[2016] UKUT 0417TCC

Case No UTJR/2015/005

Value Added Tax – supplies of commercial waste collection services by Local Authorities – section 45(1)(b) Environmental Protection Act 2009 and section 41A Value Added Tax Act 1994 – whether supplies within VAT – judicial review of HMRC failure to collect VAT on supplies – preliminary issue – supplies within section 45(1)(b) not taxable

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TRANSFERRED FROM
THE HIGH COURT OF JUSTICE **CO/5665/2014**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

THE QUEEN

on the application of

THE DURHAM COMPANY LIMITED
(trading as MAX RECYCLE)

Claimant

-and-

(1) THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS
(2) HM TREASURY

Defendants

-and-

THE LOCAL GOVERNMENT ASSOCIATION

Tribunal **Mr Justice Warren Interested Party**

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 19 July 2016

Alan Bates (instructed by Tilly, Bailey and Irvine LLP) for the Claimant

George Peretz QC (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Defendants
The Interested Party not appearing but having made written submissions

Introduction

1. This is an application for judicial review, commenced in the Administrative Court and subsequently transferred to the Upper Tribunal, concerning the lawfulness of the VAT treatment being afforded to local authorities carrying out certain trade waste collection and disposal services. The applicant, The Durham Company ("**TDC**"), carries on business including the collection and disposal of trade waste. I shall refer to the first and second defendants as "**HMRC**" and "**HMT**" respectively and to the Interested Party as "**the LGA**".

2. A direction was made on 17 February 2016 by the Chamber President for the trial of the following preliminary issue:

> "Where a local authority ("**LA**") that is a Waste Collection Authority ["**WCA**"] for the purposes of the Environmental Protection Act 1990 ["**EPA 1990**"] is making supplies of trade waste collection services to business customers (*i.e.* entities occupying non-residential property) in its area, are those supplies by the LA "activities in which it is engaged as a public authority" within the meaning of section 41A(1) of the Value Added Tax Act 1994 ["**VATA 1994**"] and/or Article 13(1) of the Principal VAT Directive ["**Article 13(1)**" and "**PVD**"] ?"

3. There is a statement of agreed facts which I set out in the Annex to this decision:

    a. Paragraphs 1 to 3 explain what a WCA is and what its functions are.

    b. Paragraphs 4 to 7 describe the parties. TDC carries on business as a provider of commercial waste collection services. When it supplies trade waste collection services, it is required to charge VAT on those supplies. The LGA is the representative body for LAs and represents its 415 member authorities in relation to matters affecting the interests of LAs in England and Wales.

    c. Paragraphs 8 to 13 describe the LAs' provision of trade waste collection services. All LAs which are WCAs collect household waste either "in-house" or by contracting-out. In some cases, WCAs have provided trade waste collection services to properties located outside their area. Paragraph 13 sets out factual

situations which apply in at least some cases where WCAs supply trade waste collection services to properties within their areas.

4. The statement of agreed facts is supplemented by the following witness statements which I will refer to as necessary:

    a. Two witness statements on behalf of TDC made by Scott Hawthorne, Managing Director of TDC.

    b. Four witness statements on behalf of HMRC made by David Ogilvie, a Technical Advisor for HMRC responsible for VAT and refund schemes for LAs and central government.

    c. Four witness statements made on behalf of the LGA by:

        - Hilary Tanner, an adviser to the LGA;
        - John Coates, Head of Waste Services at North Lincolnshire Council;
        - Jarno Stet, Waste Services Manager for Westminster City Council; and
        - John-Paul Lovie, head of Waste Management in the Community and Environmental Services Department at Blackpool Council.

5. There has been no cross-examination of the witnesses and none was sought. I have no reason to doubt the unchallenged evidence.

Background

6. Trade waste collection services are required by a wide range of organisations, including shops, banks, offices, doctors' surgeries, schools, and nursing homes. TDC provides some trade waste collection services. Although the parties have referred variously to trade waste and commercial waste, I will use the latter since that reflects the relevant statutory language. It is important to appreciate that when I use the phrase "commercial waste collection" I am referring to the nature of the waste as commercial waste and not to

the nature of the collection which may or may not be commercial in the sense of profit-making or surplus-generating.

7. Mr Hawthorne's evidence contains this assessment:

> "Competition for trade waste services takes place largely on the basis of price. Customers see trade waste collection as essentially a 'generic' service. They want a sufficient number of waste collections to suit their requirements, but otherwise they just want the cheapest supplier. Businesses which do not run formal periodic tenders for selecting a trade waste collection service supplier will usually 'shop around' by seeking a number of quotations."

8. When TDC makes supplies of trade waste collection services, it has to charge its customers VAT at the standard rate. The extent to which the customer will have to bear the burden of tax will, of course, depend on the nature of the customer's own activities in particular whether or not it is registered for VAT and, if it is, on its mix of taxable and exempt supplies. For some businesses, the true cost of TDC's services will include the whole or some of the VAT paid to TDC.

9. TDC's case is that among its competitors in the supply of trade waste collection are a growing number of LAs. Mr Hawthorne says that TDC's experience is that such LAs actively compete with TDC and other private sector operators. I think that that description of his experience is the conclusion which he draws from the actual facts to which he refers, namely what he describes as the advertising and marketing of trade waste collection services. He says that LAs provide price quotations to prospective customers who are choosing between competing trade waste collection suppliers and thus bid directly against private sector companies. I will be considering later what the witnesses for the LGA say about these matters. But I note at this stage that Mr Hawthorne's evidence goes only to his experience, which is of LAs in the area in which TDC operates. Since different LAs operate in different ways, considerable care must be taken in assessing the impact of TDC's arguments across the whole country.

EU Legislation

10. The relevant EU legislation is contained in Article 13(1) which provides relevantly that LAs

> "shall not be regarded as taxable persons in respect of activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities where their treatment as non-taxable persons would lead to significant distortions of competition."

UK legislation

11. The following provisions are relevant to the questions before me:

a. Section 101(1) Local Government Act 1972: this provides that a local authority may arrange for the discharge of any of their functions by any other local authority.

b. Section 45 EPA 1990: this is headed "Collection of controlled waste" and provides as follows:

> "(1) It shall be the duty of each waste collection authority –
> (a) To arrange for the collection of household waste in its area except……
> (b) If requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste….
> (2) [relates to industrial waste]
> (3) [relates to household waste]
> (4) A person at whose request waste other than household waste is collected under this section shall be liable to pay a reasonable charge for the collection and disposal of the waste to the authority which arranged for its collection; and it shall be the duty of that authority to recover the charge unless in a case of a charge in respect of commercial waste the authority considers it inappropriate to do so.
> ……"

c. Section 48(1) EPA 1990:

> "(1) Subject to subsections (2) and (6) below [which are not relevant], it shall be the duty of each waste collection authority to deliver for disposal all waste which is collected by the authority under section 45 above to such places as the waste disposal authority for its area directs."

d. Section 63A(1) EPA 1990:

> "(1) A relevant authority [a WCA or a waste disposal authority] may do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything which in its opinion is necessary or expedient for the purpose of minimising the quantities of controlled waste, or controlled waste of any description, generated in its area."

e. Section 75 EPA 1990 contains a number of definitions including at subsection (7) "commercial waste" which means "waste from premises used wholly or mainly for the purposes of a trade or business or for the purposes of sport, recreation or entertainment" excluding a number of listed items. Regulations may provide for waste of a prescribed description as being or not being household waste, industrial waste or commercial waste.

f. Section 41A(1) VATA 1994:

> (1) This section applies where goods or services are supplied by a body mentioned in [Article 13(1)] (status of public bodies as taxable persons) in the course of activities or transactions in which it is engaged as a public authority."

It is common ground that the WCAs' supplies of commercial waste collection services are "economic activities" for the purposes of VAT and therefore, in principle, within the scope of VAT.

g. Section 93 Local Government Act 2003: this provides, in subsection (1), that a LA may charge a person for providing a service to him if (a) the authority is authorised, but not required, by an enactment to provide the service to him, and (b) he has agreed to its provision. But under subsection (2), this does not apply if the authority (a) has power apart from section 93 to charge for the provision of the service or (b) is expressly prohibited from charging for the provision of the service. Under subsection (3), the power to charge is subject to a duty to secure,

taking one year with another, that the income from charges does not exceed the cost of the provision.

h. Section 95(1) Local Government Act 2003 makes provision for the making of orders authorising LAs to do for a commercial purpose anything which they are authorised to do for the purposes of carrying out their ordinary functions. Section 95(2), however, provides that no order under subsection (1) may authorise a LA (a) to do in relation to a person anything which it is required to do in relation to him under its ordinary functions or (b) to do in relation to a person anything which it is authorised, apart from section 95, to do in relation to him for a commercial purpose. Under subsection (4), power conferred by an order under subsection (1) may only be exercisable through a company.

i. Localism Act 2011: section 1(1) introduces a new power of a local authority "to do anything that individuals generally may do". Where the subsection confers a power to do something, it confers (subject to sections 2 to 4) power to do it for a commercial purpose or otherwise for a charge, and to do it for or otherwise than for, the benefit of the authority, its area or persons resident or present in its area. Section 3 provides limits on charging in exercise of the general power, which I will explain later.

j. Section 4(1) and (2) Localism Act 2011 provides that the general power confers power to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose. Where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.

