Neutral Citation Number: [2016] EWHC 1444 (Admin)

Case No: CO/248/2015

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2016

**Before :**

**SIR KENNETH PARKER**
**(Sitting as a Judge of the High Court)**

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**Between :**

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| **THE QUEEN (on the application of BIFFA WASTE SERVICES LIMITED)** | **Claimant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Defendants** |

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**Kieron Beal QC** (instructed by **Nabarro LLP**) for the **Claimant**
**Melanie Hall QC, Brendan McGurk,** (instructed by **The Solicitor for The Commissioners for Her Majesty's Revenue and Customs**) for the **Defendants**

Hearing dates: 13, 14, 15 April 2016

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# Approved Judgment

**Sir Kenneth Parker :**

## Introduction

1. The Claimant in this claim is Biffa Waste Services Limited ("Biffa"). The Defendants are the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

2. Biffa carries on business in the supply of waste disposal services. Biffa operates some 12 active landfill sites in the UK. Those sites contain cells in which waste is disposed of. The disposal of waste is subject to landfill tax ("LFT") charged by the Finance Act 1996 ("FA 1996"). The landfill site cells are constructed with a view to ensuring the safe containment of waste, and the sites also contain roads and other infrastructure to facilitate the landfill operation.

3. Biffa challenges a decision of HMRC dated 20 October 2014 ("the contested Decision"), by which HMRC informed Biffa that it was re-instating a decision taken on 31 May 2012. The contested Decision directed Biffa to treat as subject to LFT the use of material in the construction of a "regulation layer" (also referred to as a "regulating layer"). This layer is stated to be the layer above the final layer of soft waste placed below the "cap" used to seal the containment system which houses the waste material disposed of within the cell. The regulation layer is 300mm deep, and comprises soil or fine soils ("fines") or other appropriate material. Biffa calls the final layer of soft waste beneath the regulation layer the "EVP layer".

4. Biffa contends that the contested Decision was contrary to a previous ruling from HMRC which Biffa had received dated 28 September 2009 ("the Ruling"). Biffa maintains that the Ruling represented that the regulation layer was not subject to LFT. From September 2009 to May 2012 Biffa relied on the Ruling to its detriment, in that it did not account for LFT in relation to the material used to construct the regulation layers at each of its landfill sites.

5. Biffa contends that HMRC may not apply the contested Decision *retrospectively* and assess Biffa for LFT in respect of material used in the regulation layer prior to 31 May 2012 when HMRC revoked the Ruling. HMRC accepts that if the Ruling meant what Biffa contends that it meant, and if Biffa disclosed to HMRC all material facts before the Ruling was made, HMRC was not entitled to withdraw the Ruling with retrospective effect and the claim must succeed.

6. Biffa does not seek permission to apply for judicial review in respect of the substantive nature of the contested Decision. Although Biffa does not agree that the contested Decision is correct in law, that is a matter that Biffa is challenging before the First-tier Tribunal (Tax Chamber) ("FTT"). The judicial review proceeds therefore on the assumption that HMRC's revised analysis of the LFT treatment of the regulation layer is correct. That is, the material used in the regulation layer <u>is</u> subject to LFT.

## The Relevant Legislation

7. The relevant legislation is set out in Annex 1 to this judgment.

## The "regulation layer": Further Description

8. The construction and operation of landfill sites are regulated by the Environment Agency ("EA"). In order to operate landfill sites and individual cells, Biffa is required to be licensed as a landfill operator by the EA. It requires a permit and planning permission for each proposed site. Each permit requires Biffa to enter into a Construction Quality Assurance agreement ("CQA") with the EA setting out the way in which the cell engineering will be carried out at that site.

9. One component of the cell engineering is the containment system, also referred to as the liner. This liner is put in place to ensure that pollutants are prevented from escaping from the cell. The containment system itself may be vulnerable to large, heavy or sharp items discarded in the landfill cell. As waste decomposes, it can move underground and this can put pressure on the containment system. Landfill operators typically place a layer of approximately two metres of "fluff" at the base and side of landfill cells. This is commonly referred to as "basal and side fluff" within the industry. The term "fluff" thus relates to soft material, which is typically black bag domestic waste.

10. When the cells are full of disposed waste, a landfill operator is required to seal the top of it. This is referred to as "capping". This capping then enables restoration work to be carried out above the cap, so that the land can be re-used for other purposes.

11. For each of its sites, the CQA required Biffa to place (and compact) a 300 mm thick "regulation layer" above the final waste in a landfill cell below the cap. This layer had to consist of material with a particle size no bigger than 20 mm, which would provide a uniform surface upon which the liner would be placed and the restoration work could be carried out. The CQA also set out requirements for the material that could be used as part of the regulation layer and how it should be placed and compacted. The "regulation layer" had to be constructed using suitable material. The requirements of the regulation layer were applied in the same way across all landfill cells that Biffa constructed.

12. For example, the CQA dating from May 2009 for the North Herts Landfill Site dealt with the regulation layer in section 5. The 300mm thick regulation layer was to be placed and compacted over the final waste surface. It had to comprise the materials noted in Clause 5.2 of the Specification. The CQA Engineer (employed by a third party) had to monitor the materials that were to be used in the regulation layer, to make sure non-compliant material did not enter the works. The CQA Engineer also had periodically to excavate through the compacted regulation layer to check that the thickness was 300mm or greater.

13. The EA in draft guidance described the regulation layer in the following terms:

> **"Regulating Layer**
>
> B37. Where a regulating layer is incorporated in the design of a capping scheme, it should be installed over the final lift of waste and would generally consist of fine grained material, although a variety of materials may be appropriate including

> suitable material from the incoming waste stream. The waste regulating layer is not included in the Landfill Regulations capping guidelines as it performs none of the functions required of the capping system. However, the inclusion of a waste regulating layer has a number of benefits which include:
>
> - Protection of the overlying geo-synthetic engineered cap from puncture by protruding objects within the waste mass;
> - Reduction of the magnitude of strains on the engineered cap;
> - Provision of a firm, even surface against which to place the engineered cap therefore making control and monitoring of material placement easier." [emphasis added].

14. Biffa used a 300mm thick regulation layer as the material placed immediately below the cap.

Material changes to the legislation at the time of the Ruling

15. In July 2008, in *Waste Recycling Group v HMRC* [2008] EWCA Civ 849, CA ("*WRG*"), the Court of Appeal held (applying the earlier reasoning of the Court of Appeal in *Parkwood v. HMRC* [2002] EWCA Civ 1707; [2003] 1 WLR 697) that material which was put to "use" on a landfill site was not subject to landfill tax as it had not been disposed of with the intention of discarding it within the meaning of sections 40 and 64 of the FA 1996.

16. On 22 December 2008, HMRC published Revenue & Customs Brief 58/08 ("Brief 58/08"). Brief 58/08 stated, amongst other things, that:

> "2. . . . The Court found that where material received on a landfill site is put to use on the site (for example, for the daily coverage of sites required under environmental regulation, and construction of on-site haulage roads), it is not taxable, as there is not, at the relevant time, a disposal with the intention of discarding the material.
>
> 3. We accepted the Court's decision and did not seek leave to appeal to the House of Lords. "

Brief 58/08 then stated that:

> "4. Notwithstanding any possible changes to landfill tax legislation that the Government might decide to introduce, the judgment means that materials put to use on a landfill site are not taxable. Illustrative non-taxable uses of material include:

**Cell engineering**

- Mineral material (including clay) used as part of an artificially established (geological) barrier on the bottom, sides or top (cap) of a landfill. Materials used to protect from damage any geosynthetic product used for landfill containment on the base, sides or top of the landfill.

- Drainage material at the base and up the sides of the site used to collect leachate and allow its transport to a low point for collection/extraction.

- Material used beneath the landfill cap and up the sides of the site to allow landfill gas to accumulate for extraction. Material used as a preferential drainage layer above the cap to encourage surface water run off.

- Mineral material (including clay) used to protect the cap and provide a restoration layer for planting."

17. The relevant legislation was changed prospectively from 1 September 2009. A new section 65A FA 1996 enabled certain procedures or activities to be treated as a disposal of waste (even if pursuant to *WRG* they might be regarded as "use" of waste). HMRC enacted secondary legislation in the form of the Landfill Tax (Prescribed Landfill Site Activities) Order (SI 2009 No 1929) ("the Prescribed Activities Order"), pursuant to the new power in section 65A FA 1996.

18. At the same time the Finance Act 2009 repealed the previous exemption from landfill tax under what was section 43C FA 1996 for certain site restoration work. The Finance Act 2009 however inserted a new paragraph 1B into Schedule 5 of the FA 1996. This imposed a requirement for the operator of a landfill site to notify HMRC prior to the commencement of any "restoration work" at the site. Restoration work was defined *inter alia* to include work, "other than capping waste", required by a waste management licence or a permit authorising the disposal of waste on or in land.

19. HMRC issued revised guidance in HMRC Notice LFT1 ("Notice LFT1"), coming into effect on 1 September 2009. This guidance addressed the new legislative provisions. The guidance referred to "restoration" as:

> "any work which the planning consent, the waste management licence or permit authorising disposal of waste on or in the land require to be carried out after waste disposal operations, in order to restore the site to a condition suitable for non-landfill use."

20. The previous guidance relating to restoration had referred to exempt restoration works as not including works connected with capping. This restriction was unfortunately omitted from the new version of Notice LFT1.

**The Events Leading up to the Ruling**

21. On 22 February 2008 Ms Laura Sweeney, tax manager of Biffa, wrote to Mr Kelly, a local officer of HMRC in regard to a "Notification of Restoration of North Herts Landfill Site, application for a Tax Free Area ("TFA") & Agreement of a Special Weighing Scheme ("SWS")". This notification of course pre-dated the amended legislative regime (and related Notice LFT1) that came into effect on 1 September 2009; and also pre-dated the judgment of the Court of Appeal in *WRG* (given in July 2008). Ms Sweeney notified HMRC of Biffa's intention to commence restoration of cell 3A and cell 3B at the North Herts Landfill Site. Ms Sweeney wrote:

> "There is a requirement to progressively restore North Herts. Restoration is due to commence in April 2009 using soils that have been stockpiled to date, however given there will be a shortfall for the required restoration, soils will also be imported for the restoration work."

22. Ms Sweeney particularised the shortfall and continued:

> "The site requests approval to operate a tax free area within the confines of the site for the stockpiling of the soils until the restoration commences ... Once there is a sufficient stock of soils the restoration will commence ..."

23. In respect of the Special Weighing Scheme, Ms Sweeney said that her position was:

> "consistent with previous agreements on commencing restoration using soils stockpiled ..."

