[2015]UKUT 0093 (TCC)
Appeal number: FTC/107/2013

Aggregates Levy – aggregate extracted from pit and used in construction of dams and causeway around reservoir – commercial exploitation – whether aggregate 'again becomes part of the land at the site from which it was won' (Finance Act 2001, s 19(3)(e)) - proper approach to interpretation of 'site' in this context

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

NORTHUMBRIAN WATER LIMITED

Respondent

Tribunal: The Hon Mrs Justice Rose DBE

Sitting in public at the Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 9 and 10 February 2015

Lisa Busch instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Rupert Baldry QC and Thomas Chacko, counsel, instructed by Northumbrian Water Ltd for the Respondent

DECISION

The appeal of the Appellants, the Commissioners for Her Majesty's Revenue and Customs IS DISMISSED

REASONS

1. This appeal concerns whether the Respondent ('NWL') should be registered for aggregates levy. The Appellants ('HMRC') appeal against the decision of the First-tier Tribunal (Judge Swami Raghavan and Jo Neill) released on 6 June 2013 allowing NWL's appeal against its registration.

2. NWL is a regulated water and sewerage company and provides services in the north-east of England (trading as Northumbrian Water) and in the south-east of England (trading as Essex and Suffolk Water). The appeal concerns the construction works involved in raising the level of Abberton Reservoir south of Colchester in order to increase its storage capacity. Gravel was needed to enlarge the main reservoir dam, to raise the causeway across the reservoir and to construct further col dams around the edge of the reservoir. This aggregate was obtained from a pit some 500m away from the reservoir known as the Rye Borrow Pit. The question to be determined is whether the use of that gravel amounted to commercial exploitation of aggregates for the purposes of Part 2 of the Finance Act 2001 or whether it fell outside the definition of commercial exploitation because it failed to meet one part of that definition, namely the condition set out in section 19(3)(e) of that Act.

The legislation

3. The aggregates levy was introduced by Part 2 of the Finance Act 2001 ('FA 2001'). Section numbers referred to in this judgment are sections of the FA 2001 unless otherwise stated. According to s16(2) the aggregates levy is charged whenever a quantity of taxable aggregate is subjected to "commercial exploitation" in the United Kingdom.

4. "Aggregate" is defined in section 17 as:

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

5. It is common ground that the material being used in this case is aggregate. Section 17 provides that any aggregate is, in relation to any occasion on which it is subjected to commercial exploitation, "taxable aggregate" unless one of a number of exceptions applies. Section 17(3) exempts various kinds of aggregate from the levy. These are, broadly speaking, aggregates which are produced in the course of carrying out some other activity such as excavating the foundations of a building project, building a highway or railway or extracting clay, coal or slate.

6. "Commercial exploitation" is defined by section 19 as follows: (emphasis added)

"19 Commercial exploitation

(1) For the purposes of this Part a quantity of aggregate is subjected to exploitation if, and only if –

(a) it is removed from a site falling within subsection (2) below;

(b) it becomes subject to an agreement to supply it to any person;

(c) **it is used for construction purposes**; or

(d) it is mixed, otherwise than in permitted circumstances, with any material or substance other than water.

(2) The sites which, in relation to any quantity of aggregate, fall within this subsection are –

(a) the originating site of the aggregate;

(b) any site which is not the originating site of the aggregate but is registered under the name of a person under whose name that originating site is also registered;

(c) any site not falling within paragraph (a) or (b) above to which the quantity of aggregate had been removed for the purpose of having an exempt process applied to it on that site but at which no such process has been applied to it.

(3) For the purposes of this Part the exploitation to which a quantity of aggregate is subjected shall be taken to be commercial exploitation if, and only if –

(a) it is subjected to exploitation in the course or furtherance of a business carried on by the person, or one of the persons, responsible for subjecting it to exploitation;

(b) the exploitation to which it is subjected does not consist in its removal from one registered site to another in a case where both sites are registered under the name of the same person; [and]

…

(e) **the exploitation to which it is subjected is not such that, as a result** and without its being subjected to any process involving its being mixed with any other substance or material (apart from water), **it again becomes part of the land at the site from which it was won**."

7. Thus, if the only exploitation which takes place is exploitation which results in aggregate in its natural form becoming part of the land at the site from which it was won, then that exploitation does not count as commercial exploitation for the purposes of the levy.

