Tax Chamber
First-tier Tribunal for Scotland

[2022] FTSTC 9

Ref: FTS/TC/AP/19/0002

Scottish Landfill Tax – Fines - whether Qualifying materials – standard or lower rates – burden of proof – appellant – evidence required – whether adequate statutory records – when is guidance statutory – tertiary legislation – appeal dismissed – Penalty – whether careless – for three quarters yes – appeal dismissed in part.

DECISION NOTICE

IN THE CASE OF

Patersons of Greenoakhill Limited

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
KATRINA LUMSDAINE

Sitting in public at George House, Edinburgh in October and November 2021

Written Submissions in December 2021

Philip Simpson, KC, instructed by Davidson Chalmers LLP, for the Appellant

David M Thomson, KC, instructed by Revenue Scotland, for the Respondent

Format of Decision

DECISION

Introduction

1. This appeal is against:

   (a) a Closure Notice dated 9 August 2018 as varied by a review decision dated 17 December 2018. The appellant ("Patersons") was assessed by Revenue Scotland to Scottish Landfill Tax ("SLfT") in the sum of £1,225,232 in respect of material ("the fines") accounted for from 1 April 2015 to 31 March 2016 at the lower rate of SLfT but claimed by Revenue Scotland to attract the standard rate of SLfT, since it did not consist wholly or mainly of qualifying material, and

   (b) the Closure Notice dated 9 August 2018, as varied by the review decision dated 17 December 2018. Patersons was assessed for penalties for alleged inaccuracies in SLfT returns submitted in respect of its four accounting periods from 1 April 2015 to 31 March 2016 in the sum of £612,616.

2. Although the appeal previously covered other issues, those have been settled extra judicially and the appeal in that regard has been withdrawn.

The hearing

3. Ultimately we had a Joint Bundle extending to 4,147 pages, a Bundle of Authorities extending to 920 pages, Skeleton Arguments for both parties and a Statement of Agreed Facts. As invited by the parties, we find the facts therein as proved for the purposes of this appeal. We are not setting out the Statement of Agreed Facts in that format since our Findings in Fact are rather more extensive, as should be the case.

4. At the outset of the hearing, to set the scene, we had two brief videos taken by Officer Turner of the Scottish Environment Protection Agency ("SEPA"). We also had a number of photographs. All of these were spoken to by Officer Turner and his evidence was not challenged.

5. For Patersons, we heard evidence from James Stickler, Finance Director, Tom Paterson, Managing Director, and Allan Huggins, Site Manager.

6. For Revenue Scotland, we heard from Michael Paterson, Head of Tax at Revenue Scotland, Officers Edward Turner and Kirsty Johnston of SEPA and Matthew Pask, a Specialist II from SEPA.

Post hearing

7. On 15 November 2021, having been writing this decision, I issued an Order seeking clarification about Revenue Scotland's Guidance SLfT2006 which had been heavily relied upon in the course of the hearing and debated in Skeleton Arguments and Closing Submissions.

8. I also raised the question of HMRC's Guidance on Landfill Tax. Again, whilst drafting, I had found references to reliance on that Guidance after the introduction of

SLfT. On 7 December 2021, the parties lodged a three page Joint Statement together with appendices extending to 224 pages.

The issues

9. There is no dispute between the parties that, in terms of the relevant legislation, namely Landfill Tax (Scotland) Act 2014 ("LTSA") there was a taxable disposal of the fines[1]. The fines were utilised as daily cover and there is no dispute that that is always taxable[2]. The only substantive issue is whether or not the fines should be taxed at the standard or lower rate[3].

10. During the relevant period both HMRC and Revenue Scotland defined fines as being "particles produced by a waste treatment process that involves an element of mechanical treatment".

11. As far as penalties are concerned, in Closing Submissions, Mr Thomson, KC conceded that he was no longer seeking penalties on the basis of the deliberate behaviour of Patersons. Therefore the issue was whether penalties should be imposed and, if so, in what sum.

Overview of Patersons' arguments

12. Paterson's argue that the fines consisted wholly of qualifying material apart from a small amount of non-qualifying material and therefore the appeal should be allowed both on the substantive issue and also as regards penalties. The word "small" is not defined and it was argued that that is therefore a key issue.

13. Patersons had simply continued to apply the tax treatment that HMRC had accepted as applicable under the previous UK landfill regime.

14. In the alternative, even if the fines were properly standard rated, the appeal should be allowed so far as directed against penalties because any inaccuracy was not a result of careless behaviour. Patersons had honestly believed that the fines were taxable at the lower rate and had completed the relevant SLfT returns on that basis.

Overview of Revenue Scotland's arguments

15. Revenue Scotland argue that the question of whether the fines were qualifying or not, must be determined in accordance with the statutory requirements which includes the tertiary legislation in the SLfT2006. It is that which determines whether there is a small amount of non-qualifying material.

16. Furthermore, Patersons were required to maintain records including those set out in section 74 Revenue Scotland and Tax Powers Act 2014 ("RSTPA"), regulation 3 of the Revenue Scotland and Tax Powers Act (Record Keeping) Regulations 2015 ("Record Regulations") and the Scottish Landfill Tax (Administration) Regulations 2015 ("the

[1] sections 3 and 4 LTSA
[2] section 6 LTSA and Article 3(1)(a) Scottish Landfill Tax (Prescribed Activities) Order 2014 ("the 2014 Order")
[3] section 13 (2) and (5) LTSA and Paragraph 1 Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2015

Administration Regulations"). The records maintained by Patersons were insufficient to support a claim that the fines were qualifying material.

17. The failure to keep the requisite records was in itself careless behaviour and justified the imposition of the penalties.

The Statutory Framework

18. As can be seen from the footnotes to paragraph 9, we have referred to the relevant legislation. Since this is only the second SLfT case to come before the Tribunal, we have set out at Appendix 1 the relevant legislative provisions in full, other than those relating to record keeping. But, in general, we will simply make reference to them in the body of this Decision.

19. From 1 April 2015, SLfT, a devolved tax, replaced the Landfill Tax regime in Finance Act 1996 ("FA 96"). It is not in dispute that section 3 Landfill Tax (Scotland) Act 2014 ("LTSA") mirrors section 40 FA 96 and sections 4 and 5 LTSA mirror sections 64 and 65 FA 96. That therefore makes the extensive jurisprudence on these legislative provisions directly applicable because the Explanatory Notes to RSTPA read:-

> "The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

20. In the recent case of *Augean North Limited and another v HMRC*[4] ("Augean"), which was not cited to us, Judge Kempster explained that the statutory background consists of primary legislation being the Statutes, secondary legislation being Statutory Instruments, in this case being the various Orders and Regulations etc promulgated by the Scottish Parliament as Scottish Statutory Instruments ("SSIs"), and tertiary legislation being directions pursuant to the statutory provisions. We agree with his analysis.

21. In particular, we agree with his argument at paragraphs 47and 48 that whether it is primary, secondary or tertiary legislation, the normal rules of statutory construction apply.