24. The next relevant and crucial communication was about 18 months later, on 28 August 2009. By this time the amended legislative regime was about to come into effect, and it is clear that both Biffa and HMRC were directing their minds to that regime. Ms Jackie Doone, indirect tax manager of Biffa, wrote to Mr Kelly of HMRC regarding "North Herts Landfill – TFA [Tax Free Area] & Notification of restoration". Ms Doone wrote that Biffa wished to increase the tonnages to be stored in the Restoration TFA/Information Area at the North Herts Landfill from 85,200 tonnes [the amount approved by HMRC following the request in February 2008] to 103,837. Ms Doone explained:

> "The reason for this additional tonnage is due to specific (EA) requirements, namely that a minimum 300mm thick regulation layer above the waste (below the geo-membrane cap) is required by the EA to form a part of the restoration works." [emphasis added]

25. Ms Doone enclosed an extract from Biffa's CQA report, namely section 5.1 [see paragraph 8 above], observing that the permit authorising the disposal of waste on a landfill site "requires (and is dependent on) an EA approved CQA to be in place." She enclosed the letter from the EA, "stating their agreement to the requirement for these works" [namely, the 300mm thick regulation layer below the cap]. Ms Doone concluded:

> "For the avoidance of doubt, the afore-mentioned works required by the EA will be carried out after waste disposal operations in order to restore the site to a condition suitable for non-landfill use.
>
> I should be grateful for your formal acceptance to the above and your confirmation that the (EA required) works as described fall within [Notice] LFT1 (September 2009) [clearly referring to a published draft of the Notice LFT1 that would be applicable to the amended legislative regime from 1 September 2009] Paragraph 2.5, Activity 8, Column D."

26. In my view, it is clear what Ms Doone intended by this letter. Under the *current* legislative regime, works relating to "capping" were expressly excluded from the definition of "restoration"; and the "regulation layer" was almost certainly *related* to "capping", so that waste within that layer was *prima facie* liable to LFT. Of course, there was an argument that, following *WRG*, the placing of the regulation layer was a "use", rather than a "disposal", of waste, so that the relevant waste was outside the scope of LFT. However, Ms Doone had looked simply at the draft Notice LFT1 (dated September 2009) which was applicable to the new legislation, and believed that, following paragraph 2.5, Activity 8 in the draft Notice LFT1, "restoration" under the amended legislative regime, shortly to come into force, did not exclude work, such as the regulation layer, that related to "capping". She was plainly wrong in that assumption, which formed the basis of her letter, because the *primary legislation* continued expressly to exclude works relating to "capping" from the definition of "restoration". Ms Doone did not say that the regulation layer, or the EA requirement, was unique to the North Herts site, and it is clear from other evidence that HMRC knew that a number of operators deployed a similar layer.

27. As noted above, it was on 28 August 2009 (at 2.40pm) that Ms Doone sent a letter by email to Mr Kelly, attaching the "restoration" application. Within HMRC's records a copy of that email bore a manuscript note, presumably written by Mr Kelly, as follows:

> "Contacted John D. – use of material determines liability – more [Notice] LFT1 Activity number 1 Col. D." [my emphasis]

28. The reference to "John D." must be to Mr John Durkan, a senior member of a HMRC policy team with responsibility for Environmental Taxes, which was based at Ralli Quays, Salford. This cryptic manuscript note demonstrates that Mr Kelly, a local officer, *immediately* on receipt of Ms Doone's application sought, as would ordinarily be expected given the significance of the application, advice and assistance from a senior officer of HMRC responsible for general policy in the

affected tax area. It is not known precisely what Mr Kelly told Mr Durkan when he made the request for advice. It does appear that Mr Durkan's assessment was that the regulation layer was "capping" works, of a kind identified in Column D of the table in Notice LFTI, and, being "use", rather than disposal, of waste, was not taxable. I note that Mr Durkan correctly focussed, in the light of *WRG*, on the *use* of the material, rather than upon the specific nature of the material. There was nothing to suggest that this advice was specific to a particular site, and it bore the clear hallmarks of a general policy statement of the correct tax treatment of the regulation layer, whether or not the regulation layer was to be found at one or more than one landfill site.

29. On 1 September 2009, Ms Doone sent a further email to Mr Kelly of HMRC providing further details of the methodology used to calculate the total tonnage of material to be used in restoration at the North Herts site.

30. On 2 September 2009 Mr Kelly sent an email to Ms Doone stating that:

> "it all comes down to 'use' and we see the 300mm thick regulation layer above the waste, but below the geo-membrane cap, as put to use and it is not temporary cover."

31. It is clear that Mr Kelly's response must have been informed by the policy assessment that he had received from Mr Durkan. The communication between Mr Kelly and Mr Durkan also corroborates Ms Doone's evidence in her witness statement that, after sending the "restoration" application, she had spoken on the telephone to Mr Kelly who told her that he would consult "policy" on the matter. This evidence was somewhat sceptically questioned by HMRC, before the manuscript note belatedly emerged after the hearing in this court. I note again the emphasis on "use", rather than the nature of the material, and the general nature of the statement regarding the correct tax treatment of the regulation layer, following Mr Durkan's lead.

32. On 10 September 2009 at 12:49, following a conversation earlier that morning, Ms Doone sent an email to Mr Kelly which stated:

> "I would see that the works for North Herts fits wholly into Activity 8 [of Notice LFT1, September 2009, paragraph 2.5 dealing with "restoration"] as I would consider all the works to be restoration work. If you think that these works do not fall under Activity 8, then I would like to understand why that is the case. The reason for my concern is that this is new legislation I need to be sure that we are interpreting HMRC guidance correctly."

33. Mr Kelly responded to Ms. Doone by email at 13:34 on the same day. He stated:

> "Both Richard [Hart, another local HMRC officer] and myself see the 300mm layer below the geo-membrane cap at North Herts site as pertinent to the capping specification and as such an engineered layer rather than any work that is required to be

> carried out after waste disposal operations in order to restore the site to a condition suitable for non-landfill use.
>
> Therefore covered by Activity Number 1 of the latest LFT1 Notice rather than Activity Number 8." [my emphasis].

34. Although Mr Kelly did not specifically refer to Mr Durkan, it is now clear that Mr Durkan's assessment must have informed the response. The emphasis was again upon use ("engineered layer"), rather than upon the precise nature of the material.

35. Ms Doone responded by email to Robert Kelly and Richard Hart at 16:59 on the same day. She wrote:

> "[...] I really want to get this right. I recognise that this is new guidance and that I am being picky, but I am really struggling with your interpretation on this one.
>
> As far as Activity 1 is concerned, the legislative part [...] only applies to '... The use of material to cover the disposal area during a short term cessation in landfill disposal activity.'
>
> This is not what we are doing, so from first principles, we would contend that this work does not fall into Activity 1.
>
> The North Herts CQA previously sent to you clearly shows that this work is in relation to a Regulation Layer below the cap. Whilst we would agree that the cap itself could fall within Activity 1 Column D, the Regulation Layer squarely falls within Activity 8 as it is clearly a required element of restoration, not a formal engineered cap..."

36. On the morning of 14 September 2009 Ms Doone emailed Mr Hart of HMRC that she was not satisfied with HMRC's explanation and that she wished "to address this issue directly to the policy team". Later that day Ms Annette Hughes, "customer relationship manager" in the Utilities Sector of HMRC, based in Coventry, emailed Ms Doone that Mr Richard Hart, "a very experienced Environmental Tax Specialist", would be the main contact for the group on ET [Environmental Tax] issues.

37. On 16 September 2009, following a discussion the previous day, Julian Bowden-Williams (Biffa's then Head of Tax and Treasury) wrote to Annette Hughes.

38. In this letter, headed "Restoration Clarification Request", Mr Bowden-Williams explained that he was writing because it was "more a matter of principle around the advice given on this new legislation", and that "our fundamental issue" was the disagreement about the interpretation of the law and the new Notice LFT1. He re-iterated that:

> "This notification [of 28 August 2009] set out details of the required regulation layer to be put in place on the site in question. This requirement, as you may be aware, forms a part

> of the [CQA] for the restoration works for the site. This CQA has been approved by the [EA] and by default now forms part of the permitted restoration requirements for the site…"

39. Mr Bowden-Williams then referred to the Prescribed Activities Order and to the new Notice LFT1 (September 2009), and restated Biffa's contention that the regulation layer fell squarely within paragraph 2.5 Activity 8 of the new Notice LFT1, as non-taxable "restoration". He went on to explain that he could not accept the apparent view of HMRC that the relevant activity fell within Activity 1 of Notice LFT1. He continued:

> "… I do think it is of fundamental importance that a taxpayer fully understands the rationale behind the advice they are being given…
>
> We need clarity in this area so that we can apply your guidance operationally and code/account for LFT correctly …
>
> We recognise that it takes time for new legislation to be fully understood and to bed in, but as we are due to commence these works shortly we would welcome a rapid response to our query …
>
> Therefore, for the avoidance of doubt, I should be grateful for your formal written confirmation … that the work as described herein and in the … letter of 28 August 2009 to Rob Kelly…
>
> i) Does not fall within paragraph 3(1)(a) SI 2009 1929
>
> ii) Does fall within Activity 8, Column D (i.e. non taxable as restoration) of the in-force [Notice] LFT1."

40. On Friday, 18 September 2009 Annette Hughes emailed Mr Durkan, under the subject: Landfill Tax Clarification Request; with "High" Importance, stating that she would appreciate his view:

> "… It would appear to be part of the restoration process. What do you think?"

Mr Durkan, who of course was already au fait through Mr Kelly with the issue raised by Ms Hughes, responded promptly after the weekend on Monday, 21 September 2009:

> "I agree with Julian [Bowden-Williams] that the work is not an activity that falls under Article 3(1)(a), which, as he rightly says, is aimed at daily cover.
>
> Under the recent amendment to the Finance Act 1996, Schedule 5, paragraph 1B, Biffa are required to notify us of restoration work – failure to do so makes that restoration a prescribed activity under Article 3(1)(h)(i). This requirement is shown in [Notice] LFT1, paragraph 2.5 as Activity number 8.

> It is arguable that the regulation layer is not actually restoration but is just a use of waste that was not brought back into the tax by the Prescribed Activities Order [This sentence has been starred and marked on the disclosed copy, presumably contemporaneously with its receipt and presumably by the recipient, Ms Hughes]. That is, they could legitimately use the material without telling us. If Biffa are happy to include the regulation layer in their notification to us I don't think we should discourage this, as we get a more complete picture of activities on the site. Restoration has previously been taken to mean what goes on above the cap (where there is a cap) and this line has been accepted by the Court of Appeal in the Ebbcliffe case and is in line with the EA's guidance [case reference given]. Prior to 1 September [2009], the cap would either be taxed (because it was waste), or not (because it was bought in material that was purchased for its properties, in order to meet a high specification)..."

I note again that the entire emphasis in this advice is upon the activity in question and the *use* of the material, and not upon the precise nature of the material. I note also that the advice is phrased in general terms and is directed from a policy point of view at the correct tax treatment of the regulation layer quite generally, without any suggestion that the tax treatment would, or could rationally, differ depending upon purely local circumstances. It is also clear that Mr Durkan had applied his mind to the potential application of the Prescribed Activities Order to the regulation layer.

41. On the same day Ms Hughes replied by email to Mr Durkan. She accepted that in the light of the primary legislation the regulation layer was not "restoration", but concluded:

> "Either way both activities [presumably restoration, as properly understood, and the regulation layer] are now outside the scope of the tax, but I agree it is useful to have the additional info [presumably by voluntary notification] to get the picture."

42. Ms Hughes copied this email, and the previous emails regarding "Landfill Tax Clarification request", to Mr Hart and Mr Kelly, as might be expected given that they were the two local officers concerned with Biffa's request.