EU case law

12. The condition for VAT exemption in Article 13(1) that the relevant authority (LAs in the present case) are carrying on activities "in which they engage as public authorities" has been considered principally in three cases:

    a. Case C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2000] ECR I-11435, [2001] STC 560 (***Fazenda***);

    b. Case C-288/07 *Revenue and Customs Commissioners v Isle of Wight Council* [2008] ECR I-7203, [2008] STC 2964 (***IoW***); and

    c. Case C-174/14 *Saudaçor v Fazenda Pública*, judgment of 29 October 2015 (ECLI:EU:C:2015:733), [2016] STC 681 (***Saudaçor***).

13. In *Fazenda*, the relevant public authority let car parking spaces to motorists on the public highway, in car parks on the city's public property and in car parks on the city's private property. It was assessed to VAT on receipts from parking meters and car parks in Oporto.

14. In its discussion of the issues, the Court restated (see [16] of the judgment) the proposition that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. It also concluded (see [17]) that it is clear from the settled case law of the court that activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators.

15. In [19] it observed that whether an activity is engaged in as a public authority cannot depend on the subject matter or purpose of the activity. The Advocate-General had made the same observation at [29] of his Opinion adding in [30] that many tasks which were originally reserved for public authorities are now performed by private persons and therefore a definition based solely on the subject matter of the activity is inappropriate.

16. At [21], the court stated that the national court must, in accordance with the case law referred to in [16] and [17], analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators. And at [22], the court stated that the fact that the pursuit of the activity involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime. It is for the national court (see [23]) to classify the activities at issue in the light of the criterion adopted by the CJEU.
17. Accordingly, it was held (see [24]) that the letting of spaces for the parking of vehicles was an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of what is now the first paragraph of Article 13(1) if it is carried on under a special legal regime applicable to bodies governed by public law. That is the case where the pursuit of the activity involves the use of public powers.
18. I add references to [35], [37] and [38] of the Advocate-General's opinion:
    a. At [35] he noted that the overall context and the way in which the activity is carried out are important factors in defining an activity as one engaged in as a public authority.
    b. In [37] he said that "what is decisive is national law which determines whether the activity to be classified must be regarded as constituting the exercise of public administrative law or as private law which applies equally to all economic operators". This reflects what the court said at [15] of its judgments in Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola*

d'Arda v Comune di Carpaneto Piacentino and at [10] in Case C-4/89 *Comune di Carpaneto Piacentino v Ufficio Provinciale Imposta sul Valore Aggiunto di Piacensa* (all referred to in [16] of *Fazenda*): "Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity [*ie* as public body or as private operator] is the legal regime applicable under national law".

c. In [38] he said that it is necessary "to assess all the circumstances of the specific case".

19. Reference should also be made to [16] of the first of those two Italian cases. It is, I think, the origin of the phrase "special legal regime" and refers back to the legal regime applicable under national law referred to in that quoted sentence. The contrast was made with other cases so that "when [the public authorities] act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting 'as public authorities'".

20. The reference to the CJEU in *IoW* related to the application of the competition proviso in Article 13(1). The VAT Tribunal had already determined that the Isle of Wight Council's activity of operating off-street car parks was an activity in relation to which it was acting as a "public authority". Both the Advocate General (Maduro) in that case, as well as the Commission, clearly had reservations about that conclusion. Thus, at [11] of his Opinion he stated that "it is not certain that the provision of off-street parking is subject to a legal regime specific to the public body". There is a hint of reservation, too, in the judgment of the court at [23]. The only other reference I make to the judgment is to [31] where the derogation is described as covering principally "activities engaged in by public bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority".

21. *Saudaçor* really adds nothing, for present purposes, to the jurisprudence. The relevant paragraphs of the judgment are [70] to [72]. Thus [70] restates what can be found in *Fazenda* at [17], [19] and [22] and [71] restates what can be found in *IoW* at [31], both of which I have mentioned already. [72] reiterates, in effect, that the authority would not be acting as a public authority if the national legislation "did not amount to an instrument that could be used …. in order to carry out the activities at issue".

22. There is one other EU decision which has been cited by Mr Bates and by the LGA in its written submission. It is Case C-246/08 *Commission v Finland* ("***Finland***"). They have referred to what the Advocate-General (Ruis-Jarabo Colomer) said in section B of his opinion, in particular [57] to [60]. Those paragraphs provide a succinct resume of some of the principles. I think it is worth setting them out:

> "57. Therefore, for this exemption from VAT to apply, two conditions must be satisfied cumulatively: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority.
>
> 58. The Court of Justice offered a precise definition of this second requirement, stating that 'the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities "as public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders', they do not engage in such activities.
>
> 59. That explanation does not mean that the mere fact that businessmen or private practitioners are present in the same sphere of activity precludes an operation being regarded as carried out by an organisation acting 'as a public authority'. The term must be given a broad interpretation, encompassing both tasks which are essentially public, which private persons are prohibited from carrying out, and those in which a competitive situation arises with the private sector. Otherwise, it would be difficult to apply the 'exception to the exception' in the second subparagraph of Article 4(5), which makes 'such activities or transactions' subject to VAT if there is a risk of significant distortions of competition.
>
> 60. The exclusion in the first subparagraph of Article 4(5) is therefore objective since, although it takes the form of an elimination of the status of 'taxable person' of public bodies, it is only the way in which the activities at issue are carried out that determines the scope of the treatment of such bodies as non-taxable persons. Accordingly, the case-law has stated that the Directive considers the activities of public bodies to be subject to tax when the bodies carry them out 'not as bodies governed by public law but as bodies subject to private law', and that the only

criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law."

23. It is also worth noting (i) that in [63] of his Opinion, the Advocate General identified the provision for payment of the private lawyers participating in legal proceedings through the public legal aid office as a relevant factor distinguishing this situation from the ordinary client/adviser relationship and (ii) his conclusion in [64]:

> "63. Procedural assistance, whether provided by a public adviser or a private lawyer, constitutes a public task and is governed in both cases by the parameters of the 2002 legislation. The private lawyer who may participate in these situations is not guided only by the rules governing the exercise of his profession, as when he acts for any other client, since the aforementioned legislation imposes different requirements: first, the Administration (through the public offices) decides whether it is appropriate for him to accept that legal representation, checking in that regard that he satisfies the legal conditions and that there are no specific reasons advising against appointing him; secondly, he is remunerated in accordance with the official tariffs which are different from the general tariffs for fixing fees; and, finally, he is paid by the State, not by the person concerned. Apart from the rules of professional conduct and strictly procedural rules, there are not many similarities between the legal system governing the legal profession and that which regulates the lawyer's relationship with these special clients.
>
> 64. It is not a question, therefore, of an activity subject to the general rules of the market, but of transactions of a public authority which, when they are exercised directly by the Administration, are exempt from VAT."

The preliminary issue

24. I have set out the text of the preliminary issue at [2] above. TDC contends that the LAs engaging in the activity of trade waste collection services are not doing so "as public authorities" within the meaning of Article 13(1). In accordance with the case law of the CJEU, that phrase has been interpreted to mean that the authority must be acting under what it has described as a "special legal regime". TDC contends that a LA which has chosen effectively to 'go into the business' of providing trade waste collection services, doing so in competition with private sector operators, is not thereby acting in its capacity as a local authority, but rather is engaging in an activity which is equally open to a private sector operator under the same (or essentially the same) legal conditions.

Evidence

25. Although there is the agreed statement of facts to which I have already referred, Mr Bates, who appears for TDC, has taken me to some of the evidence in support of TDC's application to which I need to refer.

26. He starts with a document which is a summary report of a local authority commercial waste services survey 2011/12 for England. According to its front page, it provides a summary of the key findings from a comprehensive survey of commercial waste and recycling services provided by local authorities in England. It was prepared by an organisation known as WRAP (Waste and Resource Action Programme), a registered charity concerned with promoting sustainable economies and society. Section 2 contains a summary of key findings. I refer at this stage only to some statistics concerning the provision of commercial waste collection services by local authorities. Some 82% of English authorities provided a commercial residual waste service and some 68% of WCAs and unitary authorities in England offered a residual waste collection service. The proportion of local authorities in England offering commercial collection services was lower than other countries within the UK. England also had a much higher incidence of private sector contractors providing commercial collection services. Completed full surveys were collected from 69% of English authorities with a more basic survey being carried out in relation to the other 31%.