22. He also discusses the fact that the tertiary legislation is included in HMRC's various iterations of their Guidance. We will revert to that in the context of Revenue Scotland.

23. It is common ground that the Scottish Landfill Tax (Qualifying Material) Order 2015 ("the 2015 QMO") was promulgated by virtue of section 13(4) LTSA and that article 2 of the 2015 QMO defines qualifying material. The 2015 QMO makes it clear that in order to qualify, the material must be wholly comprised of one of the materials listed in the Schedule to the 2015 QMO.

24. However, section 14 LTSA permits Revenue Scotland to make directions to the effect that material should be treated as qualifying material if it would in fact be such material "but for a small quantity of non-qualifying material".

[4] [2021] UKFTT 230 (TC)

25. It is accepted that such a direction was issued by Revenue Scotland. There was considerable debate about what constituted any direction and therefore was tertiary legislation. Understandably, Mr Simpson, KC accepts that there is a direction because otherwise the appeal must fail since it has never been argued for Patersons that the fines were wholly comprised of qualifying material. We discuss the arguments in regard to the direction in the Discussion under the heading "SLfT2006".

26. The parties did not agree on the impact of articles 2(4) and (5) of the 2015 QMO. Mr Thomson argued that for the purposes of article 2(4) a "disposal" takes place when the material enters Patersons' premises at the weighbridge. Mr Simpson argues that because the 2015 QMO references section 13 LTSA which is concerned with taxable disposals, the earliest point that one could consider whether article 2(4) applies is once the material is tipped out of the customer's vehicle for processing. Therefore Patersons owned the material immediately prior to disposal which is when it was used as daily cover. Consequently, article 2(5) applies.

27. We have noted that in paragraph 96 of *Patersons of Greenoakhill v HMRC* [2014] UKFTT 334 (TC) ("the FTT Decision") the Tribunal found that:-

> "It is common ground that, ignoring material designated as recyclable on its arrival at the Site, Paterson takes ownership of the material provided by waste contractors on its being deposited at the transfer station: it then has title to the waste when it moves the material and places it in landfill or otherwise deals with it."

Of course, we are not bound by that but that seems logical since the material is in the customer's vehicle until that point and could be rejected. We therefore agree with both Mr Simpson and the *FTT Decision.*

Guidance

Revenue Scotland's Guidance

28. As can be seen from paragraph 7 above, the position in relation to Revenue Scotland's Guidance SLfT2006 was less than clear.

29. Patersons had produced one version which stated that the date of publication was 1 April 2015 but the flowchart attached to it was stated to have been published on 15 February 2015. Revenue Scotland had produced a different version which was undated. The latter referenced "Trommel Fines" in both the Guidance and in the flowchart that was attached to it. There were no such references in the former version.

30. The parties have now agreed that the Tribunal should treat as proved that, in the period with which we are concerned, there were four versions. Those were published on 15 February, 1 April, 15 September and 1 October 2015. The first had no flowchart attached to it, said that further guidance would be issued prior to 1 April 2015 and stated that Revenue Scotland might issue directions. The SLfT2006 was in general terms but made it clear that, in cases of doubt, tax should be at the standard rate and that it was the operator's responsibility to decide whether a particular load contained any standard rated materials.

31. The second version was very similar to the first but made references to the 2015 QMO and included a new section headed "Qualifying fines", the relevant portion of which reads:-

> "Note: From 1 April 2015, and under a direction made under section 14 of the LT(S)A 2014, we will require you to use the following flowchart in order to determine whether a waste load containing fine material is chargeable at the standard or lower rate.
>
> For SLfT purposes, fines are particles produced by a waste treatment process that involves an element of mechanical treatment.
>
> Qualifying fines are:
>
> - A mixture that consists of:
> - fines that consist of materials listed in the Schedule to [the 2015 QMO]: and
> - no more than a small amount of fines that consist of any other (i.e. non-qualifying) material.…".

32. That Guidance ("the April 2015 version"), including a flowchart, is set out in full at Appendix 2. The key points are that there are four boxes the contents of which can be summarised as follows:-

> (1) The first box stipulates that if the fines comprise qualifying materials with only a small amount of non-qualifying material then the operator must have complied with the General guidance and Qualifying fines section of SLfT2006.
> (2) The second box is headed Step 1 and asks whether, if there is no non-qualifying material present, the fines would comply with the 2015 QMO.
> (3) If so, Step 2 in the third box requires a WM2 test which is not defined.
> (4) If the fines are thus established to be non-hazardous then Step 3 in the fourth box requires a Loss On Ignition ("LOI") test.

33. The third version was broadly similar but included a new section on waste soils. Importantly, the sections relating to fines in General guidance, Qualifying fines and the flowchart were identical.

34. Lastly, in response to requests for clarity, from the industry generally, about the LOI tests, the fourth version ("the October 2015 version") was introduced. The section headed "Qualifying fines" was deleted and there was substituted therefor:-

> "**Waste Fines**
>
> From the (sic) 1 October 2015 under this direction made under section 14 of the LT(S)A 2014, we will require you to apply the following legislative guidance in order to determine whether a load consisting of waste fines only, is chargeable at the standard or lower rate of SLfT when disposed of to landfill.
>
> For the purposes of SLfT, fines are particles produced by a waste treatment process that involves an element of mechanical treatment. Qualifying fines are:
>
> - Fines that consist of materials listed in the Schedule to [the 2015 QMO]; and

- Contain no more than a small amount of fines that consist of any other (i.e. non-qualifying) material

….

- Are not classed as hazardous under WM3 classification

Flowchart for determining the rate of SLfT chargeable per load of waste fines

All of the conditions of the qualifying fines flow chart must be met in order for each load of waste fines to be liable at the lower rate of SLfT….".

35. That flowchart is annexed at Appendix 3. The wording is slightly different to the April 2015 version and there are only three boxes. The original Step 1 in the second box has been deleted. The new Step 1 is roughly the same as the original first box. Step 2 is a crucial difference since it asks how the waste has been classified under WM3 and provides a link to WM3 Guidance. It also states explicitly that evidence of non-hazardous WM3 classification must be obtained and retained in order to support the lower rate. If that is in place then the LOI test must be done at Step 3.

36. The October 2015 version goes on to explain LOI, the prescribed methodology for the LOI test and calculation. Before ending that section, by reiterating that in cases of doubt the standard rate of tax should be charged, it points out that the operator must make and preserve records showing that fines were qualifying for a period of five years stating:-

"This could include waste transfer notes, evidence the material is not classified as hazardous waste under WM3, LOI test results and evidence of visual inspections."

37. The version of the SLfT2006 that had been produced in the Bundle by Revenue Scotland referencing trommel fines had simply been circulated to a focus group in March 2015 and had not been published.

38. There is one crucial difference between the April 2015 version and the subsequent versions. As can be seen from paragraph 30 above, the April 2015 version referred to a direction and there was doubt as to what that was. The October 2015 version, as can be seen from paragraph 33 above, referred to this direction as did the immediately prior version. The October 2015 version was the first to also make it explicit that it had the force of law by referring to it as legislative guidance.