43. In fact Mr Hart had been applying his mind in some detail to the relevant matter. Earlier on the same day, 21 September 2009, he emailed Ms Hughes and Mr Kelly, saying that "having just had two restoration notifications from Cory Environmental on Friday" he had looked into the restoration guidance in more detail. He noted that hitherto "Policy/U[nit] of E[xpertise] and the rest of us" had failed to notice that the amended legislation continued to exclude "capping" from "restoration". As seen above, Mr Durkan had by this time in any event correctly understood the legislative position. Mr Hart concluded:

> "A regulating [*sic*] layer below and above the plastic liner in my view is clearly capping. So in reality there has been no

> change to the original restoration notification system or definitions.
>
> Capping – engineering so now outside the scope [an anonymous manuscript note records: "Both O/S scope"]…
>
> Biffa CQA plan is for capping works – not restoration …"

44. Mr Hart, therefore, in essence reached the same conclusion as that expressed by Mr Durkan in his email sent to Ms Hughes on the same day. Mr Hart also at that time was plainly focussed on the *use* of the material for the regulation layer, and not upon the precise nature of the material so used, and upon the correct tax treatment of the regulation layer as a matter of principle.

**The Ruling**

45. The Ruling was given in a letter dated 28 September 2009 from Mr Hart on behalf of HMRC to Mr Bowden-Williams on behalf of Biffa. This letter is of pivotal importance in this claim, and for ease of reference the whole letter is set out at Annex 2 to this judgment.

46. The letter set out the statutory definition of restoration referred to by Annette Hughes in her email of 22 September 2009. Mr Hart acknowledged that HMRC Notice LFT1 would have been clearer had it included the phrase "other than capping of the waste" in the definition of restoration. As a prelude to the Ruling, Mr Hart stated:

> "Materials used in capping works remain outside the scope of landfill tax under the changed interpretations following the [*WRG*] case. Here it was ruled that material received on a landfill site which is put to a use on the site was not taxable. This was because there was not, at the relevant time a disposal with the intention of discarding the material.
>
> Item 1 of section 2.5 whilst relating to materials used to cover the waste on short term cessation in landfill operations – a taxable activity, it does try at Column D to show the difference between those engineering activities such as capping works, that would be seen to be outside the scope of the tax."

47. The actual Ruling was stated as follows:

> "Having examined in detail the information and evidence provided to Robert Kelly as part of the original notification dated 28th August 2009 and examined the new landfill legislation in some depth, I can confirm that the installation of a regulation layer under the construction of a cap at South [sic] Herts landfill site is outside the scope of landfill tax, (assuming here that Biffa have no intention to discard this material, but to put it to a use), however it is not considered to be part of the site restoration. Indeed all the evidence provided relates to

> capping. Environment Agency letter dated 24th June 2009 refers to "the above proposed capping works", the CQA plan relates to phase 3B and part phase 3A capping works." [emphasis added]

48. Mr Hart concluded the letter as follows:

> "... Your request for an increase in the tonnage of materials to be stored in the site's information area is accepted as these areas are for designating activities that are non taxable ... I hope this helps to clarify landfill tax liability following the WRG Court of Appeal case and the 1/9/2009 legislation changes."

49. Biffa responded by letter of 19 October 2009 from Mr Bowden-Williams to Mr Hart as follows:

> "We note your ruling that the use of material in the installation of a regulation layer under a cap is outside the scope of landfill tax and is to be treated as 'Capping' as opposed to 'Restoration'."

50. By letter dated 20 October 2009, Mr Hart wrote to Ms Doone of Biffa, informing her that HMRC was approving a variation to the tonnage of waste which could be kept on site tax free and reissuing the agreement as an information area for the period from 1 September 2009.

**Events Following the Ruling**

51. Following the Ruling, Biffa did not account for LFT in respect of the regulation layer at the North Herts landfill site. Nor did it account for LFT in respect of any regulation layer (that is, 300mm of material immediately below the cap) at any of its other landfill sites, on the footing that the regulation layer at each of those sites was materially the same as the regulation layer at the North Herts site.

52. Following receipt of certain information Mr Hart of HMRC on 14 June 2011 visited the Biffa landfill site at Colnbrook to carry out a tax audit. Mr Hart made a contemporary note of the visit. He had observed that Biffa was using a substantial amount of "fines" in the regulation layers, and that Biffa was treating a further layer (comprising shredded waste), which Biffa called the EVP layer, as non-taxable.

53. Immediately following the Colnbrook site visit, Mr Hart wrote to Annette Hughes of HMRC by email dated 15 June 2011. In the email he noted that:

> "normally sites do put a regulating/protection layer of soily material directly under the cap – around 300-400 mm which I have with other companies accepted that this is part of the cap protection systems – so the 300mm fines may be OK & under the WRG decision we may have to accept the final soft sorted layer of waste is tax free."

54. Ms Hughes was plainly concerned by Mr Hart's email, and on 16 June 2011 she emailed a number of officers in HMRC who were involved in environmental tax matters. In the email she noted that Biffa was including 2 metres of waste as part of the "engineered" cap, comprising 300mm of fines [the regulation layer] and 1700mm of waste [the EVP layer]. She raised the possibility that "caps" might be "over-engineered" (with adverse tax consequences), and concluded:

> "Urgent policy guidance sought as it is imperative we have a consistent approach."

55. On 20 June 2011 there was a flurry of emails on the issue raised, but no firm conclusion was reached other than to seek the view of the EA on the environmental aspect of the matter.

56. On 23 June 2011 Mr Hart wrote to Biffa, stating that:

> **"Shredded waste used under the cap**
>
> It is my understanding that where Biffa use shredded transfer station waste and fines for the final layer of a cell at this site then this incoming waste stream is not being subject to landfill Tax.
>
> During the inspection I comments [sic] on the fact that I considered this material to be taxable under activity (g) of the [Prescribed Activities Order] 'the use of material placed against the drainage layer or liner of the disposal area to prevent damage to that layer or liner.'
>
> Before I make a formal decision regarding the landfill tax liability of the use of these materials, could you please arrange for me to see a copy of the CQA cap design documentation in which I believe the use of this material is mentioned.
>
> This will then enable me to refer specific documentation to my headquarters for clarification of this legislation."

57. The next relevant communication is on 16 November 2011, when Ms Hughes emailed Mr Andy Wiggins (Environmental Taxes within HMRC), stating *inter alia*:

> "... The [Biffa] ruling definitely relates to the 300mm "regulation layer" ... Given a literal reading of the 2009 legislation it would appear there is mis-direction (for the 300mm) past 2009 and this would appear to be a widespread area of confusion. I believe it was customary to use L/R [lower rated] materials for this 300mm under the cap. There is definitely no mention of the 1700mm below that. The CQA plan [referring to Biffa's CQA for North Herts] lists unsuitable materials..."

58. There was then internal communication as to the historic position which had been taken in respect of the regulation layer and in respect of "top fluff". In an email from Mr Darren Greedy of HMRC to Mr Wiggins of 18 November 2011 Mr Greedy postulated that it was possible that the Prescribed Activities Order had not been intended to capture the material in the regulation layer.

59. In an email dated 4 January 2012 from John Durkan to Richard Hart, dealing with "Reverse Fluff", Mr Durkan stated inter alia:

> "Based upon the EA's position, we said we were minded to reject the top fluff claims in their entirety, on the basis that such layers are serving no useful purpose and that therefore the waste is not being used. Given how far apart the industry and EA appeared to be, it was discussed that this rejection could be conditional on the outcome of discussions between the EA and the industry on the proposed EA guidance on capping. That guidance is only being drafted now and we haven't seen a copy, although we may get to see it later this month Until we get a look at that guidance we would be on very shakey [sic] ground if we tried to withdraw the letter to Biffa that said that the regulating layer isn't taxable…" [my emphasis]

60. By early March 2012 HMRC policy began to crystallise. On 1 March 2012 Mr Wiggins emailed Ms Hughes:

> "The position is that we have agreed with the EA that top fluff [corresponding to the EVP layer] is just careful placement of soft waste and should be liable to landfill tax but that waste deposited above this to form the regulating layer (by providing protection to the overlying geosynthetic engineered cap) would constitute a use up to the time the Prescribed Activities Order came into force in September 2009 (from this point as this layer of material is placed against the liner landfill tax would generally be due …).
>
> The basis for this being that from the EA's perspective such a layer would have an engineering specification which would be set out in specific agreements between the site operator and the EA. This specification would also include details about the required depth – which the EA felt would normally be 200-300mm – BUT there may be site specific instances where it might exceed this (if local circumstances made it difficult to source inert material like soil, for example).
>
> We have drafted a letter to go out to those who have made reverse fluff claims rejecting these purely covering fluff, but partially accepting those where the original claim for fluff specifically incorporated the regulating layer. This will indicate that we will be happy to consider this element of the claim if additional evidence could be supplied (primarily

> technical information around the engineering specification etc)...."

61. On 12 March 2012 Ms Hughes replied in a lengthy email, setting out the difficulties within the landfill industry caused by varying interpretations, and applications, of the LFT legislation and in the absence of clear guidance from HMRC. She summarised her position:

> "I would like to be able to confirm definitively our view of the legislation and how it impacts pre and post 2009. It is becoming quite embarrassing. If we were ultimately to agree Biffa and others are acting within legislation, we will have disadvantaged other compliant groups (lost contracts) who are seeking to apply the legislation as we would want ...."

62. The documents disclosed in this claim reveal no further relevant internal communications regarding the issues raised in the emails between Mr Wiggins and Ms Hughes. However, on 18 May 2012 (about 2 months later) HMRC issued Revenue and Customs Brief 15/12 ("the Brief"). The Brief stated that it sought:

> "....to give clarity on the Landfill Tax treatment of waste in certain conditions, and to provide appropriate principles so that all landfill site operators consistently apply the Landfill Tax legislation, so allowing operators to compete fairly. This clarification has been sought by the waste management industry itself and representatives of landfill site operators."

63. After setting out the relevant legislative background, the Brief continued:

> "...HMRC has received a number of claims from landfill site operators and their advisers that relate to materials which are said to be used to protect or provide a suitable stable substrate for the overlying layers at the top of a landfill cell. This material is often referred to as a 'landfill reverse fluff layer' or 'top fluff layer' as opposed to a 'landfill fluff layer', which describes material used for basal landfill engineering to protect the integrity of the lining system.
>
> HMRC has discussed these claims widely, including with site operators and the Environment Agency ('EA'), and have undertaken site visits to inform its decision. It has concluded that the so-called reverse or top fluff layer constitutes careful placement of soft waste that should not cause damage to the cap or regulating layer placed above and should be (and always should have been) liable to Landfill Tax as the waste material is disposed with the intention of discarding it and the disposal does not constitute a use of that material. However, HMRC accepts that the material placed to form the regulating layer (by providing protection to the overlying geo-synthetic engineered cap) would constitute a 'use', up to the time the 2009 Order came into force on 1 September 2009. The basis for this

> conclusion is that such a regulating layer is an engineering specification which would be set out in specific agreements between the site operator and the EA.
>
> Landfill site operators and their advisers who have made such claims will have them rejected insofar as they relate to the so-called reverse or top fluff layer and any further such claims that are submitted will be rejected.
>
> Up until 31 August 2009, Landfill Tax would not have been due on materials used in this regulating layer and HMRC will accept any parts of claims relating to this subject to certain conditions being met, including considering whether the landfill operator would be unjustly enriched by any repayment of Landfill Tax.
>
> Since 1 September 2009, by virtue of Article 3 (1)(g) of the 2009 Order, waste deposited in the regulating layer was brought back into the scope of the tax and HMRC considers that this remains subject to tax when it is placed against any drainage layer or liner, for example a geotextile separation layer, since such layers or liners form an integral part of the landfill liner.
>
> Where operators have not paid tax in accordance with the clarifications set out above, and where they do not take steps to do so following this clarification, HMRC will make assessments to ensure that all landfill site operators pay the correct amount of tax, ensuring fair and equitable treatment across the industry. The matter will be litigated if necessary. HMRC will enforce these assessments and penalties may also be applicable in such cases."