27. Mr Bates has also taken me to a print-out dated 12 December 2014 from the website of "letsrecycle.com" which I understand is an association of some LAs. The relevant part is a summary explanation of recently issued guidance from WRAP concerning commercial recycling. Under the heading "VAT exemption selling point for council services" the website states:

> "The exemption of council-run commercial waste collection services from VAT is a useful selling point, according to updated guidance from the Waste & Resources Action Programme (WRAP)."

28. That headline message is spelt out in more detail in the text, reference being made to HMRC's recent confirmation that LAs' commercial waste collection services were outside the scope of VAT. It also records the WRAP report as stating that the generation of income is one of the main reasons given for LAs offering commercial recycling services. I think it is worth quoting a couple of paragraphs:

> "WRAP explains in the report: Local authorities are able to recover all the costs associated with providing a commercial waste/recycling service. In addition, under section 95 of the Local Government Act 2003 an authority may set up a wholly council owned trading company to deliver commercial waste/recycling services. Offering a comprehensive recycling service will help protect income generated from residual waste customers who may demand recycling services as well and wish to use a single supplier. There are opportunities for authorities collecting dry recyclable from commercial customers to maximise income from the sale of these materials.
>
> Some councils are choosing to set up wholly-owned trading companies under Teckal exemption, such as Cheshire East council… However, this has come under fire from some private waste sector firms who claim it creates an unfair playing field."

29. Mr Bates has taken me to the updated (March 2014) Commercial Recycling Collections Guide produced by WRAP, which he describes as a manual for LAs in the design of their waste collection services. He referred to section 2.1.1 entitled "Income and income protection", from which the first paragraph quoted in the preceding paragraph is taken; and to section 2.1.6 identifying the possibility of existing residual waste customers being willing to adopt recycling services aligned with household configurations, with cost, service and environmental benefits. He also took me to a number of pages which demonstrate, he says, that this guidance is directed at LAs to explain how they can compete in the market for commercial waste collection services, including guidance on sales and marketing. I note, however, that the first paragraph quoted envisages the setting up of a (commercial) trading company in the context of the provision of recycling

services being supplied to existing customers who may demand residual waste collection services (which is a reference to the services provided under section 45(1)(b) EPA 1990 at a charge designed to effect full cost recovery).

30. Mr Bates has also taken me to various documents to demonstrate the nature of the activities of some LAs establishing, he would say, that the activities are not ones in which the LAs concerned are engaged as a public authority. He does not suggest that I should infer from this sample that all or even a majority of LAs in fact conduct business in this way or in a similar way. Rather, the evidence is adduced to show that activities of this sort are not ones which LAs conduct as public authorities. I list some of them, with brief explanation:

    a. An advertisement from Birmingham Commercial Waste Services. Attention is drawn to the fact that "unlike other commercial waste providers we **do not exist to make a profit**…" and that no VAT is charged.

    b. A Freedom of Information ("FoI") request from Southampton City Council. This revealed that the council operated commercial waste collections under commercial contracts with terms and conditions individually negotiated with businesses. No profit/surplus was made but a contribution was made to overheads of the waste service in general.

    c. FoI requests from South Cambridgeshire and LB Redbridge. These revealed that these councils provided limited out of area services.

    d. An FoI request from Reading Council. This revealed a surplus as a percentage of total income of 24%. The accounting basis of this figure is not, however, disclosed.

    e. An FoI request revealed that Nottingham City Council provided a commercial waste/recycling service but did not make a profit/surplus.

f. An FoI request from Malvern Hills DC. This revealed that the council provided a commercial waste collection service with a profit margin of 5.4%. The accounting basis is, again, not disclosed.

g. Other FoI requests. These revealed that some LAs detected no customers who required commercial waste collection on the basis that they could not obtain collections from any other service provider in the area. That was not universal. For instance, Ceredigion considered that 20% of their customers could not obtain such a service from any other provider.

h. A screen shot of a number of pages from the Oxford City Council website in March 2016. This lists the commercial waste services provided by Oxford Direct Services, described as a "commercial division of Oxford City Council". The first page highlights the VAT-free nature of refuse collection and disposal. The service is customer focused ("we listen to the needs of our customers, providing tailor-made waste solutions including a pay-by-weight service"). The Council's view of the powers under which it is operating is clear: "Oxford Direct Services is a member of the Oxfordshire Waste Partnership (OWP) and works within Section 45 of The Environmental Protection Act 1990 and Controlled Waste Regulations 1992 for the peace of mind of our clients".

i. A paper produced by Improvement East (part of the East of England Local Government Association) entitled "Local Authority Trade Waste: Opportunity or Headache?" Mr Bates refers to this paper for various statements made and to demonstrate the returns that can be made: 15% to 20% of gross income are said to be not unrealistic. He highlights the statement that "If invested in, it can be grown by taking market share from the private sector to increase surplus generation". He

also draws attention to the section headed “Fundamentals: where to start?” which use the language of competition and profit.

31. Evidence filed on behalf of the LGA includes the witness statement from Hilary Tanner mentioned at [4c.] above. Mr Bates does not dispute any matters of fact in that witness statement. The important point which comes out of her evidence is that there is a wide range of approaches among LAs to the discharge of their statutory duties in regard to waste collection and in the extent to which they engage in what can be called commercial waste collection and disposal. As she says in relation to the small number of councils who provided FoI responses and to whom she had spoken, the information suggests to her that “each council has taken a unique approach”: the information she has been provided with should only be regarded as a snapshop or sample of activity by councils and is not necessarily representative of all councils.

32. At paragraphs 9 to 15 of her witness statement there is a section under the heading “Approaches to discharging the duty to arrange for collection under the Environmental Protection Act 1990”. The following appear:

    a. Some councils do not operate a commercial waste collection service.

    b. Council responses are likely to be informed by the capacity of private waste contractors, arrangements for collection of domestic waste, whether the council has access to equipment or workforce to collect waste, the geography of the area and the nature of the local business.

    c. All councils she had spoken to were aware of the duty under the EPA 1990 and had put some arrangements in place.

    d. Some councils discharge their duty through providing assistance or signposting to collection services provided by other organisations. Her experience is that this

situation is most likely to arise when there is a strong and competitive market of private operators.

e. Sometimes a council will refer a potential customer to the waste operator already providing a collection service to the council.

f. Sometimes, a council may treat requests for collection services on a case-by-case basis. A request might be met by arranging collection through the household waste services if practicable.

33. Other evidence on behalf of the LGA is found in the witness statements of Mr Coates and Mr Stet mentioned in [4c.] above. Again, Mr Bates does not dispute any matters of fact in those witness statements.

34. Mr Coates observes that, as part of North Lincolnshire's duties under EPA 1990 (and in particular under section 45(1)(b) EPA 1990 referred to in the heading of the relevant section of his witness statement), the Council keeps streets clean, collects and disposes of fly-tipped waste and arranges for the collection of commercial waste from anyone within the area who requests it. He notes the Council's duty to comply with the landfill diversion targets within the Landfill Directive 1993/31/EC (implemened by the Waste and Emissions Trading Act 2003) and the recycling target in the revised Waste Framework Directive 2008/98/EC (implemented by the Waste (England and Wales) (Amendment) Regulations 2012).

35. He explains that the Council's commercial waste collection therefore sits within a framework of environmental obligations and objectives. The Council does not seek to make a profit and does not seek to increase waste collections. Rather, it encourages residents to reduce waste.

36. The Council sets its commercial waste collection charges on a costs-recovery basis, across the customer base as a whole and not on an individual transaction-by-transaction

basis. Full cost recovery can include an element to cover the costs of replacing equipment used in the provision of the service. There is no additional charge over and above full cost recovery that would equate to profit. The Council sets its tariffs annually and has a standard set of terms and conditions which apply to commercial waste collections. I note that the agreement headed "Combined Commercial Waste Agreement and Controlled Waste Transfer Note, Environmental Protection Act 1990" provides at Section F as follows:

> "I hereby make an application to [the Council] for the removal of waste described in Section C from the Collection Address and agree to the terms and conditions (as shown on reverse)".

37. The Council does not employ a sales and marketing team to approach businesses to secure new customers. The service has printed information leaflets and pages on the Council's website to explain the waste duty of care and how businesses can comply and what services the council provides.

38. In his first witness statement, Mr Stet (of Westminster City Council) gives an overview of Westminster's waste management provision. He explains that the collection of commercial waste needs to be understood in the wider context of the Council's powers, duties and policies as a public body. He notes that, in particular, the Council is subject to a duty under the EPA 1990 to ensure that the land and highways in its area are kept clear of litter and refuse; the Council must keep all its streets and public areas clear of litter including commercial waste. In particular, it falls on the Council to collect and dispose of any fly-tipped waste on its streets. He notes also the duty to arrange for the collection of commercial waste if requested by the occupier of commercial premises.