39. We also had Revenue Scotland's Guidance "SLfT2005 Evidence required for the lower rate" which was published on 1 April 2015. We annex a full copy at Appendix 4. As can be seen it references section 14 LTSA but does not explicitly state that it is a direction. Key points include:-

(a) Taxpayers must "keep and provide sufficient evidence to substantiate applying the lower rate…If sufficient evidence cannot be provided…the standard rate of tax will be payable."

(b) That includes evidence relating to having followed the guidance in SLfT2006.

(c) Whether or not waste is considered to be inert is not relevant for tax purposes.

(d) The waste transfer note ("WTN") must accurately record the composition of the waste setting out specifically which qualifying materials are in the load.

(e) The WTN must accurately describe the waste for standard rate too.

(f) The WTN may be a "season ticket".

(g) If the lower rate has been applied to waste disposed of on the operator's site, evidence such as production records and testing analysis would need to be provided.

(h) "Some waste streams may be sufficiently complex in nature that analysis may be required to demonstrate that they qualify" and the example is given of fines.

40. In the Bundle there was a copy of an undated letter, which was relied upon by Patersons and sent to Revenue Scotland on 3 December 2018 by Mr Stickler, from the Scottish Environmental Services Association and the Scottish Centre Council of the Chartered Institution of Wastes Management to three Committees of the Scottish Parliament. It included a timeline of what they described as "the relevant actions that have led to the current issues" ("the Representations").

41. In the box for 04/15 it recorded that LTSA had come into force, LOI was mandatory (but not statutory) but there was "very minimal guidance" from Revenue Scotland as to how the testing regime should be applied in practice, and

> "As such, an informal position is adopted by Revenue Scotland that, until further guidance is published, operators should follow the position in practice in the remainder of the UK."

The next box is for 10/15 and records the issue of the October 2015 version of SLfT2006.

HMRC's Guidance

42. Patersons have argued that they had followed the HMRC Guidance.

43. The version of Notice LFT1 in the Bundle which had been lodged by Patersons was published in 2018 so is not relevant and that was noted by the Tribunal in the course of the hearing. Therefore, what was described as the version in force prior to the introduction of SLfT, and it was dated July 2013, was handed up.

44. With the Joint Statement lodged on 7 December 2021, we were furnished with the version of HMRC's Notice LFT1 which was in force from 1 April 2015 and the relevant general sections from that are annexed at Appendix 5 since they were discussed in the hearing and they are identical to the July 2013 version.

45. In fact, notwithstanding Mr Stickler's assertion that Revenue Scotland's Guidance was "virtually identical to the previous UK guidance", the parties are now agreed that the April 2015 version of SLfT2006 "was in similar terms but not as detailed" as the HMRC Guidance.

46. Revenue Scotland had written to Patersons on 6 April 2015, stating that:-

> "I can confirm that you can continue to operate the site as per your previous HMRC arrangement(s) and that a transitional approval letter from Revenue Scotland has been sent to your company."

47. There had been some argument during the hearing that HMRC's Guidance had *de facto* force and effect in relation to SLfT, as was suggested by the Representations. The parties now accept that that was not the case. At paragraph 6 of the parties' Joint Statement of 7 December 2021, they stated that:-

> "HMRC's guidance as published between 1 April 2015 and 31 March 2016 did not have *de facto* force and effect in relation to SLFT. However, so far as RS' guidance, including SLFT2006, did not contain detail that appeared in HMRC's LFT1, the Appellant sought to act in accordance with LFT1 (so far as doing so was not inconsistent with SLFT legislation and RS' guidance)."

48. The April 2015 Notice LFT1 is very much more detailed than SLfT2006.

49. Sections 3.2 and 3.3 (see Appendix 5) are very similar to Revenue Scotland's Guidance in SLfT2005 and SLfT2006.

50. Sections 4.4 to 4.11 are stated to have the force of law and much of the provisions about LOI and testing are similar to the October 2015 version of SLfT2006.

51. What is different is section 4.5 which prescribes the use of pre-acceptance questionnaires (to be completed by an authorised person of the waste producer) and provides an example. It states that taxpayers may use their own questionnaires but the information must meet the requirements to establish that they are qualifying fines.

52. Patersons have produced an example that Mr Paterson signed (see paragraphs 116 and 117). It contains all of the headings suggested in the HMRC example.

53. Crucially, under the heading "4.10 WHAT RECORDS MUST I KEEP FOR QUALIFYING FINES", the third bullet point reads:-

> "evidence of qualifying fines - you must make and preserve records to show that fines disposed of at your landfill site were qualifying fines for a period of six years. This includes waste transfer notes, pre-acceptance checks and evidence of visual inspections". (emphasis added).

54. We also had HMRC's Landfill Tax Briefing issued on 20 March 2015 which included amendments to draft guidance and HMRC's 15/12 and 18/12 Briefs which, when the latter was published on 6 June 2012, were stated as being required to be read in conjunction with each other. We refer to those elsewhere in this decision.

Findings in Fact

The Background

Compliance

55. In terms of its Pollution Prevention and Control ("PPC") permit, Patersons operates a non-hazardous waste landfill installation at its site at Greenoakhill ("the Site") and has done so for many years. The only hazardous waste that it is licensed to accept, subject to appropriate disposal, is asbestos.

56. Prior to the devolution of Landfill Tax to Revenue Scotland, Patersons accounted to HMRC for Landfill Tax using a credit mechanism. The tax point was viewed as being the weighbridge and everything coming into the Site, both for landfill and recycling, was taxed at the standard rate (£82.60 per tonne).

57. On the tax return, Patersons then claimed a credit equivalent to the standard rate of the tax for the "permanent removal" of all of the material recovered at the Material Recycling/Recovery Facility ("the MRF") but then declared some of that material, being the fines, in the tax return as disposed of at the lower rate of tax (£2.60 per tonne).

58. On 12 August 2015, Mr Stickler telephoned Officer Hoey, Revenue Scotland's Head of Complex Tax, asking for help in completing the first SLfT return as he was not sure how the credit reclaim arrangement for permanent removals would work on the return. Officer Hoey very fairly said that there was a 12 month window within which the return could be amended so he should proceed on the same basis as he had done with HMRC. He did so on the following day, submitting the SLfT return for the period 1 April to 30 June 2015 (quarter 1 of 2015/16), claiming a credit for permanent removals amounting to £660,453. That was equivalent to approximately 7,995 tonnes of fines. That was subsequently amended to £649,513 on 4 August 2016. Thereafter, on 12 November 2015 he submitted the SLfT return for the period 1 July to 30 September 2015 (quarter 2 of 2015/16), claiming a credit for £1,040,831 which is the equivalent of approximately 12,600 tonnes of fines.

59. Having had site visits, meetings and having engaged in correspondence, by late November 2015, Revenue Scotland were concerned. They had opened enquiries under section 85 RSTPA into quarters 1 and 2 of 2015/16 on 11 September and 18 November 2015, and were explicit in saying that there were perceived issues with not only the credit mechanism but also as to whether the fines were qualifying material.