64. Following publication of the Brief, Biffa on 20 May 2012 began to charge its customers LFT on material used as part of the regulation layer. On 31 May 2012 Mr Hart wrote to Biffa regarding "Landfill Tax – Regulation Layer and Final waste lift (fluff layer)". The part dealing with the regulation layer stated:

> "**(b) Regulating layer**
>
> **Pre 1/9/2009**
>
> HMRC accepts that following the WRG Court of Appeal case in July 2008, materials placed to form a regulating layer (by providing protection to the overlying geosynthetic engineered cap) would constitute a use and as such fell outside the scope of Landfill tax.
>
> **Post 1/9/2009**

> Following the issue of the Landfill Tax (Prescribed Landfill site Activities) Order 2009, which took effect from 1st September 2009, a number of uses were brought back into tax.
>
> HMRC considers that waste deposited in the regulation layer is one such use brought back into the scope of the tax under the prescribed activity (g) *"the use of material placed against the drainage layer or liner of the disposal area to prevent damage to the layer or liner"* and as such this layer remains subject to tax when it is placed against any drainage layer or liner, since such layers or liners form an integral part of the landfill liner.
>
> **North Herts**
>
> I note that I gave a decision on 28th September 2009 in relation to North Herts landfill site contrary to the above interpretation.
>
> Therefore I must instruct you that with immediate effect steps must be taken to reinstate the appropriate rate of Landfill tax on materials used within this regulation layer.
>
> HMRC do not consider that this incorrect decision applies to the regulation layer at any site other than the North Herts landfill site ..."

65. On 22 June 2012 HMRC issued a protective assessment of landfill tax against Biffa for £69,888,920 relating to material used in the regulation layer and EVP layer during the period September 2009 to March 2012.

66. Notwithstanding the Brief and decision letter to Biffa, it appears that the issue of rulings on tax liability to landfill operators following the amended legislative regime in September 2009 was exercising HMRC. On 22 June 2012 Ms Hughes emailed Mr Steve Robinson (Environmental Taxes at HMRC) as follows:

> "As discussed following the meeting, would you discuss with Andy [Discombe] and Darren [Greedy] the issue of misdirection following the 2009 legislation changes, which brought certain uses back into tax. I appreciate this is an operational issue but the issue could be widespread? It concerns (I understand) lower rate material such as soils/sand placed against the liner. When queried by the likes of [redacted] and [redacted] following the legislation changes in 2009, Richard Hart and Mike Shelvey advised the businesses that LFT was not due – I understand Averil Baldwin [Environmental Taxes Case Worker] has also given this advice though I have no involvement in any of Averil's groups. I need to look at the detail in relation to [redacted] and [redacted] (Richard also confirmed he has an e-mail from Colin Airey (now retired) advising [redacted] that tax is not due).

> [redacted]. If misdirection this requires us to raise assessments (not issued) and write off the tax. I believe within that process we have to make it clear whether it is a class mis-direction and depending on level of tax involved it has to be signed off at a high level in the Dept and appears in our accounts (this was certainly the case for VAT historically). It is a long winded process which has to be undertaken by the operational side. The NAO have been taking a keen interest in ETs for the past few years and are aware of the issues re fluff and mis-description. It is very important that we ensure tax is applied correctly going forward. These issues are differentiated from Biffa who were actively processing S/R waste for this purpose. I thought you should be aware of this matter and may perhaps have a view on way forward particularly if it is class mis-direction? I have no wish to use valuable resource raising assessments which are written off but appreciate we may be under a spotlight. Perhaps then we might need to get a view from officers on whether this is widespread so we take a consistent approach in dealing with the issue?"

67. On 20 June 2012 Ernst & Young LLP ("EY") on behalf of Biffa requested an independent review of the decision to withdraw the Ruling, and on 21 June 2012 EY also requested a formal review of the protective assessment.

68. On 5 July 2012 Ms Hughes emailed Mr Greedy and Mr Robinson regarding "Landfill tax – misdirection":

> "This issue is becoming more urgent. It is my understanding that there is mis-direction in relation to the **300mm regulation layer** post September 2009. [Redacted] has raised this directly with Darren following industry meetings. Biffa, [redacted] have been given similar rulings. In the case of Biffa it related to a specific site (North Herts) but I consider it can reasonably be applied to all sites if the matter were referred to Tribunal. I did raise this point with Andy (Wiggins) whilst discussions with the EA were ongoing and he took a different view on this. The North Herts ruling was forwarded to policy (decision given 19/10/2009). [my emphasis]
>
> When the 2009 legislation was introduced we had not received any claims for reverse fluff and it was generally understood by officers (and policy) that the regulation layer formed part of the cap and remained o/s of the tax. It is only more recently, following discussions with the EA and sols, that we have come out with a firm policy view on any material against the liner being subject to tax post Sept 2009 and we do not differentiate between the regulating layer and fluff layer. [Redacted] will have used lower rated soils/sand for their 300mm layer but we certainly know that in 2011 Biffa were using shredded S/R waste. A protective best judgement assessment has been issued to Biffa for all waste coded EVP – at this point I am uncertain

> whether it includes the 300mm layer (which will be shredded to a higher spec) but Richard will check with Steve Holmes (audit officer on leave this week). A decision letter was issued to call for tax on both the 300mm layer (with exception of the North Herts site) and the 1700mm layer below that and they have been invited to supply accurate figures. They have appealed both the quantum and decision. E&Y are representing Biffa and are seeking a meeting on 25/7. However the issue will have to be referred to the review unit to comply with time limits, given they have requested a review. The review unit will then consider an extension whilst we discuss the issues and await their arguments (which is likely to include all material supplied at the Ufton site visit when John attended). Consequently we do need policy view on how we deal with class mis-direction [my emphasis] (whether l/r or s/r material) given it could end up in Tribunal.
>
> I am on leave next week but Morris is about and will be attending the meeting with E&Y. Your emerging thoughts would be most welcome as any action we take at tribunal (if it reaches that point) must have policy support."

69. In the disclosed documents the next internal communication is an email from Mr Morris Graham (LBS Birmingham) to several HMRC officers, including Mr Greedy, Mr Robinson, Mr Hart and Ms Hughes, attaching "a draft of a position paper intended to clearly set out why we think the reg [regulation] layer and top fluff are within the scope of the charge". Mr Graham also referred to the preparation of a paper on the response to "EY's legitimate expectation document". Neither of these documents was disclosed in this claim, but on 19 October 2012 Mr Durkan (HMRC Environmental Taxes) commented upon the draft sent by Mr Graham. He attached "the EA's guidance on capping", which was in fact a November 2004 consultation paper, which set out the EA's views in some detail over four paragraphs on the "Regulating Layer". Referring to paragraph 24 of Mr Graham's draft, Mr Durkan commented:

> "I think this, as worded, exposes us. The truth is we didn't appreciate that we would bring the regulating layer into tax and were trying just to tax the top fluff layer. We now say that the regulating layer is taxable because the Order says it is and the top fluff layer is just a careful placement of waste and so was always taxable." [my emphasis].

70. On 22 October 2012 Mr Graham replied by email, seeking *inter alia* an explanation of Mr Durkan's comment. Mr Durkan in turn replied, appearing to suggest that before the amended legislative regime HMRC were not aware of the regulating layer. That apparent suggestion led Mr Hart on 23 October 2012 to email all HMRC officers concerned with the relevant issue, as follows:

> "... He [Mr Durken] is right in saying our intentions at the various meetings post WRG were to ensure fluff was taxed –

> (or the first and final lift) as we knew waste was used to protect plastic liners – both base, sides and top.
>
> Why I think we ignored the regulation layer it was because at the large landfill companies it was never subject to tax nor had it been for some time – following Parkwood [a reference to an earlier Court of Appeal decision] where purchased materials (sand was often used as a regulation layer) or processed waste (processed to a spec, fit for the purpose etc was often used as a regulation layer). In addition it was considered to be part of the capping operation – as shown by CQA and capping design documentation. [my emphasis]
>
> Whilst pre WRG waste used in the capping operation would have been taxable, in reality this was a rarity as on site clays, purchased clays, processed waste etc would have been used."

71. On 29 May 2013 HMRC re-issued two assessments to landfill tax against Biffa in the revised total amount of £68,069,550.00 relating to material used in the Regulation Layer and EVP layer during the period from September 2009 to June 2012. £6,212,884.25 of this assessment relates to material used in the construction of Regulation Layers.

72. HMRC agreed in a letter to Biffa dated 26 September 2012 that following the conclusion of any negotiations, HMRC would issue a final decision which would give Biffa the right of review and appeal specifically in relation to that decision. Discussions continued between Biffa and HMRC up to September 2014.

**The Contested Decision**

73. By letter dated 20 October 2014 HMRC provided its final decision to Biffa. The effect of the contested Decision was to direct Biffa that:

> "the use of shredded materials within the final waste lift and materials used within the regulation layer prior to capping of individual landfill site waste cells was standard rated for Landfill tax purposes from 1/9/2009."

74. As to the Regulating Layer post 1 September 2009 the letter stated:

> "Following the issue of the [Prescribed Activities Order], a number of uses were brought back into tax. HMRC considers that the waste deposited in the regulation layer is one such use brought back into the scope of the tax under the prescribed activity (g) "the use of material placed against the drainage layer or liner of the disposal area to prevent damage to the layer or liner" and as such this layer remains subject to tax when it is placed against any drainage layer or liner, since such layers or liners form an integral part of the landfill liner."

75. Mr Hart noted that he had given a decision on 28 September 2009 in relation to North Herts landfill site contrary to the above interpretation, but he said that HMRC did not consider that that incorrect decision applied to the regulation layer at any site other than the North Herts landfill site.

76. On 13 November 2014 Biffa filed a Notice of Appeal in the FTT appealing against the entirety of the contested Decision. Nonetheless, in relation to the decision to withdraw the Ruling, the Claimant cannot permissibly advance public law grounds to quash the contested Decision before the FTT: see the judgments of the Upper Tribunal in *Noor v. HMRC* [2013] UKUT 71 (TCC), [2013] STC 998, UT; and *HMRC v. Hok Ltd* [2012] UKUT 363 (TCC), [2013] STC 225, UT.

**Legal Principles of Legitimate Expectation**

77. There was no real dispute between the parties as to the principles governing legitimate expectation. Mr Kieron Beal QC, on behalf of Biffa, did invoke Article 1 of Protocol 1 of the European Convention of Human Rights ("the ECHR"), and also the principle of legitimate expectation in EU law, but, in my view, if he failed to establish that the contested Decision defeated a legitimate expectation, or was so conspicuously unfair as to amount to an abuse of power, neither the ECHR nor EU law could vindicate Biffa's claim.