8. Section 48(2) defines 'construction purposes' in the following terms:

"(2) References in this Part to the use of anything for construction purposes are references to either of the following, except in so far as it consists in the application to it of an exempt process, that is to say—

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

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

9. Section 48(3) provides that:

"(3) References in this Part to winning any aggregate are references to winning it—

(a) by quarrying, dredging, mining or collecting it from any land or area of the seabed; or

(b) by separating it in any other manner from any land or area of the seabed in which it is comprised."

10. Section 20 provides that references in FA 2001 to the "originating site" in relation to any aggregate are references to "the site from which the aggregate was won or, as the case may be, from which it was most recently won". References to 'winning aggregate' or aggregate being 'won' mean winning it by quarrying, dredging, mining or collecting it from any land or area of the seabed or by separating it in any other manner from any land or area of the seabed in which it is comprised.

11. The FA 2001 set up a register of persons who are required to be registered for the purposes of the aggregates levy: see section 24. A person must be registered if he is responsible for a quantity of aggregate being subjected to commercial exploitation and he is not exempt from registration. There is a statutory right of appeal for any person who is affected by a decision of HMRC in respect of various matters, including whether someone is charged with an amount of aggregates levy or from the registration of any person or premises for the purpose

of aggregates levy. The appeal is to the First-tier Tribunal. It was agreed by the parties before the Tribunal that the Tribunal had a full appellate jurisdiction rather than merely reviewing the reasonableness of HMRC's decision.

The facts

12. The project for expanding the Abberton Reservoir involved raising the sides of the reservoir by 3.2 metres. The reservoir is an irregular shaped body of water about 5.2 km long and stretching roughly diagonally from a south west point to a north east point. The perimeter is about 17.7 km. The Rye Borrow Pit from which the gravel was taken is to the northwest of the rough midpoint of the northern bank of the reservoir. The Pit is rectangular in shape and has a surface area of 3.2 hectares. Excavation of the gravel started in March 2010. The gravel was taken from the pit about 600 metres along a track to a washing and screening plant closer to the reservoir. The track was temporary and was constructed specifically for the purpose of transporting the gravel. Once it had been washed the gravel was moved and dumped to form part of the dams or the causeway. The gravel provides drainage layers to prevent water pressure building up on the downstream slope of the dam. In total between about 160,000 and 200,000 m^3 of aggregates were used in the construction process. Once the extraction had been completed, Rye Borrow Pit was backfilled with clay and other surplus material from the building works and it was covered with a layer of topsoil to be used for agricultural purposes.

13. The construction project also used clay from another pit called Blind Knight's Pit which is situated within a bend of the reservoir. HMRC accept that that Pit is part of the site although since no aggregates were won there, the application of section 19(3)(e) was not at issue.

14. NWL owns the freehold to all the land covered by the reservoir and the two pits. The construction contract for the works at the Abberton Reservoir was a single contract let to a main contractor, Carillion. The Tribunal noted that the raising of the main dam, the construction of the col dams and the causeway and the extraction from the Rye Borrow and Blind Knight's Pits were all part of a single construction project and the contract price was for all the work on the site including the work at Rye Borrow Pit.

15. The Tribunal described the planning application process that led to the approval of the works. Various conditions were attached to the planning approval including Condition 104 which required the submission and approval of a five year restoration scheme for Rye Borrow Pit to return it to agricultural use following completion and extraction. More significant were Conditions 105 and 106 which stipulated:

> "Condition 105
>
> No Material to be Exported – Material extracted from the Rye Borrow Pit shall only be used for the purposes of constructing the raised reservoir and shall not be exported from the site for any other purpose.
>
> Reason – the extraction is contrary to the provisions of the adopted Essex Mineral Plan and permission has only been granted in view of the particular circumstances of the development.

Condition 106:

No Import of Aggregates – No aggregates to replace those that would otherwise be extracted from Rye Borrow Pit shall be brought onto any part of the application site.

[Reason same as above]"

16. Following correspondence between the parties in early 2010, HMRC wrote to NWL on 7 April 2010 asking them to submit an application to register for aggregates levy. There was further debate with both parties adopting the positions that they have continued to put forward in this appeal. On 18 April 2011, HMRC confirmed that they were registering NWL for aggregates levy and the registration was backdated to 8 January 2010.

