[2018] UKUT 0187 (TCC)
Appeal number: UT/2016/0226

AGGREGATES LEVY – exemption under section 17(3)(c) Finance Act 2001 – meaning of 'dredging' – meaning of 'watercourse' - whether navigable area of marina was 'channel' - appeal dismissed

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)

PJ THORY LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE FANCOURT
JUDGE GREG SINFIELD

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 16 April 2018

Adam Rycroft of KPMG LLP for the Appellant

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

DECISION

Introduction

1. This is an appeal by the taxpayer, PJ Thory Limited, against the decision of the First-tier Tribunal (Tax Chamber) ("the Tribunal") released on 11th August 2016, dismissing its appeal against a review decision of the Respondents by letter dated 7th March 2014 confirming a decision communicated to it by letter dated 4 September 2013. That review rejected the taxpayer's claim for a refund of overpaid aggregates levy on aggregate extracted during the course of construction of Lilford Marina on the river Nene in Northamptonshire. Save as otherwise indicated, paragraph references in square brackets in this decision are to paragraphs in the Tribunal's decision.

2. The appeal relates to levy paid in the sum of £171,379.32 for the period from 1st July 2011 to 31st December 2012, but the parties accept that its outcome will also apply to assessments in relation to later periods.

Factual background

3. The taxpayer extracted aggregate from a site adjacent to the River Nene in Northamptonshire which previously consisted of open fields and a river inlet, referred to as the 'dogleg'. The aggregate was extracted in the course of the construction of the Lilford Marina, for the mooring of pleasure boats and having access to the river.

4. There was no dispute about the facts before the Tribunal. The material facts are summarised at [15] - [22]:

> "15. The Appellant was engaged as a sub-contractor to undertake the removal of aggregate from the site, in accordance with the planning requirement.
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> 16. Plans showing (a) the proposed layout for the completed site ('Plan 1') and (b) the site as it stood prior to development ('Plan 2') were provided and annexed to the witness statement. Plan 2 shows an existing river inlet ('the dogleg'). The channel leading to the dogleg was the main channel of the River Nene until the river was reprofiled by the environment agency in the 1980s to take out a problematic kink. A further plan ('Plan 3') shows the previous site of the river.
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> 17. The site was developed by initially sealing the existing link between the dogleg and the river with clay material dug from the site. The water within the dogleg was then drained. The drained site lay below the water table and pumping was constant during the development due to the natural ingress of water. The sand and gravel itself was saturated as it spent the whole time under water.
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> 18. Most of the excavation was done above water. The site flooded four times during the process of excavation as the water level in the river breached the banks.
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> 19. The top soil and subsoils were stripped off and stockpiled on site.

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

21. Once completed, pontoons were installed.

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

Legislation

5. The relevant legislation in this appeal is contained in the Finance Act 2001 ('FA 2001'). Section 16 of that Act introduced, with effect from 1 April 2002, a tax called Aggregates Levy which is charged on taxable aggregate subjected to commercial exploitation. It is currently charged at the rate of £2 per tonne of aggregate.

6. Section 17(2) provides that any quantity of aggregate subjected to commercial exploitation is taxable except to the extent that, among other reasons, it is exempt under section 17. The main exemptions are specified in section 17(3) as follows:

"For the purposes of this Part aggregate is exempt under this section if –

(a)…

(b) it consists wholly of aggregate won by being removed from the ground on the site of any building or proposed building in the course of excavations lawfully carried out-

(i) in connection with the modification or erection of the building; and

(ii) exclusively for the purpose of laying foundations or of laying any pipe or cables;

(c) It consists wholly of aggregate won –

(i) by being removed from the bed of any river, canal or watercourse (whether natural or artificial) or of any channel in or approach to any port or harbour (whether natural or artificial); and

(ii) in the course of the carrying out of any dredging undertaken exclusively for the purpose of creating, restoring, improving or maintaining that river, canal, watercourse, channel or approach;

(d) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any highway or proposed highway and in the course of excavations carried out-

(i) for the purpose of improving or maintaining the highway or of constructing the proposed highway; and

(ii) not for the purpose of extracting that aggregate;

(da) it consists wholly of aggregate won by being removed from the ground along the line or proposed line of any railway, tramway or monorail or proposed railway, tramway or monorail and in the course of excavations carried out-