78. In the present context it is helpful to restate the basic principles as first articulated by Bingham LJ (as he then was) in *R (ex parte MFK Underwriting Agents Ltd) v Inland Revenue Commissioners* [1990] 1 WLR 1545:

> "I am, however, of opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law (see *R v A-G, ex p Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord Oliver). Such taxpayers would appreciate, if they could not so pithily express, the truth of Walton J's aphorism: 'One should be taxed by law, and not be untaxed by concession' (see *Vestey v IRC* (No 1) [1977] 3 All ER 1073 at 1098, [1979] Ch 177 at 197). No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be

> appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Second, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification."

79. My attention was also drawn, among other authorities, at the hearing to *R (on the application of Cameron) v HMRC* [2012] EWHC 1174 (Admin); *R (GSTS Pathology) v HMRC* [2013] EWHC 1801 (Admin), [2013] STC 2017; *R (Davies and Gaines-Cooper) v HMRC* [2011] UKSC 47; [2011] 1 WLR 2625; *R (Hely Hutchinson) v HMRC* [2015] EWHC 3261 (Admin); *R v IRC ex parte Unilever Plc* [1996] STC 681, CA.

80. Mr Beal QC did rely in particular on *Paponette and others v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1. In that case it was alleged that the government (of Trinidad and Tobago) had unequivocally assured certain operators of taxis that, if they agreed to move their base of operations to land owned by a publicly established body (and an alleged competitor), the public body would not have management of, or control over, the operators. The operators did move their base of operations. By statutory regulation the public body in the event acquired control over the operators, to the extent that it issued permits, and charged fees, for the use by such operators of the facilities owned by it. The operators claimed that the conduct of the government breached their legitimate expectation and was not justified by any public interest. Lord Dyson JSC delivered the judgment of the majority of the Board. The crucial issue was the meaning and scope of the representation or assurance given to the claimant operators.

81. Referring to *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56, Lord Dyson JSC stated at paragraph 30 that the relevant question was:

> "How on a fair reading of the promise it would have been reasonably understood by those to whom it was made."

82. The majority of the Board was in no doubt that the alleged representation or assurance had been given and that the regulations were inconsistent with such representation or assurance. (Lord Brown of Eaton-under-Heywood JSC dissented, holding that the operators had no more than a hope of eventually managing the new facilities, and in any event they could not have reasonably expected to enjoy the use of the facilities free of charge for other than a short period). The gravamen of the claimant operators' grievance was that the public operator used the regulations to impose fees and charges. As to that aspect, Lord Dyson JSC stated:

> "It is true that there was no express representation that, if the [operators] moved to [the new facility], the [public body] would not charge them for the use of the facility (whether a permit fee or a user fee per journey). But the charging of fees was incidental to the exercise of the [public body's] management and control of [the facility] and a direct consequence of the authorisation given to it by the 1997 Regulations. It was, therefore, a direct consequence of the breach of the representations which were relied on by [the operators] in agreeing to relocate to [the facility]." (paragraph 33).

83. Mr Beal QC relied upon *Paponette* to submit that the determination of the meaning and scope of any representation or assurance by a public authority is not an exercise in mere semantics. The court, having regard to the relevant legal and factual circumstances, must ascertain, where appropriate, what is reasonably and fairly implicit in any such representation or assurance: by agreeing that the public body would not be given "management and control" of the operators, the government in the circumstances of *Paponette* implied that the public body would not burden operators with fees or charges arising from their operations that were based at the new facility owned by the public body. In the relevant context the imposition of a significant unavoidable operating cost was an aspect of "control" that was inconsistent with the assurance given to the operators. It appears to me that Mr Beal's submission must be correct, bearing in mind that the doctrine of legitimate expectation is founded on the principle that public authorities must not act conspicuously unfairly towards those with whom they deal. Evaluating the fairness of the conduct of a public authority is not an exercise in semantics; it is necessary to ascertain, against the relevant legal and factual matrix, what the representation fairly and reasonably meant to those to whom it was made.

## The Issues

84. The two central issues in this claim are:

i) What is the meaning and scope of the Ruling of 28 September 2009?

ii) Did Biffa disclose to HMRC all relevant facts and matters before the Ruling was made, so that it would be conspicuously unfair for HMRC to revoke the Ruling with retrospective effect in respect of all sites other than North Herts?

## The First Issue

HMRC Case

85. As to the first central issue, the Detailed Grounds of Response of HMRC relied essentially on two points. First, HMRC contended that the Ruling was confined to a single site, namely North Herts, and could not reasonably be relied upon by Biffa in respect of any other landfill site operated by Biffa. Secondly, the Ruling was limited to the use of soil, and soil only, for the regulation layer, and Biffa could not reasonably rely upon the Ruling to use any other material for the regulation layer, including "fines".

86. As to the first point, I agree with Mrs Melanie Hall QC, who appeared on behalf of HMRC, that Biffa's request for guidance on the LFT position in respect of the regulation layer was made in the context of a specific site, and that the various exchanges leading to the Ruling, set out in detail above, referred to the North Herts site. Furthermore, Biffa's contention was that under the prospective new legislative scheme the regulation layer was "restoration" and that, so long as Biffa made due notification under the legislation on a site by site basis, the material used in the regulation layer was not subject to LFT.

87. For these proceedings Mr Hart, one of the local HMRC officers who, as explained earlier, had experience in the relevant field, made a lengthy witness statement in which he stated firmly that he intended the Ruling to apply only to the North Herts site. Mr Hart's subjective intention cannot of course be decisive as to the meaning of the Ruling, but it would ordinarily be something that the Court would at least take into account. However, for reasons that will emerge, I regret that I cannot in any event give any real weight to that statement of subjective intention.

88. Having carefully reviewed the contemporary documents, I am left in no doubt that the Ruling was not limited to the North Herts site, but was a general statement by HMRC, albeit in the context of the North Herts site, as to the meaning and effect of the relevant legislation that could legitimately be relied on, not only in respect of the regulation layer at the North Herts site, but also in respect of a regulation layer (assuming no material difference with the circumstances at the North Herts site) at any other landfill site. My reasons are as follows.

89. In her very first relevant request of 28 August 2009 (see paragraph 24 above) Ms Doone, indirect tax manager, was asking Mr Kelly for general guidance on the application of the new legislative regime to the regulation layer. She explained in some detail the nature of the regulation layer, enclosing the appropriate part of Biffa's CQA report and outlining the regulatory position of the EA, with a supporting letter from the EA. Biffa, as HMRC well knew, was a major landfill enterprise which operated many landfill sites. There was nothing to suggest that the regulation layer was unique to the North Herts site, or that the relevant operating conditions or regulatory position were materially different at other Biffa sites. Furthermore, as the evidence shows, Mr Hart knew that Biffa, and other major operators, deployed a regulation layer at their sites generally: see paragraph 53 and paragraph 70 above. In his witness statement Mr Hart does not refer to that evidence.

90. Ms Doone wrongly believed that under the new legislative regime the regulation layer was "restoration", and so fell in principle outside the scope of LFT. She could hardly be blamed for this mistake, for the primary legislation had been amended in a way that required some diligent scrutiny, and the published draft of Notice LFT1 was rather misleading. However, even on that footing, I interpret Ms Doone's request to be for *general* guidance in respect of the regulation layer, notwithstanding the fact that if the regulation layer were *quod non* "restoration", notification would be required on a site by site basis. Notification was simply a step required to secure favourable tax treatment: Ms Doone was asking whether the regulation layer as a matter of principle should now be treated as "restoration".

91. Similarly, Mr Kelly's immediate response to Ms Doone's request (see paragraph 30 above) was in quite general terms, not confined, either expressly or impliedly, to the North Herts site: the relevant question was whether the regulation layer was a "use" of waste, and, in HMRC's view, it was such a "use". That view did not depend on any circumstances that were specific or unique to the North Herts site, nor could it rationally do so. If the regulation layer were constructed in materially the same way at any other Biffa site or sites, the tax analysis and treatment would inevitably be the same.

92. On 10 September 2009 (see paragraph 32 above) Ms Doone again pressed Mr Kelly for general guidance on the correct interpretation of the new legislation, and the response (see paragraph 33 above), although referring to the North Herts site, had general import: the regulation layer was not "restoration"; it was an "engineered layer" (and so put to "use"). Again that view did not depend on any circumstances that were specific or unique to the North Herts site, nor rationally could it do so for the reason stated above.

93. Biffa remained puzzled by HMRC's analysis, and ultimately on 16 September 2009 Mr Bowden-Williams (Biffa's Head of Tax and Treasury) wrote a long letter seeking clarification of that analysis (see paragraphs 37-39 above). In my view, on a fair reading of that letter, Mr Bowden-Williams was seeking, as he said, "as a matter of principle", to understand HMRC's analysis of the tax treatment of the regulation layer. Mr Bowden-Williams was writing as the most senior tax executive on behalf of Biffa, a major landfill enterprise operating many landfill sites. There was nothing in the letter to suggest that the regulation layer was unique to the North Herts site, or that any site specific characteristics could in any way affect the legal analysis of the tax treatment, whether the analysis proceeded along the lines proposed at that time by Biffa (restoration) or those apparently put forward by HMRC (use).

94. As to the Ruling itself, it is correct that Mr Hart referred to the installation of a regulation layer "at South [*sic*] Herts landfill site". However, the site was part of the context in which the guidance was sought. The relevant context also included the fact that, as HMRC well knew, Biffa was a major operator with many landfill sites. There was nothing to suggest either that the regulation layer was unique to the North Herts site, or that the relevant operating procedures or regulatory position was materially different at other Biffa sites, or that Mr Hart's clear analysis of the tax treatment of the regulation layer turned, or could rationally turn, upon characteristics specific or unique to the North Herts site.

95. Although the Ruling did not in terms expressly state that it could be relied on in respect of other Biffa sites, it is plain, given the full context as explained above, that the Ruling implicitly extended to other sites: see *Paponette* at paragraphs 80-83 above. Indeed, in my view, it would have been irrational if Mr Hart had concluded the Ruling by expressly stating that it applied, and applied only, to the North Herts site, and that it could not be relied upon in respect of any other Biffa site.

96. Such a purported restriction would inevitably, and legitimately, have led Biffa to invite Mr Hart to explain (a) why he appeared to consider the North Herts site unique in some relevant respect; and (b) assuming that the regulation layer was materially the same and was put to the same use, what specific characteristics at other sites could justifiably lead to a different tax treatment of the regulation layer at such sites, and (c) again assuming that the regulation layer was materially the same and was put to the same use, what purpose could be usefully served by requiring Biffa to seek a similar Ruling for each and every regulation layer at its numerous sites. No such explanation could of course have been given because the legal analysis and conclusion did not depend upon specific site characteristics; it depended solely upon the nature and function of the regulation layer, which could be replicated at some or all of Biffa's sites; and the only effect of repeated requests for Rulings in respect of each and every site would have been to increase both private costs and public bureaucracy. In fact Mr Hart concluded the Ruling by stating quite generally, and without focussing on any particular site, that he hoped that it would help "to clarify landfill tax liability following WRG Court of Appeal case and the 1/9/2009 legislation changes". Consistently with the meaning of the Ruling, as I interpret it, Mr Bowden-Williams in his reply summarised its effect in appropriate generally applicable terms:

> "... the use of material in the installation of a regulation layer under the cap is outside the scope of landfill tax and is to be treated as "capping" as opposed to "restoration"."