60. Their concern with the credit mechanism was that the fines were not permanently removed from the Site but were used for daily cover. Therefore it could not be compliant with regulation 17(2)(a)(ii) of the Administration Regulations.

61. On 18 December 2015, Revenue Scotland formalised that by writing to Patersons' agent, KPMG, stating that Revenue Scotland did not accept the reclaim methodology. That was on the basis that it did not meet the provisions set out in Regulation 17 of the Administration Regulations. They did not accept that Patersons could claim a credit equivalent to the standard rate of SLfT for the permanent removal of all of the material

recovered at the MRF and then declare some of that material, ie the fines, at the lower rate in the return.

62. They intimated that Patersons should apply for the tipping area on the Site for the MRF to be designated as a Non Disposal Area ("NDA") and that they should do so by 15 January 2016. In summary, Patersons would have to change their method of operation in that they were required to record the non-taxable activities taking place in the NDA[5].

63. On 14 January 2016, KPMG duly requested agreement to designate that tipping area, including the MRF, as an NDA from 1 February 2016. KPMG notified Revenue Scotland that:-

(a) the outputs from the NDA are those that the Tribunal has listed at paragraph 69 below,

(b) the materials would ordinarily be held in the NDA for less than one month, and

(c) the weight of the majority of the material leaving the NDA would be determined by way of a weighing shovel.

64. The SLfT liability for residual waste and the fines would be determined at the time those materials were removed from the NDA.

65. Correspondence ensued at some length.

66. On 8 August 2016, Officer Hoey invited KPMG to amend the returns for quarters 1 and 2 of 2015/16 and review the returns for quarters 3 and 4 (which had not made any claims for credits). The returns and supplementary spreadsheets for the first two quarters were amended and the credits that had been claimed removed.

Factual

67. At the Site, Patersons accepted mixed loads of waste from a variety of customers. It consisted primarily of mixed commercial and industrial waste, bulky waste, construction waste from housing sites, skips from small builders, and skips from garden or self build work. Some of the waste is qualifying material and some is not and the proportions varied from load to load.

68. No shredded waste is accepted at the Site and Patersons do not shred or blend waste.

69. In 2011, Patersons had installed an MRF on the Site, having previously had a facility off-site. An MRF is essentially a recycling and reprocessing centre designed to sort and process waste. It is a semi-automated screening process. The MRF separates the material input into it into three different streams, namely:-

(i) recyclable material for onward recycling, being bricks, wood, metal, cardboard

[5] Regulation 12 of the Scottish Landfill Tax (Administration) Regulations 2015

and plastic,

(ii) material to be disposed of as waste at the Site, which Patersons describe as "residual waste" and which goes to landfill. It is charged at the standard rate of SLfT, and

(iii) the fines to be used as daily cover at the Site. The fines were charged to tax at the lower rate of SLfT.

It is not in dispute that the MRF includes an element of mechanical treatment.

The journey for waste in the period 1 April 2015 to 31 January 2016

70. The entry point to the Site is the weighbridge manned by a weighbridge operator. The driver would go to the window of the office.

71. The driver bringing the material to the weighbridge should have a Waste Transfer Note ("WTN") which describes the type of waste that has been transported, the source of the waste and the European Waste Catalogue ("EWC") code. The EWC code breaks materials down into a six digit code based on the material's composition; whether it is hazardous or not and the process that produces the waste. The purpose of both the WTN and the EWC code is to ensure safe handling and transport and to identify hazardous waste.

72. There is no specified format for a WTN but Regulation 3 of the Environmental Protection (Duty of Care) (Scotland) Regulations 2014 ("the 2014 Regulations") specifies what must be included. Amongst other items it must describe the type, composition and quantity of waste and include the EWC code.

73. Paragraph 4 of HMRC's Brief 18/12, under the heading "Classification of Waste: determining the Landfill Tax liability" states that:-

(a) The WTN "must accurately describe the waste… regardless of whether the load concerned may be considered to contain an 'incidental' amount of standard rated waste".

(b) "[HMRC] Brief 15/12 confirmed that inspection of the loads is the responsibility of the landfill site permit holder. The inspection should ensure that the waste description on the transfer note matches the material delivered to the site. In determining whether the landfill operator has applied the appropriate rate of Landfill Tax, HMRC will refer in particular to how the waste is described on any waste transfer note that accompanied the waste to the site and any other commercial documentation".

74. On receiving the WTN from the driver, the weighbridge operator should first check that the paperwork is correct. That should involve ensuring that the EWC code is appropriate, the waste characteristics are consistent with previous deliveries from the same source, that the driver has a Carriers Certificate of Registration, from SEPA, and that the waste is coming from a registered account customer. We say "should" since, in Appendix 1 to the SEPA Audit Report dated February 2016 and reviewed in March 2016,

it is noted that the Carriers Registration was not always checked and SEPA stated that it should be.

75. A high percentage of the waste accepted onto the Site is repeat deliveries so the type of waste might be known to the weighbridge operator. It was argued for Patersons that he might also know that there is a valid Carriers Registration.

76. In order to ensure that the material is suitable for acceptance, the weighbridge operator visually inspects the load, insofar as possible, either physically or using the CCTV camera positioned on the weighbridge. That is of particular assistance for open skips. If the skip has a cover then it can be removed for inspection. Enclosed skips cannot be checked. The weighbridge operator should also discuss the contents of the load with the driver.

77. We were told by Mr Tom Paterson that if the driver does not have a WTN the waste will be rejected. However that proved to be inaccurate. In an email from KPMG to Revenue Scotland dated 21 November 2016, referring to an analysis of incoming customer tonnages suitable for recycling under EWC Code 20 03 01 for 1 April 2015 to 30 June 2015, two of seven customers are reported as having not included an EWC code on the WTNs.

78. On the balance of probability, in those circumstances, we find that the weighbridge operator will choose an EWC Code. That is supported by Mr Stickler's witness statement where he states that "… some WTNs from customers don't even include EWC codes so the weighbridge operator has to pick a code".

79. The weighbridge operator should then describe the type of waste on the weighbridge ticket which will be taken to the banksman at the tipping area (also known as a waste transfer station).

80. Mr Stickler had freely admitted at the site visit on 18 November 2015 that Patersons had had no records of the materials entering the MRF so Revenue Scotland had visited Patersons on 2 December 2015 and reviewed a number of the WTNs and weighbridge tickets. On 15 January 2016, Patersons replied to a follow-up email from Officer Turner dated 11 January 2016 in which he had requested a breakdown of waste descriptions taken from the weighbridge tickets and a total tonnage for each. Patersons stated that they had had a look at the tickets and the field for waste description was not used or reported by the business for any purpose internally. The weighbridge operator had not been trained on how to populate the field which was simply taken from a dropdown menu on the system.