39. He notes a number of environmental obligations which apply to the Council but which do not apply to private operators when collecting and disposing of waste. In particular, the Greater London Authority's municipal waste management strategy imposes certain

standards on the Council and the Authority's emission standard of waste treatment required the Council (along with all London Boroughs) to pick outlets with very high environmental performance, whereas private sector operators can pick whichever waste outlet they choose.

40. Westminster discharges its waste collection and disposal duties, including its duties under section 45 EPA 1990, by arranging for its waste and recycling collections to be made through a long term contract with a private sector operator. Mr Stet points out that, as a public body, the Council is constrained by obligations imposed by procurement law in selecting its contractor. It has to procure that its waste management complies with all relevant legislation and policies, irrespective of the fact that it has contracted the service to a private entity. The contract between the Council and its selected contractor imposes a host of obligations which would not be applicable if that contractor were collecting and disposing of waste as a purely commercial operator.

41. When disposing of waste, the Council and its contractor do not have the freedom enjoyed by private operators. A private operator enjoys considerably more flexibility in where it can send its waste. Mr Stet gives an example of this disparity which I do not think it is necessary to explain in this decision.

42. Mr Stet refers to section 45 EPA 1990 and explains that, in accordance with the constraints which he had identified, the Council sets its charges for the collection of commercial waste on a cost recovery basis. That cost consists of a number of elements: collection, disposal/treatment, overheads, contract indexation, customer service provision, ancillary service costs. The Council aims to recover the full costs, on a global basis, for collecting and disposing of commercial waste from those businesses requesting its services.

43. The Council has a standard set of terms and conditions which apply to all commercial waste arrangements. These are not negotiated or customised for individual customers. Their main function is to limit the council's exposure to financial and legal risks from commercial waste collection agreements.

44. The Council publishes its commercial waste services on its website. It does so to minimise unnecessary calls, to inform residents about their obligations regarding waste disposal and to facilitate compliance. It also produces leaflets and brochures to inform business of their responsibilities (in particular their duty of care under the EPA 1990).

45. Mr Stet observes that it is in the Council's interests to encourage businesses within its area to dispose of commercial waste lawfully so as to minimise the incidence of fly-tipping and other unlawful disposals. It is also, he adds, in the interests of the Council to increase the number of users of its commercial waste services; since there are economies of scale, an increase in the number of users would enable the Council to avoid price increases which would otherwise be required (or to lower its prices). Lower prices encourage lawful disposal, which is to the benefit of residents in the Council's area. The Council does not seek to make any profits on its waste collections and disposal so it does not promote its services to increase margins.

Conclusions from evidence

46. Mr Bates submits (I take this from his skeleton argument) that this evidence shows the picture across the country to be as follows:

    a. Local authorities are effectively 'going into business' as providers of such services **as a matter of choice** [Mr Bates' emphasis] rather than legal obligation, in order to generate a commercial return.

    b. They actively promote their trade waste collection services in the same ways as commercial operators, including by means of print and online advertising

campaigns (often explicitly highlighting their ability to make "VAT free" supplies).

c. They employ "business development" personnel so as to better advertise their trade waste collection services to customers.

d. They are free to set their own prices, doing so with a view to being competitive and/or making a profit.

e. They enter into contracts with customers for collecting their trade waste, rather than responding to individual requests to arrange for commercial waste to be collected.

f. They are willing to make, and in fact make, collections from locations both within and outside their own local authority areas.

g. There is nothing that LAs do as part of providing trade waste services which could not also be done by a competing commercial operator (save that the commercial operator would have to charge VAT). Equally, there is nothing about trade waste collection services offered by commercial operators that cannot also be done by a LA.

h. The growth in the numbers of LAs providing trade waste services has not arisen out of any legal change, but is driven by the pressures on LAs to find commercial sources of revenue.

47. I am unable to accept the picture which Mr Bates perceives from the evidence which has been produced. Although it may be the case that each of his factors a. to h. applies to one or more LAs, I do not know from the evidence whether there is any LA to which all of the factors apply let alone what factors apply to each of the hundreds of LAs in England and Wales. As Ms Tanner's evidence makes clear (see [31] and [32] above) there is a wide variety of approaches. It cannot be said how any particular LA which conducts

commercial waste collection and disposal in its own area (or out of it) actually does so. A close examination of the facts relating to each LA is necessary before it can be said how the LA is conducting its operations.

48. Notwithstanding the great variety of ways in which LAs approach their commercial waste disposal activities, both parties appear to consider that the preliminary issue is one to which an answer can be given which is of general application. Mr Bates submits that, as a matter of law, LAs are not acting under a special legal regime whereas Mr Peretz says that they are. Before I consider their respective submissions about that, I wish to say something about what powers and duties LAs actually have to provide commercial waste collection services.

Waste collection services: LAs' powers

49. The position of HMRC, HMT and the LGA is that the services actually provided by LAs are all authorised by and effected under section 45(1)(b) EPA 1990. In contrast, TDC's position appears to be that section 45(1)(b) is concerned only with "arrangements" and does not provide a special regime for the actual collection of commercial waste.

50. As to those contentions, it will be remembered that section 45(1)(b) EPA 1990 imposes a duty on each WCA to arrange for the collection of any commercial waste if requested to do so by an occupier. Clearly, if a LA receives such a request, it is obliged to arrange for the collection. It may fulfil that obligation by employing a private sector operator to carry out the collection. If it takes that course, it is possible that, in practice, it will do so pursuant to a contract under which the private sector operator undertakes to provide the service whenever the LA directs it to do so. Alternatively, it could do so on an *ad hoc* case-by-case basis. The LA does not have to take that course: it can clearly carry out the collection 'in-house'. If it chooses to carry out the collection 'in-house' it does not need to look beyond section 45 EPA 1990 to find authority to do so.

51. Whether the LA employs a private sector operator or carries out the task 'in-house', the person making the request is liable to pay a reasonable charge not only for the collection but also for the disposal of the waste; that charge is payable to the LA which arranged for the collection, and the LA is under a duty to recover the charge unless it considers it inappropriate to do so: see section 45(4).

52. Unlike a private sector operator acting on its own account, an LA collecting commercial waste (whatever power it is acting under) has to dispose of the commercial waste which it has collected in accordance with statutory requirements which do not apply to a private contractor, usually by using the services of a WDA; and this is so whether the LA uses a private sector operator or carries out the collection 'in-house'. The LA is subject to the sort of restrictions identified in the evidence of Mr Coats and Mr Stet.

53. If HMRC, HMT and the LGA are wrong in their contention that section 45(1)(b) EPA 1990 authorises the activities in fact carried out by LAs, then some other power must be identified for the LAs to do so unless it is the case that they are, and have for many years, been acting beyond their powers (or, if use of Latin is still allowed, *ultra vires*). Showing an unsurprising reluctance to contend as his primary submission that LAs have in fact been acting beyond their powers, Mr Bates identifies section 93 Local Government Act 2003 and section 1 Localism Act 2011 as providing the relevant power over succeeding periods (at least since 2003 – earlier legislation has not been identified).

54. As to section 93 Local Government Act 2003, I do not see how this assists. That section is concerned with charging for a service which an authority is authorised, but not required, by an enactment to provide. It does not itself authorise the provision of, or even identify, any particular service. If section 45(1)(b) EPA 1990 does not authorise the provision of the services which LAs have in fact provided then in the absence of some other empowering provision – Mr Bates has not identified one – it must follow that the

LAs have been acting beyond their powers. In contrast, if section 45(1)(b) EPA 1990 does authorise what LAs have in fact done, then section 93(2)(a) has the result that section 93(1) does not apply at all.

55. Section 95 is not of assistance either since the power conferred by an order made under section 95(1) is only exercisable through a company. I am concerned only with cases where a LA has provided commercial waste collection services itself. I am, in any case, doubtful that section 95 can apply at all to commercial waste collection. Section 95(2)(a) provides that a LA cannot be authorised by an order under subsection (1) to do in relation to a person anything which it is required to do in relation to him under its ordinary functions. A LA is required to provide commercial waste collection services for a reasonable charge if requested. If the LA is requested to arrange for the collection of commercial waste by an occupier of premises, it cannot subsequently provide that service to that person on a commercial basis under section 95(1) since the power to do so would be excluded by section 95(2)(a). It would be a very strange result indeed if, before a request were made, the LA could enter into a commercial contract (without telling the occupier of premises of its duty under section 45(1)(b) EPA 1990 to provide the same service for a reasonable charge) under section 95(1). That would allow the policy behind the provision, namely to preclude commercial charges for services which the LA has to provide, to be circumvented.