97. HMRC also contended that the Ruling was not sufficiently clear to found a legitimate expectation: the concept of "regulation layer" was ambiguous and not sufficiently precise. It is correct that the Ruling itself did not in terms define the regulation layer. However, Ms Doone's request of 28 August 2009 laid out, as explained earlier, in some detail the nature of the regulation layer, with appropriate supporting material. There is nothing to suggest that any of the local HMRC officers did not understand the nature of the regulation layer; and HMRC did not ask for any further particulars of the regulation layer before the Ruling was given. In truth, as the documents plainly demonstrate, HMRC, through the officers concerned, fully understood what was meant by the regulation layer, and made the Ruling on the basis of that understanding.

98. Some confusion was initially caused because Biffa had incorrectly described in its internal records some of the material used for the regulation layer. Biffa relied upon those records to report to HMRC and to account for LFT. The error arose because Biffa had internally attached an incorrect description of material to two particular codes, and had incorrectly included a type of material that had in fact not been used in the regulation layer. Ms Doone explained the nature of those errors in an email of 22 December 2015. In the light of the explanation, the errors are irrelevant to the question whether the Ruling was ambiguous, and do not undermine Biffa's

evidence that only "fines" were used for the regulation layer. I was also given during the hearing a document called "Bundle References to the EVP layer". Having considered the references, I do not believe that they show, individually or collectively, that there was at the time of the Ruling, or at any subsequent time, any ambiguity in the meaning of, or any failure to understand, the regulation layer.

99. It was also contended that the Ruling was not unconditional because Mr Hart included the words:

> "assuming here that Biffa have no intention to discard this material, but to put it to a use." (see paragraph 47 above).

100. However, to read those words as conditional would simply have deprived the Ruling of any real utility, and again would have invited an explanation from Mr Hart as to how the putative condition could be satisfied. In my view, Mr Hart was *explaining* that *because*, in HMRC's view, the regulation layer was put "to use", it fell outside the scope of the tax following *WRG*. That interpretation is also of course consistent with what other local HMRC officers had told Biffa before the formal Ruling was made, namely, that the regulation layer constituted a "use" of waste. It is also consistent with Mr Bowden-Williams letter to HMRC of 28 September 2008 (see paragraph 49 above) in which he stated unequivocally how Biffa interpreted the Ruling, an interpretation that was not questioned by HMRC at the time.

101. During the course of the evidence at the hearing I was testing the proposition that the Ruling was of general application and not site specific. On that hypothesis, I had some difficulty in understanding why, as appeared at first sight from the material disclosed by HMRC, only local officers had been involved in the process of decision making. Interpretations of important fiscal legislation, that are likely to carry substantial financial consequences, ordinarily, in my experience, do require the involvement of HMRC officers at a higher policy level, and, not unusually, the provision of legal advice. Indeed confidence in the integrity of the administration of tax would appear to demand such involvement. In the present case there was, somewhat unusually, no witness statement from any senior HMRC officer at policy level to explain how a Ruling of the present nature came to be made at local level, and why no senior policy officer had been involved in the decision-making, if that were indeed the case.

102. At the hearing I pressed this concern on the parties. Mr Kieron Beal QC, on behalf of the Claimant, submitted, first, that, in line with my own concern, it was inconceivable that senior policy officers had not been involved in the decision making and, secondly, that the subsequent material relating to HMRC's *change* of policy in respect of the regulation layer strongly suggested that there had been such earlier involvement. The Claimant on many occasions had accordingly asked for specific disclosure of documents that would have shed light on this issue, but HMRC consistently maintained that they had disclosed all relevant material: see the letters from Nabarro LLP, on behalf of Biffa, dated 15 October 2015, 7 December 2015, 11 December 2015, February 2016, and the second witness statement of Ms Doone for Biffa.

103. The gist of my concern can be seen from the following interchange with Mr Beal QC during his opening submissions after he had reviewed the documents leading to the Ruling:

> "Judge: Can I just make another general sort of observation. Obviously what has gone on over those few days [that is, in the days leading to the Ruling] is of pretty, I don't say monumental, but very substantial importance for the industry as a whole. It is an interpretation of an important bit of legislation. It is important conclusions, for example, the conclusion that it [the regulation layer] is not restoration, because it should be properly treated as capping. That is point one …
>
> Point two, it does not matter whether it is capping because of *WRG*. That also requires someone applying their mind to it [the correct legal analysis]. And, thirdly, and this is implicit, there is nothing else that can bring it [the regulation layer] back in [to LFT]. My impression is that Mr Hart wasn't sort of within the policy team of HMRC….
>
> … and something as big as that [the Ruling] usually goes beyond the sort of local level … up to policy, and as you said earlier, followed by something like a business brief: "we have looked at this generally speaking because it is quite important obviously for all operators and this is our mature and considered understanding of the legislative position"….
>
> *Therefore if you are going to be saying that WRG applies, it [the regulation layer] is not taxable and by implication nothing else would bring it in [to LTF] normally that is done at – you would have thought done at – a pretty high level. But there we are.*" (Transcript of hearing, Day 1, pp115-117) [emphasis added].

104. I raised this issue with Mrs Hall QC in the course of her submissions in response, and was told the following:

> "…. So, yes, policy had a view on the 2009 order and the very fact that Richard Hart did not give effect to that policy in issuing the decision on 28 September 2009 demonstrates that part of my case, *namely that policy were not involved in that decision, which is of no great surprise because it was a site-specific cells 3A and B imminent restoration for North Herts site,* "Please give us clearance to increase the tonnage, otherwise we won't have enough material to restore these particular cells". *That is an operational question, as policy itself has recognised in these emails.*" (Transcript, Day 3, p91) [emphasis added].

105. That response was somewhat confused, in that, as the later documents conclusively show, the policy view that the regulation layer fell within article 3(1)(g) of the Prescribed Activities Order only emerged long after the Ruling had been given. As a simple matter of chronology, Mr Hart could not have referred to that later policy at the time of the Ruling. Much more importantly, however, I regret to say that Mrs Hall's response, in so far as it put forward, to bolster HMRC's case, that the Ruling was merely an "operational" decision, directed at the circumstances of a particular site, and that the Ruling was not informed by any assessment of the general legal position made at a senior policy level in HMRC, has turned out to be seriously misleading. After this judgment was sent in draft to the parties, on 21 June 2016 Mrs Hall QC sent to me an email (copied to Mr Beal QC), in which she stated that at the time of the hearing she was unaware of the documents disclosed after the hearing and at the hearing she had no intention to mislead. I fully accept that statement.

106. On reviewing the documents for the purpose of preparing this judgment, I reluctantly reached the point where I could barely believe that senior HMRC officers concerned with policy had not been involved in the decision-making leading to the Ruling. Therefore, on 22 April 2016, some little time after the three day hearing had concluded, and most exceptionally at such a stage in the proceedings, I sent an email to the parties stating that I was minded to order HMRC to provide specific disclosure. I stated my reasons as follows:

> "HMRC contends, among other submissions, that the relevant Ruling was specific to, and limited to, the North Herts site, exclusively in respect of the deployment of soils for the regulation layer. The further documentation [to which I had referred] may well throw light upon how HMRC officers at or about the time of the Ruling perceived the intended scope, and potential fiscal consequences, of the Ruling. They may also shed light on the email of 23 October 2012 from Mr Hart, in which, on one interpretation, he appears to say that HMRC knew at the time of the Ruling that landfill operators more generally deployed a regulation layer and that the layer sometimes comprised certain processed waste."

107. In response, on 29 April 2016 Mr Richard Shaw, a senior lawyer on behalf of HMRC, filed a second witness statement, to which certain documents were exhibited. Those documents conclusively show that at least one senior HMRC officer at policy level in the relevant tax area was centrally involved in the decision making leading to the Ruling. In fact Mr Kelly, one of the local officers, *immediately* contacted a senior policy officer, Mr John Durkan, after receipt of Ms Doone's request of 28 August 2009. Furthermore, it appears that Mr Durkan's view, conveyed to Mr Kelly, was that the regulation layer, being "use", fell outside the scope of the tax. It is clear that on 2 September 2009 Mr Kelly, having been asked by Ms Doone to consult "policy", did so, and passed on to her the view of "policy" [Mr Durkan] that the regulation layer was "put to use".

108. Even more astonishingly, it is now known, following disclosure of the further material, that, just before the Ruling was given on 28 September 2009, Ms Annette Hughes, HMRC "customer relationship manager" for Biffa, on 18 September 2009

emailed Mr Durkan on the specific subject of "Landfill Tax Clarification", drawing his attention, as a senior policy officer in the relevant area, to the "High Importance" of her request for guidance. Mr Durkan replied promptly and at length, to the effect that the regulation layer was not "restoration", but "arguably", a "use" of waste (and so outside the scope of the tax). Mr Durkan also made the point that Biffa was not required to notify this particular use of waste: in other words, on a correct understanding of the legal position, "notification" was a red herring – a point forcefully made by Mr Beal QC, on behalf of Biffa, at the hearing before me, without of course his having the benefit of its endorsement by the senior HMRC policy officer involved in the decision making leading to the Ruling.

109. It is also clear from Mr Durkan's response to Ms Hughes that, first, he fully grasped the concept of the regulation layer; and secondly, that he had applied his mind to the potential application of the Prescribed Activities Order; and thirdly, that he believed that the Order had no application to the regulation layer. Ms Hughes then confirmed her understanding of the advice that she was receiving from Mr Durkan, namely, that the regulation layer was an "activity" outside the scope of the tax. It is of some significance that Ms Hughes copied all the relevant emails regarding "Landfill Tax Clarification request" to both Mr Hart and Mr Kelly. That was entirely understandable because it was Mr Hart who had been made Biffa's primary contact on the correct tax treatment of the regulation layer, and who was deputed to give a written response to Biffa's request for clarification of the legal position. The inescapable inference, therefore, is that Mr Hart, before he made the Ruling, had before him the assessment made by Mr Durkan, a senior policy officer in the relevant tax area in HMRC, of the correct tax treatment of the regulation layer. However, in his witness statement Mr Hart does not refer either to the earlier communication between Mr Kelly and Mr Durkan, or to the important email chain, copied to him, concerning the "Landfill Tax Clarification request" of "High Importance".

110. In his witness statement Mr Hart said *inter alia*: "If Biffa had told me that its methods were standardised and that universal clearance was being sought on that basis, I would have set out to establish whether that was the case. The revenue at stake would have been very substantial indeed and *I would have elevated the request accordingly. It is difficult for me to say exactly what HMRC's reaction would have been.*" (paragraph 63, emphasis added). At paragraph 85 of his statement Mr Hart said categorically: "The statements made by me in relation to the North Herts site *were not statements of policy"* (my emphasis).

111. In my view, it is simply not possible to reconcile those assertions with the documents disclosed after the hearing. Those documents show that policy advice had been sought and given, that the Ruling fully reflected that policy advice, and that at the time Mr Hart knew that to be the case.