81. Patersons conceded that, having looked at a sample of the tickets, there were obvious errors/mis-classifications in the use of that field. That field has not been included on any weighbridge tickets since August 2015 following a review of the format of the tickets by SEPA. In that email, Patersons argued that:

> "… the most meaningful (and reliable) analysis of the various incoming waste streams is the analysis by customer and vehicle type … This is what we use internally to monitor the incoming waste streams."

That was produced in table form but did not show waste types, just customer vehicle types and/or vehicle sizes.

82. In the event that the weighbridge operator had concerns about the nature of the waste, for example, if there are offensive odours or the waste is liquid, after consultation with Mr Huggins, the load might be rejected. If it transpires that the load is hazardous then the load is isolated for three days and the issues reported to SEPA and thereafter it is moved to a site that is licensed to receive hazardous waste. Mr Huggins said that it was rare to encounter problems. If it is considered that the concerns might be resolved, then the load would be tipped onto the concrete hard standing and be examined.

83. The weighbridge operator will then issue the ticket and instruct the driver to drive to the concrete hard standing just in front of the tipping wall. The weighbridge operator initially decides what waste goes directly to landfill, for example black bin waste, and what goes to the MRF.

84. The banksman, whose role is partly that of health and safety and who is present at the hard standing where the waste is tipped, does another assessment relying upon feedback from the weighbridge operator, if any. He also does a further visual inspection, if possible, and has a chat with the driver. Many deliveries are repeat business so he may know what it is that is being delivered. Mr Tom Paterson stated that the banksman would only be able to visually inspect the smaller skips.

85. If the banksman decides that a load that was coded for landfill would in fact be suitable for recycling, or *vice versa*, he would radio the weighbridge to instruct that the load be recoded.

86. If plasterboard (gypsum enclosed in cardboard or stiff paper), which is not accepted on site as a distinct waste stream, is noted it is removed and not tipped. The customer is charged for it. There may be residual small pieces in a general builder's skip and those are not removed.

87. If there are no perceived issues with the waste then the banksman would direct the driver to one of the eight vehicle bays at the tipping face, four for waste going directly to landfill and four for waste destined for the MRF.

88. The banksman watches the load being tipped and decides whether it matches the description given. If it does not it will be removed appropriately.

89. Any load that does not meet the PPC conditions will be rejected and quarantined. Patersons cannot accept liquid, explosive, corrosive or flammable waste or waste from medical or veterinary establishments or electrical items.

The operation of the MRF throughout the period with which we are concerned

90. At the hard standing there is a wall running (roughly) east to west over which all loads are tipped. The wall and the face immediately behind it are known as the "tipping face".

91. Waste accepted onto the Site is ejected from the carrier's vehicle and tipped over the tipping face to the concrete tipping floor some 15 feet below. Obviously, some of the material, such as glass and ceramics, may shatter at that point and other material will be broken in that process. Material which is not recyclable is tipped over the east half of the wall of the tipping face onto the part of the tipping floor which is a holding area until Patersons' own on-site specialist dumper trucks transport the material to landfill or other parts of the Site. All compacted waste and bin lorry waste is directed there. Effectively it is a landfill stockpile.

92. Material which has been categorised as potentially suitable for recycling is tipped to the west side of the tipping floor. Patersons assert that approximately 40% of loads received go for recycling. That may be the case but as the table in paragraph 141(a) shows that was not the position in the period 1 January to 30 September 2015. Once the system changed, at Revenue Scotland's behest from 1 February 2016 when the NDA was created, Patersons constructed a wall between the two sides in order to separate the two types of waste. Previously there had been no physical separation. At that time written procedures were put in place but there had been no written instructions previously.

93. The loads tipped over the tipping face on the west side combine to create a feedstock of material for the MRF which is close by. The loads are not processed individually.

94. The waste is inspected by the operator of the mechanical grab and, for most of the day, also by either the Recycling Plant Manager, Mr Smith, or Mr Huggins, to check that the load is suitable for input to the MRF. Non-recyclable items are pulled directly from the waste by a mechanical grab and moved to the part of the transfer station with the landfill stockpile. The presorting is done by both type and size because the MRF has a maximum size capacity. Large recyclable items such as wood, metals, HDPE pipe and mixed rigid plastic etc are transferred to skips and non-recyclable waste or foreign objects such as carpets, mattresses and clothes are moved to the landfill stock pile. If the whole, or a significant portion, of the load at that stage seems to be unsuitable for recycling then the entire load is diverted to landfill.

95. There should be no household waste in the materials destined for the MRF although there is a contract with one Local Authority for household bulky waste so theoretically it is possible that there might be some minimal contamination.

96. The objective of this initial presort is to maintain a good and well mixed feedstock for the MRF.

97. A second mechanical grab is then utilised to place the feedstock in a hopper and it is fed through a screen that separates material larger than 100mm from smaller material. Everything above 100mm moves up a conveyor belt into the MRF where there is a picking line where operators manually remove wood, mixed rigid plastic, stone, cardboard, metal and brick which are sent for recycling. The residual waste travels on to a bay for subsequent disposal into a landfill cell.

98. The material that is less than 100mm and therefore falls through that screen travels up a conveyor belt and into a large rotating trommel screen (a rotating drum with screen panels) and is screened at 20mm.

99. The material that does not pass through that screen is then exposed to magnets which remove the ferrous material and light material is taken off by an air knife. The residual waste then travels along a second picking line to remove non-ferrous metals, wood, plastic, stone and brick. All heavy items, primarily brick and stones, travel over a de-stoner which mechanically separates items such as plastic or wood from the heavy items and that is done by a combination of air and motion. The stone from that line is then sent to the aggregates recycling plant and further screened into 40mm, 20mm and 10mm aggregate.

100. The fines are the material which has passed through the 20mm trommel screen into the substantial bay below. Those fines are weighed via a calibrated weighing shovel. They may be used promptly or they might be stockpiled before being used for daily cover for the landfill cells, which is to say spread on top of the cell at the end of the working day so as to minimise odours and wind-blown litter and to deter vermin.

101. The parties are agreed that, in principle, it is possible to separate the contents of a load of mixed waste, and that was always what Patersons processed, into (i) recyclable material, (ii) material to be disposed of in landfill, and (iii) fines that are either qualifying material, or are qualifying material except for a small amount of non-qualifying material.

102. They also agree that whether the fines fall into the third category depends on the material that comprises the input to the process and what the process involved. We accept the very clear evidence from Officer Turner that the mixed waste input varied (that was not in dispute) and that what the MRF primarily achieved was simply separation by size.

Recording the MRF output

103. Since 1 February 2016, all movements in and out of the NDA area were recorded in a daily NDA account.

104. All outputs from the MRF are supported by tickets from the calibrated weighing shovel and/or movements off site over the weighbridge. The weighing shovel tickets record the outputs from the MRF, eg fines, bricks and residual waste. The weighing shovel has a printer and those tickets are input into the weighbridge system on a daily basis. All weighbridge tickets and WTNs are sent from the Site to head office on a daily basis and the information from the weighbridge ticket and WTNs generate an invoice which is sent to the customer.

