

## Landfill Tax Claim Against HMRC

### **Background and History**

This concerns the proposition that SCC have overpaid landfill tax in relation to three elements of material:

- (a) “Fluff” – the material used to line the bottom of a landfill cell
- (b) “Reverse fluff” – the final layer placed on top prior to the cap
- (c) “Gas production material” - the material that broke down to form methane which was subsequently extracted and used to produce electricity.

In 2008, the Court of Appeal found that where material (“fluff”) received at landfill is put to use on the site it cannot be classified as taxable. Effectively, this material was used in engineering works and not disposed of as such. Fluff can be described as soft waste for engineering, which can be used to layer the base, sides and cap of a landfill cell and help protect against leachate run-off.

Therefore, it was ruled that landfill tax should not have been charged on this material, and the claimant (Waste Recycling Group) won back £2.1 million for landfill tax it had paid on this material. HMRC subsequently even invited landfill claims on “fluff” and other materials used for landfill containment. Some small number claims were paid, and the Treasury estimated that possible costs would total £300 million. However, HMRC abruptly decided, in the light of an “internal review,” that the policy should be reversed and no more fluff claims would be paid.

HMRC has also issued notices claiming that “reverse or top layer fluff” material was taxable and that its disposal did not constitute a use of the material; that all types of fluff “are and always have been taxable”; and that the 2008 ruling “does not set a precedent”.

This certainly did not endear HMRC to the industry, and a number of landfill site operators commenced Judicial Reviews challenging HMRC’s refusal to pay their claims. HMRC tried to get this appeal suspended, but this was thrown out by the Court of Appeal in 2015.

At the present time . . . HMRC was expected to appeal the decision, and if the Judicial Review goes ahead it is likely that the tax appeals will take years to process.

## **Use of PricewaterhouseCoopers (PwC)**

The Council have instructed PwC to act for them in pursuance of a claim against HMRC on a “no win no fee” basis in exchange for a percentage of any tax payments recovered. The values of SCC’s potential claims for the applicable periods are:-

Fluff £3.06m

Reverse fluff £8.66m (somewhat more speculative)

Gas production material £15m (highly speculative)

A claim form and the Particulars of Claim were submitted to the High Court on 18 July 2013 on HM Revenue and Customs (HMRC).

The PwC Legal claim on behalf of SCC submitted is based on the premise that although we paid tax via third party Viridor, the tax was directly passed on to HMRC, and that SCC bore the burden of the tax, therefore we should apply direct. Our claims contends that HMRC is the entity which wrongly charged imposed landfill tax to the site operators which was in turn passed on/charged to Somerset County Council.

For complex legal reasons, it is actually potentially better for SCC to make the claim. If a landfill operator were to make a claim this would be a “statutory claim” i.e. limited by statute to the four years leading up to the claim. So the SCC claim is for significantly more money than Viridor could claim.

PwC have also cited a current UK VAT case, in a claim where HMRC has been “unjustly enriched” due to its mistake at the expense of the tax payer. This may go as far as the European Court before suitable case law can be established one way or another.