112. I am not satisfied that even now all relevant documents relating to the Ruling have been disclosed. I find it inconceivable, for example, that a draft of the Ruling, prepared by Mr Hart, would not have been sent to the senior policy officer, Mr Durkan, for his consideration, comment and approval. Ms Hughes had solicited Mr Durkan's assistance, and she must surely in line with best practice have invited his comments on the proposed Ruling, to ensure that it fully and accurately accorded with Mr Durkan's assessment of the legal position. Mr Durkan himself may have

liaised with other policy officers on this matter, as certainly happened, extensively, when the policy was changed.

113. In his second witness statement Mr Richard Shaw stated that both Ms Hughes and Mr Durkan have retired from HMRC, and that "in accordance with HMRC's normal policy" their email accounts have been deleted. I have to say that I find it extraordinary that communications between public officials in respect of important decision making, which form part of the official record of public tax administration, simply disappear and are not recoverable the moment that the officials leave public service. What if, for example, many years later the integrity of a particular retiree came under scrutiny, and the former officer herself was deprived of recourse to significant communications bearing upon the matter under investigation? Furthermore, Mr Kelly knew that policy had been involved in the decision-making, because he had sought Mr Durkan's advice, and Mr Kelly had been sent the important email chain regarding the correct tax treatment of the regulation layer. It is unclear why Mr Kelly has not been able to assist the court. In any event I must proceed on the basis that no further documents can be discovered, however unsatisfactory that may be.

114. I should stress that I reached my conclusion stated at paragraph 88 above exclusively on the basis of the documents before me at the hearing, being the communications between Biffa and HMRC, particularly, of course, the Ruling itself. Biffa was not aware of the policy assessment made at the time of the Ruling, and became aware of that assessment only through the further disclosure following the hearing. However, in my view, the documents now disclosed utterly undermine any contention that HMRC intended to make a Ruling that was exclusively site specific. The issue of the correct tax treatment of the regulation layer was considered at a senior policy level within HMRC and an assessment was made, as a matter of general principle and application, of the correct tax treatment of the regulation layer, a concept well understood both locally and centrally within HMRC.

115. It is deeply unattractive, to put the matter at its lowest, for HMRC to advance a case, based upon incomplete material known to the taxpayer, that a particular representation should be given a very narrow scope, when HMRC has in its possession further significant documents that, on a fair reading, show that no such narrow scope was intended at the time by HMRC The position reached in this case, as far as I am aware, is without precedent, and I sincerely hope that it will never recur. On the footing, however, that public law recognises a principle of conspicuous unfairness I would have been prepared to hold, had it been necessary, that a public authority, certainly an authority having the heavy responsibilities that are borne by HMRC, may not, without infringing that principle, put forward as the true meaning of a particular representation an interpretation that is wholly inconsistent with what the public authority at the time intended should be the effect of that representation in question. Such conduct might be acceptable in the sphere of private contract; in public law it is, in my view, simply offensive to justice and unlawful.

116. In the present context Mr Beal QC made a further point. It is clear from the material before the Court that after the Ruling HMRC gave favourable rulings bearing upon the regulation layer to a number (possibly all) of the major enterprises

in the industry. Mr Beal QC submitted, with some force, that it was inherently improbable that such rulings were given on a limited site specific basis, as was said to be the case for the Ruling. HMRC has not disclosed the other rulings. In the light of the further post-hearing disclosure it is, in my view, even less probable that such rulings to other operators were made on a site specific basis. This raises a serious question of unlawful discrimination. I could direct further disclosure by HMRC. However, that would simply prolong proceedings and, in the light of my conclusions, I do not believe that such a step is necessary for the fair and efficient disposal of this claim.

117. The events following the Ruling (set out in some detail at paragraphs 51 - 72 of this judgment) are strictly irrelevant to the proper interpretation of the Ruling. However, in my judgment, they do tend to confirm, first, that the Ruling itself was intended to be a generally applicable interpretation of the correct tax treatment of the regulation layer, and, secondly, that HMRC came to believe, as a matter of policy, that the Ruling represented an incorrect interpretation of the tax treatment of the regulation layer, in that Article 3(1)(g) of the Prescribed Activities Order, on one view, made the regulation layer liable to LFT from 1 September 2009.

118. This conclusion emerges perhaps most clearly from: Ms Hughes' email of 16 November 2011 where she recognises apparent mis-direction and "a widespread area of confusion" in respect of the regulation layer "post-2009" (that is, after 1 September 2009); the email of 4 January 2012 from Mr Durkan (who of course was the senior officer at policy level involved with the Ruling), in which he recognised, without suggesting any site specific limitation, that, without further, and presumably different, guidance from the EA, HMRC would be on "very shaky ground" if it "tried to withdraw the letter to Biffa that said that the regulating layer isn't taxable"; the email of 1 March 2012 from Mr Wiggins, another policy officer, referring to a draft letter which said that claims relating to the regulation layer would in principle be accepted; the email of 12 March 2012 from Ms Hughes which proceeded on the basis that Biffa had received from HMRC a generally applicable interpretation of the tax treatment of the regulation layer; the email of 22 June 2012 from Ms Hughes in which she referred to advice given to business that "LFT was not due" [in the context of the regulation layer], and to the possibility of class mis-direction requiring tax [that would be due under the new interpretation of the relevant legislation] to be written off in HMRC's accounts; and the email of 5 July 2012 from Ms Hughes in which she stated that as at 1 September 2009 "it was generally understood by officers (and policy) that the regulation layer formed part of the cap and remained o/s of the cap", and that it was "only recently" that policy had changed, which caused her in the email to seek policy assistance "on how we deal with class mis-direction … given it could end up in Tribunal".

119. The final point in relation to the meaning of the Ruling relates to the nature of the material used in the regulation layer. It is HMRC's case that the Ruling restricted the material to soil, and that accordingly Biffa could not legitimately rely upon the Ruling to use other material, namely, fines, for the regulation layer.

120. There are a number of immediate difficulties with that case. First, following *WRG*, it was the *use* to which material is put, rather than the specific nature of the material itself, which determined liability to LFT; and there was nothing to suggest that fines were being put to a different use from that provided by soil. Secondly, the

Ruling itself correctly emphasised that the liability to tax turned upon the question of "use", rather than upon the specific material used, an emphasis that is entirely in line with the assessment at policy level within HMRC which informed, and provided the basis for, the Ruling. Nowhere in the Ruling or in the contemporary documents is it suggested that soil only could be used in the regulation layer.

121. Mrs Hall QC, on behalf of HMRC, relied strongly upon the letter of 22 February 2008 from Ms Sweeney, tax manager of Biffa. It is correct that at that stage the particular request did relate to soil, and soil only. However, by 28 August 2009 events had significantly moved on, with the passage of the new legislation. It is clear that Ms Doone was a year later on 28 August 2009 specifically directing HMRC's attention to the regulation layer, which, in the strict sense, was not restoration above the cap. As I have already explained, Ms Doone set out in some detail what was meant by the regulation layer, and, importantly for present purposes, she enclosed key extracts from the relevant part of the CQA that described the material that would comprise the regulation layer, namely:

> "... sourced from on-site stockpiles, as directed by the site operator ... free of any unsuitable material or other deleterious materials or objects that may potentially cause damage to the capping system."

122. "Unsuitable materials" were defined, but there was nothing to suggest that soil, and soil only, could properly be used to form the regulation layer.

123. I also note that after the Ruling had been given, HMRC, although it knew that material other than soil was being used for the regulation layer, did not consider that fact of significance. On 15 June 2011, in his email to Ms Hughes (see paragraph 53 above), Mr Hart said:

> "Normally sites do put a regulating protection protecting layer of *soily material* directly under the cap, around 300 to 400 millimetres, which I have with other companies accepted that this is part of the cap protection systems. So the 300 millimetre *fines* may be okay and under the WRG decision we may have to accept that the final soft sorted layer of waste is tax." [my emphasis]

124. Mr Hart, therefore, recognised that the use of fines was appropriate for the regulation layer, and did not in any way suggest that soil only was appropriate or that the tax treatment could be different if fines, rather than soil, were used for the regulation layer. In that email he did not express any surprise that fines were generally used for the regulation layer, or suggest that the use of fines for the regulation layer went beyond the scope of the Ruling, or of rulings to other operators in respect of the regulation layer, that HMRC had given in the past.

125. On 5 January 2012, as part of the policy review, Mr Hart wrote to Mr Durkan:

> "... My view is that the letter I issued dated 28/9/2009 [clearly a reference to the Ruling] only relates to the final 300mm *fines*

> *soily material* and only to North Herts landfill site ..." [my emphasis]

126. Although the matter had been exercising HMRC for many months, I believe that this was the first occasion on which it was said in terms that the Ruling was limited to the North Herts site, but for present purposes the significance of the above observations is Mr Hart's recognition that "fines soily material" were used for the regulation layer, and that such use was consistent with the Ruling, notwithstanding Mr Hart's evident inclination at that time to limit the scope of the Ruling. Mr Hart did not refer to this email in his witness statement.

127. On 22 October 2012, following publication in May 2012 of the Business Brief, Mr Hart wrote to Mr Morris Graham, Assistant Director in LBS Birmingham:

> ""... why I think we ignored the regulation layer it was because at the larger landfill companies it was never subject to tax nor had it been for some time – following Parkwood where purchased materials (sand was often used as a regulation layer) or processed waste (processed to a spec, fit for purpose, etc) was often used as a regulation layer. In addition it was considered to be part of the capping system – as shown by CQA and capping design documentation..."

128. Mr Hart, therefore, at the time of the Ruling knew that many operators deployed a regulation layer, and that materials used for that layer did not consist exclusively of soil. However, he did not in the Ruling expressly seek to limit its scope to the use of soil, and indeed, for the reasons already given, there would have been no rational basis for such a limitation. Mr Hart again did not refer to this evidence in his witness statement.

129. In short, I resolve the first issue in favour of the Claimant.

**The Second Issue**

130. HMRC has advanced a case, put forward in various ways as these proceedings have progressed, that Biffa had failed to disclose to HMRC all relevant facts and matters before the Ruling was made.

131. The following passages from HMRC's Detailed Grounds of Response (settled by Mrs Hall QC and her junior counsel, Mr Brenden McGurk) clearly set out HMRC's position:

> "3. These proceedings only concern the tax treatment of material placed into the Regulation Layer at Biffa's landfill sites. They do not concern the tax treatment of the material placed into the EVP layer at its sites, in relation to which Biffa has brought statutory appeals that are pending before the First tier Tribunal ("FTT")." [*There is then a footnote: "It appears likely that Biffa unilaterally extended the North Herts clearance to the material in the EVP layer, also, insofar as Biffa did not (unlike other operators) pay tax on that material in the relevant*

*period either. This will be determined by the FTT.*] This case arises out of the fact that, unbeknownst to HMRC, the Claimant took the limited clearance that HMRC gave solely in relation to the North Herts site … and unilaterally applied that clearance not to the Regulation Layers at all of Biffa's UK landfill sites, irrespective of the material used. It therefore opted not to pay landfill tax on any material constituting the regulation layer in any of its landfill sites during the relevant period.