105. Mr Stickler states in his witness statement that that invoice will either charge landfill tax, or not, depending on the product code. A direct landfill load will include landfill tax but the disposal charge for a load that is recycled would not include landfill tax. The quarterly landfill tax due comprises the aggregation of SLfT on:

(a) all direct landfill loads at standard rate;
(b) all residual waste from the MRF at standard rate; and

(c) the fines taxed at lower rate.

Patersons have consistently stated that their *modus operandi* has not changed since they introduced the MRF. We observed from the findings of the Tribunal in the *FTT Decision* at paragraphs 163 and 164 that the product codes are "domestic, commercial and industrial".

The operation of the MRF from 31 March 2016

106. Patersons installed a secondary processing procedure for waste fines on 31 March 2016 in anticipation of the LOI threshold dropping from 15% to 10%. In fact the change in threshold was postponed until 1 October 2016 but Patersons had ordered the plant in December 2015 prior to the implementation date being postponed. To guarantee LOI at less than 10%, Patersons required a much finer screen process.

107. The primary process remained as previously other than having the trommel screen set at 50mm instead of 20mm. The feedstock for the secondary plant is the waste fines that have fallen through that trommel screen in the main plant. The secondary fines treatment plant consists of a flip-flow screen (horizontal screen for fine material) which agitates fine materials in a different way from the trommel screen, an air separation unit (ie blowers) and an over band magnet to remove ferrous metals.

108. The feedstock for the secondary plant is the waste fines that have fallen through the trommel screen in the main plant. The secondary plant then separates the trommel fines using mid-size, over-size separation and an 8mm trommel screen. This process produces a heavy fraction (ie stones for onward processing), a fine fraction ie waste fines, and a residual fraction which is disposed of to landfill and taxed at the standard rate. The fines at under 8mm are used for daily cover and those between 8mm and 50mm, after processing, are used to make recycled aggregates.

109. This has greatly increased the output of fines from the MRF.

110. Revenue Scotland have accepted that that process means that Patersons can produce qualifying waste fines from 1 April 2016 from the same input of waste as before that date.

After the MRF process

111. The material that has been rejected on the picking line, having been tipped into a landfill bay below the MRF, is transported to either a landfill stockpile or direct to landfill.

112. Mr Huggins and Mr Smith regularly visually inspect the fines in the bay below the trommel to ensure quality. Mr Huggins' evidence was that he did so several times each day. They check the size and content of the fines (which need to be inert) to be sure that they are "acceptable" for use as daily cover. They also smell the fines looking for signs of contaminants such as oil and solvents.

113. If a contaminant is noted then they stop the process and the fines would either be reprocessed or sent to landfill. If they perceive another issue then they stop the process and check if the trommel is broken (eg letting through larger pieces) then the screen is

fixed and the fines reprocessed. There is no record of how often that happens other than that we were told that it is a very rare occurrence.

114. Mr Smith is present in that area for most of the day and Mr Huggins is there also for a large part of the day but he was unable to quantify that as he said that every day was different.

115. When the fines leave the MRF, having been weighed, their movement is supported by an annual Season Ticket WTN.

The Season Ticket WTN and the pre-acceptance questionnaire

116. These two documents were produced by KPMG to Revenue Scotland on 30 March 2017. The Season Ticket WTN (its full name is "Duty of Care Controlled Waste Transfer Note-Season Ticket") had been signed by Mr Tom Paterson, both as waste producer and waste collector. It is undated and covers the period 1 April 2015 to 31 March 2016. It describes the waste transported as being "Screened subsoil and particles of stone, ceramics and concrete containing an incidental amount of paper, wood and plastic-lower rate". The EWC Code is 19 12 12 which is "Other Wastes from Mechanical Treatment".

117. The pre-acceptance questionnaire is a form and there are a number of printed questions in boxes with boxes for answers under the heading "2. Details of waste handled". We have blank examples but the completed one submitted to Revenue Scotland is headed up "Example questionnaire"; that description has not been explained.

118. It was filled in by someone other than Mr Tom Paterson but signed by him on 1 April 2015 after he had reviewed it. He did so on the basis that he stated that he knew what waste was accepted by Patersons and what was sent to the MRF. He said that it was used only for the NDA and not for general waste.

119. The relevant boxes stated that:

(a) "Detail of waste stream inputs" – Mixed commercial/industrial, construction and demolition waste.
(b) "EWC Codes" – 20 03 01, 20 03 07, 17 09 04, 15 01 06, 17 05 04.
(c) "Can you confirm that gypsum (e.g. plasterboard) is not contained within the fines? –Gypsum segregated at source. Any residual amounts of gypsum are removed before processing.
(d) "Characterisation of output waste from production processes (including EWC)"-

Bricks 19 12 09
Wood 19 12 07
Plastics 19 12 04
Metals 19 12 03
Paper and cardboard 19 12 01
Qualifying fines 19 12 12

(e) "Procedures for storing fines" - Fines stored in separate bay prior to disposal.

(f) "Estimated tonnage of qualifying fines to be sent to the landfill site operator per month" – 1,000 tonnes.
(g) There are no blending or shredding processes.

120. As we have indicated, the HMRC Guidance has an example of a pre-acceptance questionnaire and this one has the same pre-populated headings.

121. Revenue Scotland have repeatedly argued, for example in a letter dated 13 September 2017 in respect of quarter 1 of 2015, that that characterisation of the output waste is incorrect since it does not reflect what was declared in the tax returns, waste data returns or the Season Ticket WTN. In that quarter, Patersons had paid the standard rate of tax on 8,652 tonnes of residual waste from the MRF.

WAC, WM2 (and WM3) and LOI Tests

122. Mr Huggins, and Ian Burke of Patersons Quarries Limited, the holding company's quality manager, were jointly responsible for taking samples of the fines and sending those to an external laboratory, Scientific Analysis Labs Ltd ("SAL") for Waste Acceptance Criteria ("WAC") tests. They selected 10 x 0.5 kg scoops to get a 5kg representative sample. Sometimes the recycling supervisor would assist since it requires two people.

123. Mr Stickler stated that, following the practice adopted with HMRC, and in the absence of guidance from Revenue Scotland, Patersons, who were generating approximately 1000 tonnes of fines per month, had "…at least one" WAC test completed each month, effectively testing every 1000 tonnes. In fact, that proved not to be entirely accurate.

124. We set out below a summary of the frequency of the tests in the relevant period:

Date of sample	Date received by SAL	Date of report
12 May 2015	15 May 2015	27 May 2015
19 June 2015	29 July 2015	11 August 2015
29 July 2015	29 July 2015	11 August 2015
26 August 2015	28 August 2015	11 September 2015
3 September 2015	4 September 2015	16 September 2015
15 October 2015	16 October 2015	27 October 2015
18 November 2015	19 November 2015	1 December 2015
14 December 2015	14 December 2015	24 December 2015
29 January 2016	11 February 2016	22 February 2016
10 February 2016	11 February 2016	22 February 2016
23 March 2016	25 March 2016	6 April 2016

125. Those tests included LOI tests, all of which were within the then limit of 15%; they ranged between approximately 5% and 12% (the HMRC limit until March 2016 was 12%).