56. Section 1(1) Localism Act 2011 confers power on a LA to do anything that individuals generally may do. Section 1(4) provides that, where the general power confers power on an authority to do something, it confers power to do it in any way whatever, including (see section 1(4)(b)) power to do it for a commercial purpose. Clearly, the commercial purpose here being referred to is the purpose of the LA providing the service, not of the

user of the service. The apparent generality of section 1(4) is, however, subject to sections 2 to 4.

57. Section 2 is concerned with the boundaries on the extent of the general power, the detail of which is not of relevance for present purposes. Section 3 is concerned with the limits on charging in exercise of the general power. Section 3(1) provides that section 3(2) applies where a LA provides a service to a person other than for a commercial purpose and where the provision of the service is done, or could be done, in exercise of the general power. (By way of comment, I note that, since the general power apparently authorises an authority to do anything, the purpose of the latter requirement (*ie* done or could be done in exercise of the general power) is not immediately apparent. There are, however, activities which cannot be carried out under the general power notwithstanding its apparent width, for instance where an activity is constrained by the boundaries imposed by section 2. This demonstrates the, or at least one, purpose of the provision. Where section 3(2) does apply, the general power confers power to charge only if (a) the service is not one which a statutory provision requires the authority to provide to a person, (b) the person has agreed to its being provided and (c) ignoring section 3(2) itself and section 93 Local Government Act 2003, the authority does not have power to charge for providing the service.

58. The provision of a commercial waste collection service other than for a commercial purpose falls within section 3(1) and is thus subject to section 3(2). Such a service is, in my view, one which a statutory provision, namely section 45(1)(b) EPA 1990, requires a LA to provide. It has to provide that service either itself or by arranging for someone else to do it. If it is said that this is an incorrect analysis because the duty is not to provide a commercial waste collection service but only to arrange for the collection of such waste, then the relevant service (*ie* arranging) is subject to section 3. In that case, the service

falls within section 3(2)(a). It is true that the duty only arises if the service is requested by an occupier of premises. But if a request is made, then the service is then one which a statutory provision (namely section 45(1)(b) EPA 1990) requires the WCA to provide. The effect is that the general power cannot be invoked as power to impose a charge where the service is provided other than for a commercial purpose.

59. It can be seen, therefore, that it is only if a LA provides a service for a commercial purpose that the general power can be relied on to enable it to charge for the service.

60. Section 4(1) Localism Act 2011 provides that the general power confers power on a LA to do things for a commercial purpose only if they are things which the LA may, in exercise of the general power, do other than for a commercial purpose. However, where a LA does things for a commercial purpose in exercise of the general power, it must do them through a company: see section 4(2). I note that, clearly, the doing of that thing by a company is, for the purposes of the general power, seen as the provision of the relevant service by the LA itself.

61. Section 4(3) Localism Act 2011 provides that a LA may not, in exercise of the general power, do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to that person. For the same reasons which I have given in relation to section 95(1) Local Government Act 2003 at [58] above, I doubt that the general power is available to LAs to provide commercial waste collection services in their areas. Just as section 95(2)(a) arguably applies to preclude an order giving authority to a LA to provide commercial waste collection services on a commercial basis, section 4(3) applies to preclude the exercise of the general power to do so.

62. Ignoring the doubts which I have expressed, if the commercial waste collection service provided by a LA in the present case is for a commercial purpose (*ie* a commercial

purpose of the LA, not the person to whom the service is provided) and if that is done in exercise of the general power, it must be done through a company. On the one hand, (although I do not know if there are in fact any such cases), where an LA provides commercial waste collection for its commercial purposes through a company, it has not been suggested that the company is to be treated for VAT purposes differently from a private sector operator. On the other hand, where a LA provides commercial waste services directly, and not through a company, then either a power to do so other than the general power must be identified or, if the general power is the only available power, the LA is acting in breach of section 4(2).

63. For the purposes of the provisions of the Local Government Act 2003 and the Localism Act 2011 just discussed, the concept of a commercial purpose is of some importance. It is not a defined term. But what is clear is that there must be a "purpose" and it must be "commercial". The fact that a service is provided for a charge, even if that charge is set so as to make a surplus or profit, does not demonstrate that the purpose of providing the service is commercial. Indeed, the fact, if it be a fact, that a LA is carrying out certain activities – including advertising and negotiating contracts with customers – in the same way as a private sector operator does not necessarily mean that the relevant service is being provided for a commercial purpose. A LA has wide social responsibilities which a private sector operator does not, responsibilities which include statutory duties. Its purposes in providing a particular service may be to fulfil those responsibilities. The service is not, in those circumstances a commercial purpose. It is not immediately obvious to me that, if the LA is empowered and chooses to provide those services in a way which is designed to make a profit, the purpose of the provision then becomes a commercial purpose. It is well-arguable that the LA's purpose in providing the service (*ie* "to do something" or "do things", as envisaged in section 1 and 4 Localism Act 2011)

is not a commercial purpose even though its objective in adopting the method which it does for effecting its purpose is to make a profit. In cases where there is no intention to make a profit but only to cover costs (as in the case of North Lincolnshire and Westminster in the present case), that will be a factor – and an important factor – in determining whether there is a commercial purpose. It is a question of fact, in any particular case, whether the LA is carrying out the relevant activities for a commercial purpose or otherwise than for a commercial purpose.

64. From the above discussion, it can be seen that the Local Government Act 2003 and the Localism Act 2011 are themselves something of a "red herring" to adopt Mr Bates' description of section 45 EPA 1990. They are red herrings because the LAs all say that they are acting under section 45(1)(b) EPA 1990: they were doing so before the Localism Act 2011 came into force and continued to act under that same power after it had come into force. In any case, if a LA wished to act under the Local Government Act 2003 or under the Localism Act 2011 so as to provide a service for its own commercial purpose, it would have to do so through a company, which is not the position in relation to the cases with which TDC's application is concerned.

The arguments

65. Turning now to the arguments, Mr Bates submits that the national court should approach the question in three stages:

    a. Stage 1 is to identify the activity and how it is carried out, a question which he says is purely one of fact and not law.

    b. Stage 2 is to consider how the activities are affected by legislation applying only to LAs, a question which he says is one of mixed fact and law.

c. Stage 3 is to form a view whether the activities are thereby being carried out under a special legal regime. This the national court would do applying the criteria developed by the CJEU.

66. As to stage 3, Mr Bates contends that the correct approach is to take an overall view, identifying the practical realities, in asking whether the national legislation facilitates or governs the way in which LAs provide the service in question, a matter of fact and degree: this is the correct approach since the CJEU case law mandates this approach. A special legal regime entails more than that the LA is affected by some legal provisions. The question is whether the differences between the ways in which the public authority and the private sector operator are affected are so significant as to amount to different conditions so as to constitute a special legal regime. The derogation under article 135(1) is to be strictly construed so that, for there to be a special legal regime, national law must constrain the LA in a meaningful way. In that context, Mr Bates submits that the LAs are acting under the general provisions of the Localism Act 2011 and not section 45 EPA 1990. There is therefore no special legal regime since it cannot possibly be correct that every supply by LAs acting under those general provisions is a supply under a special legal regime.

67. In relation to such LAs, Mr Bates submits that they are not, when providing trade waste collection services in competition with commercial operators, "acting as public authorities" or operating under any "special legal regime". He contends that LAs are not under any legal duty to provide commercial waste collection services. He contends that WCAs are responsible for making regular collections of household waste free of charge but says that they are not under any corresponding duty in relation to commercial waste. In that context, he draws attention to the fact that some WCAs do not provide commercial waste collection services at all. He submits that LAs are not discharging any public duty

but are supplying services for a consideration, a commercial service being supplied on the same basis as private sector operators, other than the charging of VAT. There is, he says, no difference between the terms on which LAs are providing trade waste collection services to customers under contracts, and the contracts that could be, and are, offered by commercial operators. He emphasises the requirement appearing from *Fazenda* at [16] (see[14] above) that the question whether or not a public authority is carrying out a particular activity under a "special legal regime" must be answered by examining "the way in which the activities are carried out", and relies also on what the Advocate General said in his opinion at [35] and [38] (see [18] above) to the effect that "the overall context and the way in which an activity is carried out are also important" and that it is necessary "to assess all the circumstances of the specific case". And he emphasises, too, that the case law in relation to the concept of the "special legal regime" has been developed as the yardstick for whether an authority is carrying out an activity "acting in its capacity as such" and relies on the passages from *Fazenda* at [22] to [24], from *IoW* at [31] and *Saudaçor,* as to which see [16], [17], [20] and [21] above.

68. Mr Bates accordingly submits that it is not enough for HMRC simply to rely on the fact that all WCAs have a statutory duty to arrange for commercial waste to be collected from premises when requested to do so. Rather, it is necessary to examine whether and how any relevant national legislation actually affects the way in which they carry out those activities.