The Decision

17. The Tribunal described the Reservoir and the construction works in some detail and then set out the parties' submissions on the proper construction of section 19(3)(e). At paragraph 119 the Tribunal stated that the starting point was 'to construe section 19(3)(e) purposively'. They considered that it was relevant to look at what kinds of exploitation are likely to fall within section 19(3)(e) in the first place. In other words, looking at the list of activities in section 19(1) that amount to 'exploitation', which of those activities has the potential to result in aggregate 'again becoming part of the land' at the site from which it was won? The Tribunal concluded that exploitation by way of use for construction purposes was the most likely to lead to aggregate again becoming part of the land. They did not rule out that other kinds of exploitation might also have that result, but those activities were far less likely to do so than exploitation by way of use for construction purposes. They agreed with NWL that interpreting 'site' so that the exclusion only applied where aggregate was used for construction purposes within the particular footprint of the quarry or pit from where the aggregate was extracted would be too narrow: it was difficult to see when the relief would apply.

18. The Tribunal considered two cases concerning the interpretation of the levy. The first is *Customs and Excise Commissioners v East Midlands Aggregates Ltd* [2004] EWHC 856 (Ch) ('*East Midlands*'). That case concerned the interpretation of a different provision, namely section 17(3)(b) which exempts aggregate from the levy where:

"… 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"

19. In the *East Midlands* case the identification of the 'site of any building or proposed building' was in issue. The building work was the construction of a new warehouse together with a lorry park adjacent to an existing warehouse. In order to build the lorry park, aggregate had to be removed from the land where the lorry park would be. The taxpayer argued that the whole area, including the lorry park, comprised the site of the proposed building whereas HMRC argued that the footprint of the lorry park was separate from the footprint of the warehouse and, since the lorry park was not a building, the aggregate was not exempt.

20. Rimer J upheld the Tribunal's conclusion that the site included the lorry park as well as the new warehouse. He held that the phrase 'the site of … [the] proposed building' must be given a 'sensible workable meaning' and that the meaning corresponds to what would ordinarily be regarded as the building site for the proposed works. That was the entire area on which the builders would be working for the purpose of constructing the building. Rimer J posited the following test:

> "If ten people were to be lined up outside an area of land on which a detached house was to be built and on which pipes were to be laid linking the house to mains services, and they were asked to identify "the site of…[the] proposed building", I do not believe any of them would suggest that it was the footprint of the proposed house plus the routes to be followed by the pipes."

21. The Tribunal in the present case recognised that the *East Midlands* case concerned the interpretation of a different provision of the Finance Act and that the meaning of 'site' in section 17 was not the same necessarily as the meaning of 'site' in section 19(3)(e). They regarded the relevance of the case only as 'providing an example of recourse being made to the ordinary meaning of "site" and of a narrow construction being rejected which was not in line with the ordinary meaning': paragraph 155. The Tribunal also wisely declined to be drawn into questions about where the ten hypothetical people should be standing or what qualities and attributes they should be assumed to have. They held that the reference to 'ten people' was simply a convenient way of considering what an ordinary person would understand by the word 'site' and should not be applied over-literally.

22. The other case referred to by the Tribunal did concern the interpretation of section 19(3)(e). In *Hochtief Ltd v Revenue and Customs Commissioners* [2009] UKFTT 321 (TC) ('*Hochtief*'), the Tribunal was considering a hydro-electric dam in Scotland built using rock extracted from a quarry a short distance from the place where the dam was to be built. HMRC argued that the 'site' was the footprint of the dam and that this was different from the footprint of the quarry so that there were two sites. The Tribunal held that the works around the dam and the reservoir was the relevant site for the purposes of section 19; the quarry and the dams, though clearly physically separate, were all part of the same site; the condition in section 19(3)(e) was not satisfied and the exploitation of the aggregates was not commercial. The Tribunal in the present case regarded *Hochtief* as an example of the Tribunal focusing on the ordinary meaning of the word 'site'. The Tribunal rejected HMRC's contention that the decision in *Hochtief* turned on the fact that at the end of the construction project, the hydro-electric dam would cover the quarry with water. In two important paragraphs the Tribunal then said this:

"161. We also take into account our earlier discussion in relation to the need to consider the exploitation to which the relief in s19(3)(e) is directed and our view that it is primarily directed towards exploitation in the form of use of aggregate for construction purposes. That suggests to us that, while not conclusive, the issue of what is the construction site is a significant factor to take into account.