126. The rest of the tests were a combination of looking for hazardous material or contaminants and also chemical analysis, looking for contaminants, such as testing for

levels of organic carbon, hydrocarbons, pH levels etc. The leachate is measured to do that.

127. We accepted Officer Turner's evidence that an LOI test is a guide to the combustible components in the materials tested. It is not a test of the composition of the material. It can give an indication of the level of non-qualifying material but it is only an indication. Some types of non-qualifying material, such as metal, are not combustible. That could distort the results, and possibly significantly, depending on the composition of the waste. That is supported by the SEPA analysis of the waste sample where the LOI was 5.4% but the percentage of non-qualifying material was 13.64%.

128. From the outset, being the response by Mr Stickler dated 2 October 2015 to the initial Notice of Enquiry from Revenue Scotland, Patersons' stance, in his words, has been that "Application of the lower rate is supported by regular loss-of-ignition testing". Earlier in that letter he had stated that the fines were inert and used for daily cover.

129. In his witness statement he had stated: "If you've already established that the material is largely a qualifying material ie inert then you wouldn't need to do an LOI test …".

130. Patersons have consistently argued, including in their response to the Closure Notice, that LOI testing is part of the process, along with other sources of evidence to establish the level of non-qualifying material included within waste fines. Mr Tom Paterson's witness statement stated simply at paragraph 5.7:

> "The material is then sent for a LOI test to confirm the percentage on non-qualifying material present…and ultimately the LOI test along with the chemical testing confirms the percentage present which then gives confirmation that the material is inert, non-hazardous and non-polluting".

131. At the beginning of the period with which we are concerned, the relevant test specified in the flowchart was a WM2 test. That changed to WM3 with the October 2015 version.

132. On 29 June 2018, KPMG wrote to Revenue Scotland at length and under the heading "Evidence held by Patersons to substantiate lower rating of the waste fines" KPMG enclosed, again, the pre-acceptance questionnaire and the Season Ticket WTN. They stated that there had been regular visual inspections but also stated that regular LOI and WM2/WM3 testing had been performed and enclosed copies of the WAC reports as an appendix. They argued that the combination "acts as a proxy for the detailed composition of the waste fines".

133. In an attachment to a further email dated 26 September 2018 to Revenue Scotland, KPMG stated:-

> "A range of tests including visual inspections, WM2/3 testing and LOI testing enabled Patersons to characterise the waste fines and determine their landfill tax liability. As previously stated the fines were consistently below the 15% LOI threshold."

134. Messrs Stickler and Paterson had insisted in the hearing that Patersons had done WM2 tests. They had not.

135. Officer Turner's evidence was that a WAC test is not a WM2 test. He explained that the purpose of a WAC test is to ensure that waste goes to the correct type of landfill site, ie inert, hazardous or non-hazardous. It measures the composition of the leachate but not the waste. Officer Johnston confirmed that qualifying materials do not degrade or produce leachate. She said that a WAC test does not classify the waste and that the test that is required for characterising the waste, both by law and the PPC, is the WM2/3 test. We accept that.

136. Officer Turner agreed that for SEPA purposes a WM2 test is not always necessary if there is certainty as to what the waste is. It is possible to categorise waste on the basis of knowing its derivation but if the EWC code was 19 12 11 then a WM2 or 3 is certainly needed. The issue is that for Revenue Scotland's purposes it is.

137. He described a WM2 test as being an in depth test requiring chemical analysis of solid waste that would allow the operator to determine hazard levels. The WM2/3 tests would give the correct EWC code.

138. In summary, a WAC test is much less detailed than a WM2 test. It is a fairly basic test for contaminants.

Revenue Scotland's enquiries

139. Enquiries were opened into quarters 1 and 2 of 2015/16 on 11 September and 18 November 2015 respectively and into quarters 3 and 4 on 28 September 2017. The officials primarily involved were Officer Hoey of Revenue Scotland and Officers Turner and Johnston of SEPA.

140. During the period of the enquiries there were a number of visits to the Site with the first being on 17 August 2015 and there were also a number of other meetings. We cover some of those visits under the next heading.

141. There was also extensive correspondence both with Patersons and KPMG. Amongst the key documents are:

(a) An e-mail from Mr Stickler dated 27 November 2015, responding to an enquiry from Revenue Scotland, enclosing a one page spreadsheet summarising the incoming waste streams to the MRF by EWC code for the period 1 April 2015 to 30 September 2015 (ie quarters 1 and 2). Some customers had waste going both to landfill and to the MRF, some simply to landfill and some simply to the MRF. We also had the figures provided to HMRC for the immediately preceding quarter and in the same format.

HMRC/Revenue Scotland	MRF	LANDFILL	TOTAL	APPROX % TO MRF
HMRC Jan-Mar 2015	10,956.95	28,150.20	39,107.15	28
Revenue Scotland Quarter 1	16,515.73	33,714.36	50,230.09	33

Apr-Jun 2015				
Revenue Scotland Quarter 2 July-Sept 2015	22,047.94	28,885.43	50,933.37	43
TOTAL	**49,520.62**	**90,749.99**	**140,270.61**	**35**

The waste was described as:

(i) EWC code 20 03 01 Mixed Municipal Waste. In both quarters there were 27 customers. In the first quarter the tonnages for 22 customers went straight to landfill and seven to the MRF. In the second quarter it was 22 to landfill and six to the MRF. In the HMRC quarter there were 26 customers and the tonnages for six customers went to the MRF and 24 to landfill.

(ii) EWC code 20 03 07 Bulky Waste. There were two customers and all the tonnage went to the MRF in both quarters. In the HMRC quarter there was one customer and the tonnage went to landfill.

(iii) EWC code 17 09 04 Mixed Construction and Demolition Waste. In both Revenue Scotland quarters and the HMRC quarter there was only one customer and the tonnage went to the MRF.

(iv) EWC code 15 01 06 Mixed Packaging. In all three quarters there were three customers and the tonnage went to the MRF.

(b) The email dated 15 January 2016, referred to at paragraphs 80 and 81 above wherein Patersons argued that the only reliable source of information about waste was an analysis by customer and vehicle type.

(c) An email from KPMG dated 24 February 2016, confirming that the credit mechanism with HMRC had been a "pragmatic" arrangement and that it was not possible to cross reference specific loads with specific recyclables retrospectively as HMRC had not required such records. They stated that:-

"…given that many different loads were deposited in the same place prior to sorting, it would not have been possible …to remove and record the recyclables from the incoming waste on a load by load basis."

(d) Revenue Scotland's letter dated 2 June 2016, confirming their view that LOI results were not determinative of what was qualifying material and that LOI was simply one factor.

(e) KPMG's letter dated 1 July 2016 stating that "no mixed municipal waste" is processed in the MRF even although it had been consigned under EWC Code 20 03 01. They stated that Patersons had confirmed that:-"Incoming waste to the site for potential recycling comprises mixed commercial/industrial, construction and demolition waste only".

