therefore far from obviously contrary to the broad policy of the legislation that black bag waste so used is not a taxable disposal.

100. Accordingly, for the reasons given, we conclude that the appeal must succeed on ground 1. It is not necessary to determine grounds 2 and 3.

Disposition

101. The Biffa Appeal is allowed.

IV. COSTS

102. Any application for costs in relation to these appeals must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE FANCOURT **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 2 January 2020