162. This is also consistent with how we think an ordinary person would approach the meaning of "site". The person would we think ask "site for what?". HMRC say the legislation answers this by the words "site at which [the aggregate] was won" but we have discussed above why we think this interpretation is too narrow. The notion of site in this context ought, in our view, to acknowledge that the relief applies primarily to exploitation in the form of use for construction purposes. The activity given in answer to the question "site for what?" has to, we think, bear some relation to something other than aggregate winning in order to give 19(3)(e) some purpose."

23. The Tribunal then applied section 19(3)(e) to the facts of the case. They considered a range of factors:

(a) the distance, scale and size of the project: they held that these factors did not suggest that the locations constitute one site but, given this was a large scale civil engineering project, these factors were also 'not… inconsistent with them being on one site';

(b) the site boundaries in the planning application: these were not determinative but were something that the Tribunal ought to take into account. Looking at the plans, and in particular at Condition 105, this factor was supportive of the extraction of the gravel and the raising of the reservoir being viewed as part and parcel of the same project. However this factor did not assist the Tribunal a great deal in applying section 19(3)(e) and so was not something they placed any significant weight on;

(c) the site boundaries in the construction contract and the fencing on the ground. The Tribunal considered that while the construction site is not necessarily determinative of what is the site for section 19(3)(e), it is a significant factor to take into account because that is the primary form of exploitation to which the relief in that section is directed. The extent of the construction site was a matter of fact and impression, not necessarily co-extensive with the bounded area. They concluded that the pits and the reservoir formed one construction site;

(d) NWL's rights to the whole site. The fact that NWL owned both the pits and the reservoir enabled it to create the temporary haulage road for the transport of the gravel, thereby breaching any 'buffer area' created by agricultural land in between the Rye Borrow Pit and the reservoir.

24. In applying section 19(3)(e), the Tribunal held that the relevant time to look at the site was at the time the aggregate was won.

25. In its conclusions the Tribunal said:

"*Conclusion*

195. The question we have had to consider is whether the Rye Borrow Pit location, the main dam, various col dams, and causeway were the "site at which [the aggregate] was won" for the purposes of s19(3)(e). For the reasons set out above, "site" in this context does not mean the particular location where the aggregate is won but must we think bear a wider meaning in order to reflect its purpose. The locations are all within the same planning application site and while we take that into account it is not something we give any significant weight to. In contrast whether the locations are on the same construction site is of significance given s19(3)(e) has construction purposes firmly within its purview.

196. Taking into account the size and scale of the construction project we consider the pit and gravel use locations are on the same one construction site which is delineated by a fenced off construction boundary. We think that if the ordinary person were asked whether the locations were on one site, they would in view of the clearly defined construction site say that it was. The construction site containing both the pit and the locations where the gravel was used is a "site" for the purposes of the relief referred to in s19(3)(e) FA 2001. That s19(3)(e) applies is in our view consistent with the relief having as a primary purpose the relief from levy where aggregate is sourced and extracted within the construction site rather than being restricted to construction at the particular area of ground where the aggregate was extracted."

The grounds of appeal

26. HMRC sought permission to appeal on three grounds. They were refused permission to argue the third ground – that the decision was one that no reasonable decision maker could have arrived at on the facts. The first and second ground raise questions of law rather than fact.

Ground one: interpretation of section 19(3)(e)

27. The first basis for challenging the Decision is that the Tribunal misdirected itself by identifying the relevant question in issue as whether the Rye Borrow Pit formed part of the same location as the construction site. HMRC refer to paragraphs 195 and 196 as showing that the Tribunal in effect replaced the question 'are the Rye Borrow Pit and the reservoir both part of the site from which the aggregate was won?' with the question 'are the Rye Borrow Pit and the reservoir both part of the same construction site?'.