69. More generally, he submits that it is necessary to consider what, if any, national legislation relating specifically to public authorities actually governs, facilitates or alters how, when or on what terms the authority carries out that activity. If that legislation has no impact on those aspects of the activity, then to describe the authority as carrying out the activity under a "special legal regime" would be to render that concept meaningless.

70. There is, clearly, force in that last submission so far as it goes. A LA has only the powers which it is given by statute. A most general power is now found in the Localism Act 2011, but even before that, LAs had a wide range of powers in the exercise of their functions. It could not be said that, because every activity must have some statutory basis, that the activity is therefore being conducted under a special statutory regime; it is not every statutory duty or power which creates different legal conditions from those that apply to private economic operators (to reflect the words used in [17] of the judgment in *Fazenda*). The question in the present case is whether the powers under which the LAs in the present case are operating do constitute such a special legal regime.

71. Mr Bates submits that on no reasonable view can the LAs providing waste collection services in competition with commercial operators be said to be doing so under any special legal regime. They are not exercising any special rights or powers that have been entrusted to them; nor are they carrying out regulatory activity. Rather, they are doing no more or less than that which can be done by private commercial competitors.

72. To illustrate the wrongness of HMRC's view, Mr Bates gives in his skeleton argument this example relating to 'out or area' collections:

> "Consider, for example, a WCA that markets its provision of trade waste collection services both within its local authority area and in a neighbouring area, entering into trade waste collection contracts with customers in both areas on the same standard terms and on the basis of the same pricing schedule. The waste collection vehicle drives out of the WCA's depot in the morning and starts its daily round, which includes premises in both its LA area and the neighbouring area. According to HMRC, when the vehicle is making the waste collection in the LA's local authority area, then the LA is acting in its capacity as a public authority under a "special legal regime" and is not making any supply; but where the collection is being made over the border in the neighbouring area, then it is a "supply for consideration" and VAT must be charged. But HMRC's analysis makes no sense. There is *no difference* between the authority's activity as between the two areas, or in how it is carrying out that activity, or in the legal or other conditions under which it carries out the activity. In both areas, the authority's charges are determined by the terms of its contract with its customers. Indeed, it is possible that such collections may be made under *the same contract* (such as, for example, where the contract is with a company or organisation that has premises both within and outside the LA's local authority area)."

73. Mr Bates contends that section 45(1)(b) EPA 1990 is a 'red herring'. The duty under that section is "to arrange for the collection" of commercial waste if an occupier of premises so requests. It is there to ensure that commercial waste collection can be obtained for every premises in the country. By way of a footnote, the evidence before me does not establish whether there are any places where private sector operators are in fact unwilling to provide trade waste collection. It is at least in theory possible that there are some places, for instance very remote places, where there is no private operator willing to collect. One might think that, provided sufficient money is paid, it would always be possible to find some private sector company willing to do so: but that cost might well exceed the reasonable cost which the relevant LA would be able to charge, so it is not possible to rule out the need for provision of services by the LA. In any case, what is clear is that, if requested, an LA must arrange for collection and that it is open to the LA itself to effect the collection without having to employ outside contractors.

74. Mr Bates submits that the duty under section 45(1)(b) EPA 1990, equally clearly, is not one which obliges a LA to set up in commercial business as offering trade waste collection and disposal services. Indeed, some LAs do not do so, relying entirely on private sector contractors to provide the service in their areas.

75. More controversially, perhaps, Mr Bates submits that the duty does not "alter the conditions under which, or terms on which, the authority can itself provide and market its trade waste collection services where it has decided to take up that business". He suggests that it is not credible to suggest that a LA which is actively marketing its trade waste collection services, in competition with commercial operators, is fulfilling its duty to serve as the waste collection arranger of last resort. Further, a contractual obligation to provide a collection service by a LA is not the same as responding to a request for collection under section 45(1)(b) EPA 1990; and the payment of the contractual price in

the former case is different in character from the payment of the reasonable cost imposed under section 45(4) and which the LA is obliged to enforce. The contractual price, he says, is not the product of the authority carrying out its duty under section 45(4) EPA 1990 to enforce a liability for a "reasonable charge". I note that the words "last resort" do not appear in the legislation or in the case law. A LA is not, it seems to me, a provider of last resort in the sense that it is obliged to provide a service only if no-one else will. Rather, it is under a statutory obligation to arrange for collection if requested. Far from being a last resort, the LA may, for some occupiers, be the first port of call.

76. TDC does not deny that a LA that is actually arranging a collection in response to a request under section 45(1)(b), and then levying a charge under section 45(4) for the reasonable costs of that collection, may be "acting as a public authority". But Mr Bates submits that this is irrelevant to the circumstances in the present case. There is, he says, no evidence that the LAs engaged in providing trade waste collection services in competition with commercial operators are acting in fulfilment of any such statutory duty. On the contrary, he says that they are doing the same thing as commercial operators can do, and do do, under the same legal conditions.

77. Mr Peretz's submission, in contrast, is that the legal basis on which LAs provide commercial waste collection services is to be found in section 45 EPA 1990. Far from being a 'red-herring', that section is central since not only is it the legal basis on which the services are provided but it is also a special legal regime.

78. Mr Peretz challenges Mr Bates' contention that WCAs are not under any duty in relation to commercial waste equivalent to their duties in relation to household waste. He points out, correctly, that the duty in relation to household waste is, like that in relation to commercial waste, only to arrange for collection. If it is right, as appears to be TDC's position, that WCAs have a responsibility to collect household waste, then that is equally true of commercial waste.

79. I agree with the submission that, in both cases, WCAs have a responsibility to arrange for collection. In the case of household waste, a WCA may carry out the function 'in-house' or it may employ outside contractors to do so. Whichever course is adopted, the service is free to the occupier. In contrast, in the case of commercial waste collection, the duty to arrange for collection arises only if the occupier of premises requests collection, in which case the person making the request is liable to pay to the WCA a reasonable charge. Whether one calls the two duties "equivalent" does not much matter. The question in each case is whether the statutory provisions applicable in each case provide for a special legal regime. The regimes are similar. That relating to the collection of household waste is clearly, I consider, a special legal regime. One question then is whether the requirement in relation to commercial waste that there should be a request before the duty to arrange for collection arises and a liability to pay a reasonable charge if collection and disposal are effected means that the similar regime in relation to commercial waste is not, in contrast with the regime in relation to household waste, a special legal regime.

80. I note that there is an exception from the absence of charge in relation to household waste: section 45(3) EPA 1990 allows a charge to be made in prescribed cases; and where the exception applies, the duty to arrange for collection only arises when the WCA is requested to collect the household waste, in which case, the WCA is entitled to recover a reasonable charge. In effect, in these excepted cases, the duty to collect and the power to charge is the same in practice as those which apply in relation to commercial waste.

81. Mr Peretz relies on the decision of Evans-Lombe J in *R (oao Western Riverside Waste Authority) v Wandsworth BC* [2005] EWHC 536 (Admin), [2005] Env LR 926 ("***Wandsworth***"). I do not need to go into the facts of that case save to note that Wandsworth itself did not, and was not intending to, provide commercial waste collection services. Instead, that service was provided by a commercial provider, Onyx, as part of

its contract with Wandsworth. The same was the case in relation to the successor provider, Biffa. The tender document to which Biffa responded made clear that the commercial waste collection was to be provided in fulfilment of Wandsworth's duty under section 45(1)(b) EPA 1990. After referring to Wandsworth's duty under that section "if requested by the occupier", the tender document provided for the contractor to provide the required collection service

> "in response to any request which the Council receives pursuant to section 45(1)(b) of the 1990 Act as part of the non domestic waste collection service."

82. It is clear from that, and from various parts of the judgment, that Biffa was to provide only a residual commercial waste collection service. In other words, a request for collection would have to be made by an occupier of premises, with Wandsworth receiving the tariff charge from the occupier. It is clear, in my view, that the service actually being provided by Wandsworth would fall within section 45(1)(b) EPA 1990. It is not clear from the judgment precisely what the arrangements with Onyx concerning collection under its contract with Wandsworth actually were. It appears, however, that Onyx (rather than Wandsworth) contracted with occupiers of premises for collection and operated some sort of profit-share arrangement with Wandsworth in the light of some licence granted by Wandsworth. I do not know the powers under which Wandsworth purported to act in relation to that arrangement. That was not material to the judgment and the judge's conclusions.

83. I have not found the case of any assistance in determining what powers LAs in the present case are acting under in providing the services which they do. I do not accept Mr Peretz's submission that it is authority for the proposition that, when LAs provide the commercial waste collection services which they do, they actually have power to do so under section 45 EPA 1990.

84. Mr Peretz draws attention to the following significant differences between the regimes applicable to LAs and private operators.