(i) for the purpose of improving or maintaining the railway, tramway or monorail or of constructing the proposed railway, tramway or monorail; and

(ii) not for the purpose of extracting that aggregate…"

The Tribunal's decision

7. The Tribunal decided against the taxpayer on the grounds that the exemption from levy contained in section 17(3)(c) of the Finance Act 2001, as amended, did not apply because-

(1) Creation of a new marina by excavation, principally of two fields near the river, was not dredging the bed of a river, canal or watercourse or of any channel in or approach to any port or harbour, within the meaning of the subsection; and

(2) The marina was neither a watercourse nor a channel in a port or harbour within the meaning of the subsection, though it probably was a port or harbour.

8. The Tribunal directed itself, we think correctly, that it did not matter what machinery was used to dredge, whether a dredge or similar machine, or a 360 excavator of the kind actually used. What mattered was not how the aggregate was removed but whether the activity undertaken was in and of itself "dredging". It concluded that for dredging to have occurred there must be a body of water in existence, otherwise it is digging rather than dredging that is being carried out. It considered that the activity carried on by the taxpayer in the fields was digging on dry land even if, when below the water table, pumps were needed to prevent the ingress of water.

9. The Tribunal considered that, for there to be a watercourse within the meaning of section 17(3)(c), there had to be a flow of water under the action of gravity. It held that the rising and falling of the water level in the marina was not sufficient to constitute flow for these purposes.

10. In relation to the argument that all the navigable area of the marina would be a channel, the Tribunal concluded that the marina was not in and of itself a channel, but that a marina is more analogous to a port or harbour: it may have channels within it but it is not a channel in its entirety.

11. The taxpayer now appeals, with permission of the Tribunal, on three grounds.

(1) The Tribunal erred in law in failing to decide that the term "dredging" can mean the removal of material from an area that will later form a body of water.

(2) The Tribunal erred in law in finding that the appropriate definition of the term "watercourse" was the Respondents' definition of watercourse as published in HMRC Notice AGL1.

(3) The Tribunal made an error of law in finding the navigable area of the marina does not fall within the meaning of section 17(3)(c)(i).

Appellant's submissions

12. On ground one, Mr Adam Rycroft for the taxpayer submits that a broad and purposive construction should be given to the meaning of the word "dredging" and to the reference to removal of aggregate from the "bed of any river, canal, or watercourse…" for two reasons. First, the purpose of the legislation (as is common ground) was to afford environmental protection against the extraction of "virgin" aggregate, by imposing a tax on such activity and by incentivising the commercial exploitation of aggregate that could or would be won incidentally to other types of construction activities. Second, he submits that the use of the word "creating" in section 17(3)(c)(ii) contemplates that the construction of a new canal, watercourse or channel must be within the exemption, and that accordingly the meaning of "dredging" must be extended (in such a case, at least) to excavation required to create the new feature and not confined to the dredging of an existing feature. Mr Rycroft further submits that dredging in ordinary usage means only the extraction of material that could be won by using a dredge.

13. As to the first argument, the general premise is accepted but it has to be acknowledged that Parliament used specific and not general words to create the exemptions from the levy. That is particularly so in exemption (c), which unlike the other main exemptions does not refer to the "removal from the ground" of aggregate, nor to the location of a feature or "proposed" feature. Thus, paragraph (c) refers to removal from the bed of any river, canal, watercourse, channel or approach, not proposed features, and it refers to the carrying out of "dredging", not to aggregate being won by being removed from the ground. Accordingly, we do not consider that the general purpose of the legislation assists the taxpayer in urging a benevolent approach to the construction of this particular exemption.

14. As to the second argument, we do not accept that the ordinary meaning of "dredging" can be displaced – and in effect the words "dredging or excavating" substituted – because of the existence of the word "creating" in paragraph (c)(ii). Dredging is central to this exemption, and the aggregate has to be removed from the bed of the watercourse or channel in question in the course of dredging. The contrast with the other specified exemptions is marked. It is not impossible to conceive of a new watercourse being created by dredging an existing (more limited) feature, or indeed a new channel being created in a port or harbour. There are, we accept, difficulties in giving a precisely literal effect to exemption (c) where a new feature is created. The words in paragraph (c)(ii) "that river, canal, watercourse, channel or approach" refer back to the feature in paragraph (c)(i) from whose bed the aggregate is won, and it

therefore appears that it must be the bed of the new feature that has to be dredged in such a case. But that interpretative difficulty is not solved by giving an extended meaning to the word "dredging".