28. Although I see that the Tribunal has referred to the 'construction site' in those paragraphs I do not consider that a fair reading of the Decision taken as a whole shows that they regarded the 'site' referred to in section 19(3)(e) as necessarily co-extensive with the construction site. On the contrary, as I have described, they considered a range of factors, some of which they gave significant weight to and some of which they gave less weight to. The Tribunal did examine the photographs and plans of the construction site but they expressly stated in paragraph 180 that although that boundary was a significant factor, it was not

necessarily determinative of the extent of the site for the purposes of section 19(3)(e). Despite the wording of the concluding paragraphs 195 and 196, the Tribunal did not in fact substitute the wrong question for the right one.

29. HMRC however argue that the Tribunal erred in treating the boundary of the construction site as a significant factor because the basis for them doing so was an incorrect appreciation of the context of section 19(3)(e). There are two aspects to that context; the Tribunal's assessment that the primary form of exploitation where the exclusion in section 19(3)(e) is likely to be relevant is exploitation by way of use for construction purposes within section 19(1)(c) rather than any other kind of exploitation listed in section 19(1) and secondly the Tribunal's assessment of the policy behind the condition in section 19(3)(e).

30. So far as the kind of exploitation most relevant to section 19(3)(e) is concerned, this factor was an important part of the Tribunal's approach to the proper delineation of the site. They discussed this at paragraphs 119 to 123 and returned to it in paragraph 161. Ms Busch appearing on behalf of HMRC submits that this was an error of law because there are other kinds of exploitation which can fall outside the definition of commercial exploitation on the application of the exclusion in section 19(3)(e). The example she gave was where aggregate is removed from the site (thereby being 'exploited' within the meaning of section 19(1)(a)) but is then not in fact needed where it has been removed to. She argued that the purpose of section 19(3)(e) is to encourage the owner of the unwanted aggregate to return it to the land from which it was won rather than leave it in an unsightly heap, marring the countryside. I do not accept that such a situation would necessarily benefit from the exclusion in section 19(3)(e) because in that case the aggregate again becomes part of the site from which it was won not as a result of being removed from the site but as a result of being returned to the land at some later point. Being 'returned to the land' is not a form of exploitation listed in section 19(1) and that subsection is exhaustive of when aggregate is exploited ('if, and only if, …').

31. I also agree with the point the Tribunal made at paragraph 120 of the Decision that the scenario where unwanted aggregate is returned to the quarry is covered by the provisions made for tax credits where levy has been paid. Section 30 empowers HMRC, by regulations, to make provision for cases where levy has been paid on a quantity of aggregate and that aggregate is then 'disposed of (by way of dumping or otherwise in such manner not constituting its use for construction purposes as may be prescribed'. That power was exercised in The Aggregates Levy (General) Regulations 2002 (S.I. 2002/761) which deals with tax credits. Regulation 13 provides that a person who has commercially exploited taxable aggregate and has paid the levy on it is entitled to a tax credit in certain circumstances including where the aggregate is disposed of (by dumping or otherwise) by returning it without further processing to its originating site. That regulation is therefore apt to cover the situation where unwanted aggregate is tipped back into the quarry after being removed from the quarry.

32. Ms Busch argues that section 19(3)(e) and regulation 13 are covering the same situation, the only distinction being whether the moment at which the aggregate again becomes part of the land by being tipped back into the quarry happens in the

same accounting period as its removal (in which case section 19(3)(e) prevents that removal amounting to commercial exploitation so no levy will be paid) or in a different accounting period (in which case section 19(3)(e) will not have applied, levy will have been paid, and regulation 13 will entitle the taxpayer to a tax credit in a subsequent accounting period).

33. That interpretation does not, however, overcome the problem that some effect must be given to the words 'as a result' in section 19(3)(e). In any event, the Tribunal did not find that the only kind of exploitation to which section 19(3)(e) might be relevant was exploitation by way of use for construction purposes – they found that that was the most likely kind and that the section had to be construed in that context. Ms Busch also accepted that the return of unwanted aggregate to the quarry was not the only kind of exploitation that could fall within section 19(3)(e) and that use for construction purposes might also benefit from section 19(3)(e). For example, HMRC accepts that where a company buys an undeveloped quarry and uses some of the aggregate to build the infrastructure needed to get the business going, section 19(3)(e) would apply to prevent that exploitation from being commercial exploitation.