85. First, section 45(1)(b) EPA 1990 requires a WCA to arrange for the collection of **any** commercial waste from **any** premises in its area. This duty does not apply to a private operator which is not required to collect all types of waste and is not required to service all premises. The duty imposed on LAs has, according to this submission, a very substantial effect on the way in which WCAs operate their services, with WCAs having to bear the economic burden of uneconomic customers (such as those lying some distance from any other commercial premises and far from disposal facilities) as Mr Coates' evidence explains. The wide definition of commercial waste in section 75(7) EPA 1990 (coupled with the power of the Secretary of State under section 75(8), including power to prescribe types of waste as being or not being commercial waste), means that WCAs are obliged to collect commercial waste from, as Mr Peretz puts it, "an eclectic range of businesses and non-businesses". This has an impact on how LAs fulfil their statutory duties.

86. Secondly, the obligation of a WCA under section 48(1) EPA 1990 is to deliver all waste collected under section 45(2) "to such places as the waste disposal authority for its area directs". No private operator is under this duty and, as Mr Stet points out, private operators are free to take the waste they collect to a range of permitted disposal sites.

87. Thirdly, section 45(4) restricts WCAs to making a reasonable charge and imposes a duty to collect that charge (save in cases where that is considered inappropriate). At [56] of his judgment in *Wandsworth*, Evans-Lombe J explains that the discretion to fix charges is a wide one; but one matter to be taken into account is the WCA's fiduciary duty not to impose on its payers of council tax unnecessary burdens. Further, WCAs must, in setting the level of charge, have regard to factors such as their power to do, or arrange for the

doing of, or to contribute towards the expenses of doing of anything which in their opinion is necessary or expedient for the purposes of minimising the quantities of controlled wasted generated in their area: see section 63A EPA 1990. No similar issue affects private operators. The definition of "controlled waste" is found in section 75(4) and means "household, industrial and commercial waste or any such waste".

88. In contrast with a private operator, a WCA is under a duty to collect the reasonable charge provided for in section 45(4) EPA 1990 unless it considers it inappropriate to do so. A WCA must therefore balance its fiduciary duty to payers of council tax before waiving or reducing a charge. A private operator is under no similar constraint.

89. Accordingly, Mr Peretz submits that the legal regime governing WCAs' collection of commercial waste differs significantly from that governing private operators such as TDC in these three respects: obligation to ensure collection from any person at any premises; obligation in dealing with waste collected; and obligations in relation to pricing.

90. In relation to the factors relied on by Mr Bates which I have set out at [41] above, Mr Peretz responds as follows:

    a. WCAs are not permitted, under section 45 EPA 1990, to set charges so as to generate a commercial return.

    b. "Promotional" activity reflects the need to inform generators of commercial waste about their responsibilities and the WCAs' ability to assist, and the point that greater usage improves economies of scale and therefore enables lower charges to be set. Reliance is placed on the evidence of Mr Stet: see in particular [45] above.

    c. For the same reasons, "business development" personnel may be engaged.

    d. Section 45(4) EPA 1990 regulates the ability of WCAs to set prices.

    e. The contracts entered into between WCAs and generators of commercial waste are designed to protect WCAs against unacceptable financial and legal risks and

do not affect the analysis. Reliance is again placed on Mr Stet's evidence: see [43] above.

f. It is no part of HMRC's case that "out of area" collections are governed by section 45: HMRC have accepted that such collections are subject to VAT.

g. WCAs are subject to conditions, in their collection of commercial waste, to which private operators are not subject. And, unlike commercial operators, WCAs are subject to section 48 EPA 1990 and the power of waste disposal authorities to require disposal at such places that they direct. The judgment in *Wandsworth* shows that these conditions have a practical impact on LAs.

h. The reasons for the (alleged) "growth" in the numbers of WCAs providing commercial waste collection services are irrelevant to the issue presently before the Court.

91. I do not propose to comment in this decision on those responses save as follows:

a. Mr Peretz might have added under response a. something about Mr Bates' assertion as part of his first factor that LAs are going into business as a matter of choice. It is important to identify the choice here. A LA has a choice whether to comply with its duty under section 45(1)(b) EPA 1990 by collecting commercial waste 'in-house' or by arranging for a private sector operator do so. It does not have a choice not to provide the service at all. If a request is made, the LA must arrange for the collection of the commercial waste concerned. It seems to me that a LA is entitled to set up the necessary infrastructures and administrative arrangements for dealing with such requests without thereby taking itself out of the legal regime applicable to it under section 45(1)(b) EPA 1990.

b. As to response f., the acceptance by HMRC and the LGA that 'out of area' collections are subject to VAT leaves open the question of what powers LAs have

been operating on, both before and after the commencement of the Localism Act 2011. The issue does not arise for decision. However, Mr Bates contends that there is no practical difference between the way in which LAs provide 'out of area' collections of commercial waste and the way in which they provide collection in their own area. If the former is commercial and not subject to a special legal regime, then it should follow that the latter is not subject to a special legal regime either. I do not accept that line of reasoning. Assuming that the power being used to carry out collections in the LA's own area is to be found in section 45(1)(b) EPA 1990, the issue is whether that provision, as operated, attracts the exemption in accordance with the case-law of the CJEU regarding special legal regimes. The answer to that issue is not to be found in an analysis of the operation, pursuant to different powers, carried on 'out of area'.

92. Mr Peretz's submission, in the light of the case law which I have already considered, is that section 45(1)(b) constitutes a special legal regime which does not apply to private operators such as TDC. He submits that it is irrelevant, for the purposes of the preliminary issue, whether the services provided by LAs are, in an economic sense, in competition with those provided by private operators. If it were always the case that economic competition led to the conclusion that the public authority was not operating under a special legal regime, the competition proviso to Article 13(1) would not be necessary. This is a point made by the Advocate General in [59] of his Opinion in *Finland*.

93. The LGA adopts the arguments in Mr Peretz' skeleton argument (on which he enlarged at the hearing). It has not appeared at the hearing but has itself provided some further written submissions. Those submissions refer to and rely on the passages from the Advocate General's Opinion in *Finland* which I have set out at [22] and [23] above.

94. The LGA submits that Mr Bates is wrong in characterising LAs as "going into business" as providers of commercial waste collection services "in order to generate a commercial return", in asserting that they "are free to set their own prices, doing so with a view to being competitive and/or making a profit" and in arguing that LAs "are doing the same thing as commercial operators can do, and do do, under the same legal conditions".

95. Those assertions are wrong, according to the LGA, because they fail to take account of the legislative constraints on the ability of LAs to provide services for a commercial purpose. It contends that the legal regime under national law in England and Wales, which is it says to be found in section 45(1)(b) EPA 1990 and not in the Local Government Act 2003 or the Localism Act 2011, does not permit LAs to provide waste collection services under the same legal conditions as are applicable to private operators. The relevant legislation imposes different requirements.

96. The LGA also relies on what was said by the CJEU (see [31] of the judgment in *IoW* referred to at the end of [21] above) about the VAT derogation for public authorities' activities as covering "activities engaged in by public bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority". An LA's collection of commercial waste sits within a wider regime of rights, powers and duties of public authorities in relation to environmental law which does not apply to private operators, including the duty to keep streets clean and to collect and dispose of fly-tipped waste. And so the LGA, consistently with Mr Coates' evidence, says in its written argument: "Unlike private operators pursuing waste collection on a commercial basis, WCAs have strong incentives to ensure the availability of reasonably-priced collections in order to avoid fly-tipping and to *reduce* commercial waste". This is another indication, it is submitted, that WCAs carry out commercial waste collection services "under the special regime

applicable to them" rather than "under the same legal conditions as those that apply to private economic operators".

Discussion

97. I have already considered the relevant provisions of the Local Government Act 2003 and the Localism Act 2011 at [49] to [64] above. For the reasons which I have given, I consider that LAs have no power to provide commercial waste collection services on a commercial basis other than through a company. I have considerable doubt that they can provide them at all in the light of section 95(2)(a) Local Government Act 2003 and section 4(3) Localism Act 2011 (although I make clear that I do not decide the point and do not rely on it in reaching my conclusions). If LAs are acting within their powers in providing directly, and not through a company, the services which they have, then the only available power is to be found in section 45(1)(b) EPA 1990.

98. I am not willing, on this application, to assume, let alone find, that any particular LA is or has been acting beyond its powers. In any case where it is asserted that an LA has acted beyond its powers, that could only be resolved after a detailed investigation of the facts concerning that LA, including consideration of its purpose in carrying out its activities in the way which it has. It may be that even a fully commercial provision of commercial waste collection services falls within section 45(1)(b) EPA 1990. I do not propose to decide whether any LA might be acting beyond its powers; nor do I propose to decide whether the fact that a LA contracts with an occupier for the collection of commercial waste is thereby necessarily acting pursuant to a request for the purpose of section 45(1)(b). I decline to do so for two reasons: first, the points have not been subjected to sufficient detailed argument; and secondly, the points ought properly to be decided on an established (or agreed) factual basis and not as particular legal points within the preliminary issue before me.