…

5. HMRC does not accept that the first Decision was applicable to any other landfill site operated by Biffa other than its North Herts site. The clearance was granted in relation to that site on the basis that Biffa Informed HMRC that the material in the Regulation Layer at North Herts and in relation to which clearance was sought was soil, a 'qualifying material' that attracts a much reduced rate of landfill tax and the use of which was required as a specific condition of operating the site. However, Biffa unilaterally extended that clearance to regulation layers at other landfill sites comprised of small processed waste material known commonly as "fines", which was a 'non-qualifying material' that was subject to LFT at the standard rate, and furthermore was not a specific requirement in relation to those sites. *In the circumstances, the Claimant did not put its cards face up on the table and was not entitled to apply the clearance to any landfill site beyond North Herts.* That is did so, amounts to nothing more than an aggressive tax strategy in pursuit of a commercial strategy designed to obtain increased market share. [*With a footnote referring to Mr Hart's witness statement*]

…

39. It is therefore not at all clear that HMRC would have issued the clearance at all but for Biffa's failure to advise HMRC of the nature of the material that it was actually using in the regulation layer at its other sites or that it intended to apply a clearance to all of its sites notwithstanding the significant factual differences between how the regulation layers were constituted at those sites." [emphasis added]

132. In sum, HMRC was alleging that Biffa failed at the time of the Ruling to disclose that it intended (i) to apply any ruling, not only to North Herts site, but also to other sites; and (ii) to use "fines" for the regulation layer. On that basis Biffa, it was argued, failed to disclose material facts to HMRC and could not therefore rely upon the Ruling for any purpose. That argument would of course raise the question why Biffa was allowed to enjoy the benefit of the Ruling even in respect of the North Herts site. As to that apparent anomaly, Mrs Hall QC submitted that HMRC had made a concession that in strict law it need not have made.

133. However, in the light of the concession, this ground adds nothing. If the scope of the Ruling was as HMRC contended was the case, HMRC had in any event a complete defence, and did not need to invoke a separate failure to disclose material facts.

134. I have already set out why I have concluded that:

i) HMRC did not intend to limit the scope of the Ruling to the North Herts site, and the Ruling was not so limited; and

ii) Nothing in the Ruling, expressly or impliedly, required the deployment of soil, and soil only, for the regulation layer.

135. Those conclusions therefore provide a complete answer to the case that was set out in the paragraphs of the Detailed Grounds of Response set out above, in so far as that case rested upon an allegation that the Claimant "did not put its cards face up on the table".

136. Nonetheless it appeared to me at the hearing that HMRC began to shift its ground somewhat on this part of its defence. Much more emphasis was placed on the so-called "EVP layer", that is, the "top fluff" layer of 1.7m placed immediately below the regulation layer. The proper tax treatment of that layer, with other matters, is of course before the FTT. HMRC appeared to be contending, for the first time, that Biffa had not "put all its cards face up on the table" because it had failed to tell HMRC that it intended to apply the Ruling not only to the regulation layer but to the much more extensive EVP layer of 1.7m.

137. Biffa did, in about March 2010, introduce an EVP layer, and did not account for LFT in respect of that layer. Whether or not Biffa, at the time of the Ruling, had an intention to introduce such a layer is a question of fact and, given the way in which HMRC had presented its defence in the Detailed Grounds of Response, as set out above, Biffa naturally had not filed evidence on this particular matter. The need to ensure that grounds of claim and response to such grounds in any action for judicial review are fully and clearly set out in the pleadings, and that new points, particularly if they turn upon evidence, are not introduced at the hearing, has been powerfully emphasised by the Court of Appeal: see *Prudential Assurance Company Limited v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 376, CA.

138. In any event, Mr Beal QC was able at relatively short notice to take instructions on this issue, and it appears that it was only following further meetings with officers from HMRC in early 2010 that Biffa introduced an EVP layer, and that Biffa did not have such an EVP layer in contemplation at the time of the Ruling. In these circumstances, the point falls away, as it appears HMRC has accepted.

139. HMRC also adopted a contention, which was not advanced in the Detailed Grounds of Response or flagged in the written Submissions for the hearing, that Biffa failed to disclose that the Ruling could *potentially* be applied to the EVP layer. However, the EVP layer was distinct from the regulation layer and, in particular, did not have the EA underpinning of the regulation layer. The Ruling therefore could not

directly be relied upon to claim that the EVP layer was not subject to LFT, and Biffa has not sought to rely on the Ruling directly for that purpose.

140. It is true that the *rationale* of the Ruling rested upon "use" of the material, and a similar rationale could be advanced to claim that the EVP layer was also put to "use". However, that rationale could be advanced in respect of the EVP layer, whether or not the Ruling was made in respect of the regulation layer. The rationale, as applied to the EVP layer, would require separate evaluation by, in the final analysis, the FTT.

141. The Court should also, in my view, be cautious about the present argument. Many tax rulings from HMRC are likely to have the potential for application in other contexts. It would in many cases be unduly burdensome for the taxpayer to seek to identify how a putative ruling might be used in a different context. HMRC might be as well, or better placed, to assess how such a ruling could be exploited; and an over demanding test for disclosure in this respect could cause significant uncertainty and lessen the incentive to seek advance rulings, in a way that would not be conducive to the public interest.

142. In these circumstances I conclude that the potential, such as it was, for application of the Ruling to the EVP layer was not a matter that Biffa was obliged to draw to the attention of HMRC if it was to take advantage of the Ruling.

143. For these reasons, I decide the second issue in favour of Biffa.

144. **Conclusions**

i) The Ruling was not limited to the North Herts site. It was generally applicable to other sites where Biffa deployed a regulation layer, in accordance with the EA requirements at such sites;

ii) The Ruling was clear, unambiguous and devoid of any relevant condition; and it did not require the deployment of soil and soil only for the regulation layer at Biffa landfill sites; and

iii) There was no material non-disclosure by Biffa such that Biffa could not legitimately rely upon the Ruling.

HMRC has conceded that, if I should find (i) to (iii) above satisfied, there is no answer to this claim. Accordingly, I allow the claim.

# ANNEX 1

## The Legislation

Landfill Tax and the Provisions of FA 96

1. LFT was introduced by the FA 96. The UK Government informed the EU Commission of its intention to introduce LFT via the Finance Bill pursuant to Article 3(2) of Directive 75/442 on waste which obliges Member States to:

> "...inform the Commission in good time of any draft rules to such effect and in particular any draft rule concerning...
>
> (b) the encouragement of:
>
> 1. reduction in the quantities of certain waste
>
> 2. the treatment of waste for its recycling and re-use
>
> 3. the recovery of raw materials and/or the production of energy from certain waste."

2. Landfill tax contributes to the Government's general and 'green' taxation objectives, including the Government's commitment to work towards a 'zero waste' economy. Landfill Tax is a key component in the drive to divert waste from landfill to ensure that EU targets are met.

3. Landfill Tax is imposed on Landfill Operators such as Biffa who dispose of material as waste at landfill sites which they are permitted by the Environment Agency to operate. Sections 39-41 of the FA 96 provide:

> **"39. Landfill Tax**
>
> (1) A tax, to be known as landfill tax, shall be charged in accordance with this Part.
>
> (2) The tax shall be under the care and management of the Commissioners of Customs and Excise.
>
> **40. Charge to tax**
>
> (1) Tax shall be charged on a taxable disposal made in England and Wales or Northern Ireland.
>
> (2) A disposal is a taxable disposal if—
>
> (a) it is a disposal of material as waste,
>
> (b) it is made by way of landfill,
>
> (c) it is made at a landfill site, and
>
> (d) it is made on or after 1st October 1996.

(3) For this purpose a disposal is made at a landfill site if the land on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal.

**41. Liability to tax**

(1) The person liable to pay tax charged on a taxable disposal is the landfill site operator.

(2) The reference here to the landfill site operator is to the person who is at the time of the disposal the operator of the landfill site which constitutes or contains the land on or under which the disposal is made."

4. Section 42 prescribes the amount of the tax per tonne of waste disposed of. The rate varies depending upon whether the waste is active, inactive or inert waste. Sections 42(1)-(3) currently provides:

"(1) The amount of tax charged on a taxable disposal shall be found by taking—

(a) £84.40 for each whole tonne disposed of and a proportionately reduced sum for any additional part of a tonne,

(b) a proportionately reduced sum if less than a tonne is disposed of.

(2) Where the material disposed of consists entirely of qualifying material or qualifying fines this section applies as if the [reference to £84.40 were to £2.65]

(3) Qualifying material is material for the time being listed for the purposes of this section in an order."

5. Section 43C (inserted by the Landfill Tax (Site Restoration and Quarries) Order 1999) related to site restoration and provided:

"(1) A disposal is not a taxable disposal for the purposes of this Part if—

(a) the disposal is of material all of which is treated for the purposes of section 42 above as qualifying material,

(b) before the disposal the operator of the landfill site notifies the Commissioners in writing that he is commencing the restoration of all or a part of the site and provides such other written information as the Commissioners may require generally or in the particular case, and

(c) the material is deposited on and used in the restoration of the site or part specified in the notification under paragraph (b) above.

(2) In this section "restoration" means work, other than capping waste, which is required by a relevant instrument to be carried out to restore a landfill site to use on completion of waste disposal operations.

(3) The following are relevant instruments—

(a) a planning consent;

(b) a waste management licence;

(c) resolution authorising the disposal of waste on or in land." (emphasis added)

6. It is important to note that Schedule 60 to the Finance Act 2009 (entitled 'Landfill Tax: Prescribed Landfill Site activities") repealed s.43C (see para 10 of schedule 60) and paragraph 11 inserted a new paragraph 1(B) into Schedule 5 of the Finance Act 1996. That paragraph provides:

**"1B Information: site restoration**

(1) Before commencing restoration of all or part of a landfill site, the operator of the site must—

(a) notify the Commissioners in writing that the restoration is to commence, and

(b) provide such other written information as the Commissioners may require generally or in the particular case.

(2) In this paragraph "restoration" means work, other than capping waste, which is required by a relevant instrument to be carried out to restore a landfill site to use on completion of waste disposal operations.

(3) The following are relevant instruments—

(a) a planning consent,

(b) a waste management licence, and

(c) a permit authorising the disposal of waste on or in land."

7. Section 64 FA 96 then sets out what amounts to a disposal of material as waste, as follows:

**"64. Disposal of material as waste**

(1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material.

(2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.

(3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) above the person on whose behalf the disposal is made shall be treated as making the disposal.

(4) The reference in subsection (3) above to a disposal on behalf of another person includes references to a disposal—

(a) at the request of another person;

(b) in pursuance of a contract with another person"

8. Section 65 amplifies the meaning of a chargeable disposal in s 40(2)(b). So far as material, it provides as follows:

**"65 Disposal by way of landfill**

(1) There is a disposal of material by way of landfill if –

(a) it is deposited on the surface of land or on a structure set into the surface, or

(b) it is deposited under the surface of land.

(2) Subsection (1) above applies whether or not the material is placed in a container before it is deposited.

(3) Subsection (1)(b) above applies whether the material –

(a) is covered with earth after it is deposited, or

(b) is deposited in a cavity (such as a cavern or mine).

(4) If material is deposited on the surface of land (or on a structure set into the surface) with a view to it being covered with earth the disposal must be treated as made when the material is deposited and not when it is covered ..."

9. The Landfill Tax (Prescribed Activities) Order 2009 came into force on 1 September 2009 and subjected the activities listed in Article 3 to landfill tax. Article 3(1) provided:

"The following landfill site activities are prescribed for the purposes of Section 65A of the Finance Act 1996 (activities to be treated as taxable disposals):

> (g) the use of material placed against the drainage layer or liner of the disposal area to prevent damage to that layer or liner."