34. Where one is considering exploitation by way of such use, then the effect of section 19(3)(e) is that aggregate used for construction purposes is being exploited, but it is not being exploited commercially if, as a result of it being used for construction purposes, it again becomes part of the land at the site from which it was won. If one approaches the issue that way, I consider that the Tribunal was right to regard consideration of the construction site as a significant factor – albeit not a determinative one - in identifying the site. If one is asking: does this particular use of aggregate in a construction project amount to the commercial exploitation of that aggregate, then the nature of the construction project and the location of the building work in relation to the quarry must be an important consideration.

35. I do not consider that the Tribunal erred in its assessment of the decision in *Hochtief*. It is true that the facts in that case were different from the facts here because in *Hochtief* the quarry from which the aggregate was won was going to be flooded with water to form part of the reservoir once the works were finished. In the instant case Rye Borrow Pit was not going to form part of the reservoir. I do not accept that this distinction means that the present case must fall on a different side of the line from the decision in *Hochtief*. Such a conclusion would go against the tenor of the *East Midlands* decision which emphasises that the identification of the 'site' in these provisions is a multi-factorial test in which one weighs a number of factors without relying on any one factor as being conclusive.

36. I do not accept HMRC's argument that the Tribunal was wrong to look at the state of the construction site as at the date of the building works (when a temporary haulage road had been created to transport the aggregate to the reservoir) rather than when the work had been completed (when that track would be removed and the land between the Pit and the reservoir returned to agricultural use). There is nothing in the wording of the section to direct attention exclusively to the position once the construction works have finished. I accept Mr Baldry's submission that it is important for a builder to know at the time it makes use of the aggregate

whether the exploitation of the aggregate will be 'commercial' or not and hence whether he is under an obligation to register for the levy under section 24 or not. The definition of 'taxable activity' in section 24(3) indicates that a person will know at the time he is carrying on a particular activity whether it amounts to subjecting the aggregate to commercial exploitation or not and whether he is responsible for it or not. This does not fit comfortably with an interpretation which requires the person to predict on the basis of the initial building plans whether there is going to be a sufficient nexus between the quarry and the reservoir once the project is completed many months afterwards for the exploitation to fall outside the definition of commercial exploitation.

37. As to the position during the construction works, the Tribunal considered the evidence of Mr Hayes for HMRC that the haulage road was not part of the site but were entitled to reject that evidence on the basis of the aerial and ground based photographs that they examined.

38. HMRC argue that the Tribunal was led into error in construing section 19(3)(e) by a misunderstanding of the purpose of the exclusion from commercial exploitation allowed here. The Tribunal referred to the judgment of Moses J in *R (oao British Aggregates Associates and others v Customs and Excise Commissioners* [2002] EWHC 926 (Admin) ('*British Aggregates*'). Although they recognised that the overall policy for the general scheme of the levy was to discourage extraction of 'first use' or 'virgin' aggregate, they accepted NWL's submission that the policy underlying section 19(3)(e) was to encourage gravel to be sourced locally at the site where it is to be used to avoid the environmental costs of transporting gravel from other sites. HMRC argue that the policy behind the levy is nothing to do with minimising the transport of aggregate. On the contrary, as Moses J recognised in *British Aggregates*, the aim of the levy is to discourage the use of first use aggregate in favour of either recycled aggregate or aggregate comprising waste material created in the course of some other activity that might otherwise go to landfill. The effect of the levy is to incorporate in the price of the virgin aggregate an element of cost (namely damage to the environment) that is usually external to the cost of producing the virgin aggregate. This may well result in making it cost effective to buy recycled aggregate from a supplier, say, 10 miles away than to buy virgin aggregate from a supplier five miles away.

39. I agree with HMRC to the extent that it is difficult to see how the exception in section 19(3)(e) can be squared with the primary environmental objective pursued by the levy. One would have thought that the situation where the operator of a construction site is comparing the benefits of using virgin aggregate won on site with the benefits of transporting recycled aggregate from elsewhere is precisely the situation where imposing the levy would ensure that the environmental disadvantages of using virgin aggregate are taken into account in deciding which option is more cost effective. However, although minimising transport is not the primary goal of the levy, I consider that the policy basis for section 19(3)(e) must be to avoid discouraging use of aggregate which is immediately to hand when construction works are being carried out. That follows from a rejection of the submission that the primary aim of section 19(3)(e) is to encourage the return to the land of aggregate that has been removed but is not, in the event, needed. I do

not accept that the references to the policy behind section 19(3)(e) led the Tribunal into an error of law in their interpretation of the statutory provisions.