99. For the purposes of the application by TDC, I therefore proceed with my discussion on the basis that the provision of commercial waste collection services by an LA is validly carried out in exercise of the powers conferred by section 45(1)(b). As part of that approach, I also proceed on the basis that the charges actually made by LAs are reasonable charges for the purposes of section 45(4) EPA 1990. There is no evidence that any particular LA has charged more than a reasonable charge; it is no part of the preliminary issue or the agreed statement of facts that I should assume that there exist cases where a LA has charged more than a reasonable charge.

100. In that context, if a charge was not justified by section 45(4) EPA 1990, or if for some reason that power were not available, LAs would have to use their general powers under the Local Government Act 2003 and the Localism Act 2011: but those powers do not permit LAs (in contrast with companies though which they provide services) to charge other than on a cost recovery basis.

101. I have considered at length the legal regime governing the provision of commercial waste collection services by LAs and the relevant charging powers. I have also identified in considerable detail the arguments of the parties and made a number of comments as I have gone along. My discussion and conclusions can therefore be relatively brief.

102. In my view, the three stage approach (see [65] above), in focusing on activities to the extent which it does, risks losing an essential element of the jurisprudence of the CJEU namely that "the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law": see [18b.] and [22] above.

103. I have no doubt that section 45(1)(b) EPA 1990 is, or at least is capable of being, a "special legal regime". This is demonstrated by consideration of a LA which provides a commercial waste collection service only if requested to arrange for such collection by an

occupier of premises and does so for a reasonable charge which, taking the provision of the service to occupiers generally, results only in cost recovery and no surplus. It would appear that this is the position with North Lincolnshire Council. Indeed, TDC itself does not deny that a LA that is actually arranging a collection in response to a request under section 45(1)(b), and then levying a charge under section 45(4) for the reasonable costs of that collection, may be "acting as a public authority".

104. Since it cannot be said that section 45(1)(b) is not ever capable of constituting a special legal regime, it must follow, even on TDC's case, that whether any particular LA is acting as a public authority will depend on the facts relevant to that LA. As I have already observed, I do not know the detailed facts in relation to any particular LA to say which of the factors relied on by Mr Bates (see in particular [46] above) might even arguably apply quite apart from the responses to those factors (as to which see [90] above). I do not even have the relevant details in relation to the activities of the LAs in whose areas TDC operates. Although this is not a matter relevant to the preliminary issue, I would have thought that, if TDC is to succeed in an application for judicial review of HMRC and HMT, it is essential for it to show that it is affected by the activities of those LAs. For all I know, each of those LAs is one where commercial waste collections are carried out only following a request and for a reasonable cost reflecting cost recovery and no surplus.

105. It is therefore impossible, even on TDC's case, to answer the preliminary issue with the answer "No" (so that the VAT derogation does not apply) since there are at least some, and may be many, LAs who are not to be regarded as taxable persons in relation to supplies of commercial waste collection services. The answer, on TDC's case, would have to be "it all depends".

106. However, once it is accepted, as it must be, that section 45(1)(b) EPA 1990 is capable of constituting a special legal regime in some cases, then in my view any activities carried out by a LA pursuant to that special legal regime fall within the VAT derogation, subject always to the competition proviso. As the cases show, the only criterion making it possible to distinguish with certainty between activities as a public body and activities subject to private law is "the legal regime applicable under national law". I accept, of course, that not every activity carried on by a LA is subject to a special legal regime simply because some statutory basis has to be found for that activity. But once a legal regime has been identified as a special legal regime in accordance with the case-law, it would defeat the purpose of that clear criterion – namely to provide a clearly and readily applicable test – to require national courts to enter into a further enquiry as to whether particular activities within that legal regime are entitled to the benefit of the VAT derogation. In the present case, the difficulty in drawing lines between what would, and would not, qualify for exemption is, I suggest, obvious. It is no answer for TDC to say (without any, or any adequate, evidence I add) that, wherever lines are to be drawn, there are many cases which exhibit all of the factors identified by Mr Bates (see [41] above) and which should not, on his approach, attract the exemption. Rather, if TDC is to succeed on its application for judicial review, it must be on one of the two bases appearing in the following paragraphs.

107. The first basis is that the competition proviso applies. This would have to be tested as a matter between TDC and the LAs in whose areas it operates.

108. The second basis is that there are LAs who are, in fact, operating beyond their powers and who cannot rely on section 45(1)(b) EPA 1990. It may well be – this is not a matter to be dealt with on the preliminary issue – that if an LA is acting beyond its powers, so that section 45(1)(b) cannot be relied on, VAT should be charged for its commercial

waste disposal services. This second basis is not one which I am prepared to deal with on this preliminary issue. For the reasons already given (see [98] above), I am now proceeding on the basis that all LAs are acting pursuant to their powers and duties under section 45(1)(b) EPA 1990 and are making charges which are reasonable charges within section 45(4). If TDC wishes to argue that there are in fact LAs which are acting outside the powers and duties conferred and imposed by section 45(1)(b) and (4), it needs to identify a case or cases where that is said to be so; the facts relevant to those cases will then have to be investigated in detail, with the relevant LAs being given the opportunity to explain and defend their actions.

Disposition

109. The preliminary issue is to be answered in the sense that, where a LA is making supplies of trade waste collection services to business customers in its area and does so in the performance of its duties under section 45(1)(b) EPA 1990, the supplies are "activities in which it is engaged as a public authority" within the meaning of section 41A(a) VATA 1994 and Article 13(1). Whether a LA is in fact providing its commercial waste collection services under section 45(1)(b) is a matter to be determined on the facts of each case.

Mr Justice Warren

Release date: 19 September 2016

ANNEX

Statement of agreed facts for the purposes of determining the preliminary issue

WCAs

1. A WCA is a local authority in the United Kingdom charged with the collection of municipal waste. There are 342 WCAs in England and Wales.

2. WCAs have a legal duty under section 45(1)(a) and (3) of the EPA 1990 to collect household waste and to do so free of charge.

3. In addition, section 45(1)(b) EPA 1990 provides that it is the duty of a WCA "if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste". Provision is made in relation to charging for such collection by section 45(4) EPA 1990 (which is set out at [11] of this Decision).

The Parties

4. TDC is a company registered in England (Company Number 03757703) and carries on business as a provider of commercial waste services, including in particular "trade waste" collection services consisting of emptying "wheelie bins" used by businesses and other occupiers of non-residential premises for disposing of waste. When TDC supplies trade waste collection services, it is required to charge its customers VAT on those supplies.

5. HMRC have statutory responsibility for the collection of VAT within the United Kingdom, including for taking decisions regarding the proper application of tax legislation to particular situations or persons.

6. HMT is the department of Her Majesty's Government responsible for matters relating to high level tax legislation and high level tax policy.

7. LGA, which has filed an Acknowledgment of Service, is the representative body for local authorities and represents its 415 member authorities in relation to matters affecting the interests of local authorities in England and Wales generally.

LAs' provision of trade waste collection services

8. All LAs that are WCAs collect household waste, doing so either directly (*ie* using their own staff and other resources) or by "contracting out" the provision of that service to a contractor appointed following a public procurement process.

9. Some, but not all, LAs that are WCAs supply trade waste collection services to businesses and other customers. Such services may be provided using the same assets (*eg* waste collection vehicles, staff, *etc*) that are used for household waste collection. The services may be carried out either by the LA directly or by its contractor.

10. Trade waste collection services are also provided by TDC and other private sector operators.

11. Trade waste collection services provided by private sector operators are generally available throughout the United Kingdom. However, there may be certain locations where no private operator is willing to provide those services (either at all or at an affordable rate).

12. In some cases, WCAs have provided trade waste collection services to properties located outside their areas. It is common ground between the parties that section 45 EPA does not apply to such collections and that section 41A(1) VATA 1994 does not apply (so that those supplies are subject to VAT at the standard rate).

13. The following are factual situations that apply in at least some cases where WCAs supply trade waste collection services to properties within their areas: -

    a. A number of LAs provide trade waste collection services on the basis of regular collections made under contracts with specific or minimum durations or requiring a particular period of notice to be given for termination.

    b. A number of LAs actively publicise their trade waste collection services and a number of them employ "business development" personnel engaged in the provision of commercial waste services.

    c. A number of LAs negotiate with customers the prices and/or other terms on which they supply trade waste collection services.

    d. A number of LAs respond to requests from prospective customers of trade waste collection services, for quotations/tenders to be provided.

e. Certain LAs have made a surplus on these activities when viewed as a whole.