15. As to the Appellant's submission on the ordinary meaning of the term "dredging", in our view, for dredging to occur, there must be some existing water feature, not (as was mainly the case here) fields that required to be excavated. It makes no difference in this case, that the excavation for the purposes of removing aggregate had to be carried out to a depth below the natural water table. What was carried out was not dredging in the ordinary meaning of that word, nor was the bed of any specified water feature being dredged.

16. We therefore agree with the Tribunal that dredging did not take place in this case. What took place was excavation of fields and a drained dogleg feature of the river to the depth of five metres, followed by infill of inert waste and sub soil to the depth of two metres. As to the dogleg, that was not dredged for the purpose of creating, restoring, improving or maintaining it. The dogleg was, in fact, destroyed in the creation of the marina.

17. On ground two, the taxpayer submits that the Tribunal was wrong to take the meaning of "watercourse" in the Finance Act as being defined in any way by the HMRC guidance notice AGL1. This states at paragraph 3.4, that a watercourse is a body of water with the following characteristics:

- Natural source of surface or underground water
- Flow under the action of gravity
- Reasonably well-defined channel of beds and banks, and
- Confluence with another watercourse or tidal waters

18. The taxpayer submits that "watercourse" should be given a wide meaning, as is suggested by the definitions of "watercourse" and "inland waters" in Section 221 of the Water Resources Act 1991, and therefore extending to certain types of cuts, lakes, ponds, reservoirs or docks. It submits that since the marina has hydraulic continuity with the river, and the water level rises and falls with the river level, it is a watercourse. The marina and river are as one, it contends.

19. Save that we agree that the meaning of "watercourse" in the FA 2001 is not determined by the HMRC guidance notice, we reject the appeal on ground two. The term "watercourse" in section 17(3)(c) bears its ordinary meaning, which is no doubt a wide meaning but not so wide as to include an artificial marina built near to a river and connecting to the river only by a narrow channel. Insofar as the definitions in the Water Resources Act 1991 give rise to technical argument under it that certain lakes and ponds can be watercourses and are therefore inland waters for the purposes of that Act, we do not accept that to be any guidance to the meaning of "watercourse" in the FA 2001.

20. We consider that a watercourse is, for the purposes of the FA 2001, at minimum a linear feature (natural or artificial) that carries naturally arising water from one part or end of it to or towards the other, such as a stream, culvert or ditch. The marina, by contrast, is in the nature of a lagoon, connected with but distinct from the adjoining river. Alternatively, as is envisaged in ground three of this appeal, it may be an inland port or harbour within the meaning of the Act. In either case, it has no natural flow of water; only the rise and fall in its level from time to time. We therefore consider that the Tribunal was correct to reject the argument that the marina is a watercourse.

21. On ground three the taxpayer contends that the Tribunal was wrong to hold that substantially the whole of the marina (excluding those small parts that were not navigable owing to a profiled gradient of the banks) was not a channel in a port or harbour. On the basis that the Tribunal appears to accept that the marina was a "port or harbour" within the meaning of Section 17(3)(c), the taxpayer contends that the Tribunal should have held that all navigable parts of the marina (i.e. substantially the whole of it) was a channel that had been created by dredging its bed.

22. We cannot agree. It was the marina (i.e. the port or harbour) that was constructed, not a channel in a port or harbour. In our view, in agreement with the Tribunal, it is an inappropriate use of language to describe virtually the entirety of the port or harbour as a channel on the basis that all of it is navigable. The narrow channel between the river and the marina might be described as a channel, within the meaning of the FA 2001, but the aggregate was not removed from there. That area was blocked by clay while the marina was excavated, and on completion the clay bung was removed so that river water could fill the marina.

Disposition

23. For all these cumulative reasons, we would dismiss the taxpayer's appeal.

Costs

24. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Fancourt

Judge Greg Sinfield

Release date: 25 June 2018