40. I also reject the submission that the Tribunal's interpretation makes a substantial inroad into the application of levy by excluding a typical engineering project from the scope of the levy. The exclusion in section 19(3)(e) only applies where the aggregate is used in its original form, not when it is used to make concrete or subjected to any other process. This is reflected in the definition of use for construction purposes in section 48(2) as including "mixing it with anything as part of the process of producing mortar, concrete, tarmacadam, coated roadstone or any similar construction material"

41. Finally HMRC refer to section 19(4) as an indication that the term 'site' in section 19(3) is intended to be construed to apply to a narrow area. Section 19(4) makes special provision extending the application of the exclusion in section 19(3)(e) for agriculture and forestry. According to section 19(4), the exemption in section 19(3)(e) can apply not only where the aggregate becomes part of the land at the site from which it was won but also if it becomes part of 'other land', if that 'other land' is occupied by the same person and where both pieces of land are occupied by that person for the purpose of an agriculture or forestry business.

42. During the course of argument I raised with counsel whether the requirement in section 19(4) that the 'other land' is occupied 'together with' the site from which the aggregate was won suggested that the sites had to be close to each other. It emerged that the reference to 'other land' had been substituted in 2002 for the original wording of the Act which referred to 'adjacent land' rather than to 'other land'. Although it is clear, therefore, that the subsection was intended to ensure that the exclusion in section 19(3)(e) applied more broadly in respect of agricultural and forestry land than other uses, it is difficult to draw any particular inference from that about the scope of section 19(3)(e) in its unextended form.

43. I therefore find that Ground One of the appeal does not succeed. Despite what was said at in the concluding paragraphs, a fair reading of the Decision as a whole shows that the Tribunal did not apply section 19(3)(e) on the basis that the site referred to there must be the same as the construction site. They regarded the scope of the construction site as a significant factor, amongst the other factors they described. There was no error of law in that approach.

Ground 2: relevance of section 24(7)

44. The second ground of appeal arises from the provisions in the Act about maintaining a register of people subject to the levy. Section 24(6) provides for HMRC, if they think fit, to register premises that appear to them to be operated or used for certain activities. Those activities include premises where aggregate is won.

45. Section 24(7) provides:

> "Where any premises are registered in accordance with subsection (6) above as a registered site, the particulars included in the register shall set out as the boundaries of the site such boundaries as appear to the Commissioners best to

secure the avoidance of levy is not facilitated by the registration of any part of any premises that is not used or operated as mentioned in subsection (6) above"

46. Section 24(8) provides that an entry in the register can specify that the premises registered under a person's name as a registered site are to be taken to be the originating site of any aggregate won there. Where the register so specifies, then any question for the purposes of Part 2 as to the boundaries of the originating site of any such aggregate shall be conclusively determined in accordance with that entry.

47. HMRC argues that in registering the site in a way which limited its scope to a small area of land comprising only the Rye Borrow Pit, HMRC was acting in accordance with its power under section 24(7) to delineate the boundaries so as to prevent the avoidance of the levy. They say that the Tribunal did not explain why it was entitled to interfere with the discretion that section 24(7) confers on HMRC to determine the boundaries of the site included on the register.

48. In my judgment the Tribunal was not addressing the issue as to the proper scope of the premises to be registered but was considering the prior issue as to whether the premises should be registered at all. There is no other commercial exploitation of the aggregates from Rye Borrow Pit alleged to be taking place other than the use of the aggregates in improving the reservoir. If, as the Tribunal found, there is no commercial exploitation taking place at all here, then the question as to where the boundary lines should be drawn on the register does not arise – there is nothing to register.

49. There was therefore no error of law in failing to explain why the boundaries of the site for the purposes of section 19(3)(e) should be different from the boundaries drawn by the Commissioners under section 24.

Disposition

50. For the reasons set out above, I dismiss the appeal.

TRIBUNAL JUDGE: The Hon Mrs Justice Rose DBE

RELEASE DATE: 13 March 2015