(f) KPMG's email dated 21 November 2016, included an analysis of customer waste types for the period 1 April 2015 to 30 June 2015 derived from Patersons'

management information including sales reports (which had been used to provide the analysis referred to at sub paragraph (a) above). It also stated that:

(i) The initial assessment at the weighbridge "…was not critical to the process". By contrast Mr Stickler and Mr Tom Paterson argued that it was.

(ii) A number of waste streams could be more accurately classified under different EWC codes. Referencing the spreadsheet to which we refer in sub-paragraph (a) above, they stated that of the seven customers who had used code 20 03 01, whose loads went to the MRF, it was conceded that three should have been using code 17 09 04 and a fourth had used that code for some of the waste but had also used 20 03 01. All of that customer's waste was commercial, industrial or construction waste from commercial premises. One of the seven was Patersons' sister company, Patersons Waste Management, who did not include the originating site addresses but it was argued that the waste would have been from commercial/industrial sources.

(iii) In the case of the two customers who had not included an EWC code, on the assumption that the weighbridge operator had entered it, it was nevertheless the wrong code.

(iv) The WTNs are prepared by the customers and Patersons have no control over the WTNs, the classification of waste therein and the choice of EWC code.

(g) KPMG's letter dated 30 March 2017 enclosing Patersons' Season Ticket WTN and pre-acceptance questionnaire.

(h) KPMG's Notes of a meeting held with Revenue Scotland on 11 April 2018 sent to Revenue Scotland on 3 May 2018 and Revenue Scotland's Notes sent to KPMG on 4 June 2018. Those included:-

(i) KPMG's concession that "The use of the credit mechanism was not strictly in line with the legislation or guidance in respect of either UK landfill tax or SLfT, but had been agreed as an easement with HMRC". That was noted by Revenue Scotland but Revenue Scotland pointed out that "…no evidence had been seen that Patersons informed HMRC that they were reusing fines as daily cover or of agreement from HMRC that this aspect of the credit mechanism had been agreed by HMRC as an easement". That remains the case.

(ii) It was agreed between the parties that "Waste accepted at the MRF with EWC code 20-03-01, described as mixed municipal waste is not 'municipal waste' but is mixed waste" and "The analysis of fines by SEPA is representative of the input from the MRF on that day but cannot be used to determine the rate of fines for the whole enquiry period".

(iii) It was agreed that the material accepted into the MRF is not wholly qualifying material.

142. In the Closure Notice dated 9 August 2018, Revenue Scotland concluded that in the four quarters, of the material entering the MRF, 2,518 tonnes, 4,794 tonnes, 3,619 tonnes and 845 tonnes (rounded) were taxable at the standard rate of SLfT; the balance of 690 tonnes, 1,432 tonnes, 1,199 tonnes and 218 tonnes were taxable at the lower rate.

143. In the Review Conclusion letter dated 17 December 2018, Revenue Scotland concluded that all of the waste fines produced from the MRF were taxable at the standard rate of SLfT as Patersons had not provided evidence that the fines consisted of qualifying material but for a small amount of non-qualifying material.

144. The parties are agreed that:-

(1) The volumes of the fines material as an output of the MRF are as follows:-

(a) 1st April 2015 to 30th June 2015: 3,208 tonnes;
(b) 1st July 2015 to 30th September 2015: 6,226 tonnes;
(c) 1st October 2015 to 31st December 2015: 4,818 tonnes; and
(d) 1st January 2016 to 31st March 2016: 1,063 tonnes.

(2) The volumes of "residual waste" as an output of the MRF are as follows:-

(a) 1st April 2015 to 30th June 2015: 8,652 tonnes;
(b) 1st July 2015 to 30th September 2015: 9,447 tonnes;
(c) 1st October 2015 to 31st December 2015: 9,686 tonnes; and
(d) 1st January 2016 to 31st March 2016: 7,734 tonnes.

The SEPA analysis and SEPA generally

145. On 17 August 2015, Officers Hoey, Turner and Johnston and SEPA, visited the Site. They walked up to the disposal area at an engineered landfill cell and the SEPA officers were concerned about the quality of the fines being used as daily cover. Officer Turner's concern was based on the fact that he knew that the fines had been taxed at the lower rate and thus should consist wholly or mainly of qualifying material. However, the fines were gritty and he could see small pieces of insulation fibres, plastic and plasterboard. He took photographs. However, as he said in evidence, he had an open mind on the subject.

146. On that occasion they also visited the MRF and observed and photographed parts of the process. They saw the waste streams separated in the tipping area and noted that the input waste streams were mixed with a high degree of non-qualifying material such as cardboard, plastic sheeting, carpets, plastic bags, a mattress etc. (Even to the untutored eye, such as ours, that is obvious.) That fed into their concerns about the possibility that the fines might not be comprised of wholly or mainly qualifying material.

147. On looking at the bay below the trommel, Officer Johnston noted that the fines were not uniform, were two different colours and contained plastics and polystyrene. Officer Johnston confirmed that she would have expected qualifying fines to be uniform in colour, looking like earth, so these fines attracted their interest because they included multi-coloured plastics and white polystyrene. When the trommel is operating, as the

fines fall, the colours, the white and the glass are more obvious than when in the stockpile.

148. As visual inspection is only one part of an overall assessment and is not definitive, Officer Turner agreed with Mr Tom Paterson that SEPA would return in the next few weeks to attend the Site to take a sample of the fines. He agreed that they did not need to arrange a visit and could arrive without notice.

149. On 3 September 2015, Officers Turner and Johnston visited the Site to take a sample of the fines to test for what SEPA's Chemistry Department call a "Physical Characterisation of Waste Material".

150. The officers were accompanied by Mr Huggins. The officers identified the fines below the trommel. They took a number of photographs of fines. They saw not only the fines in the bay below the trommel but also fines in various parts of the MRF. They did not inspect fines which might have been stored anywhere else. They also saw the feedstock and took photographs. Again there were large quantities of non-qualifying material such as green waste, mattresses, cardboard, timber and black plastic bags.

151. There was a stockpile of material near the trommel bay but as a lot of restoration work was being done, with inert material being moved around, they did not know the use for that stockpile.

152. The trommel was operating during the 20 minutes that the officers were present to take the sample. Officer Turner used a trowel and bucket to mix the fines taken from a variety of locations (8 or 10) in the stock pile, having also dug into it, albeit not to the bottom, in order to get a representative sample. He did not notice any difference in the fines as he took the samples. Officer Turner "coned and quartered" the contents of the bucket to obtain homogenous samples. That is to say the contents were shaped into a cone, divided in quarters, and then 2 quarters were separately combined and then the other two. Those two samples were then placed in sample tubs and sealed.

153. Whilst Officer Turner was taking the sample, Officer Johnston took photographs both of the fines and of the sampling process. Both officers thought that the quality of the fines, on that day, appeared to be slightly better than what they had seen at the previous visit but both formed the view that they included non-qualifying material. The site visit report stated that the samples were sent for LOI and typification (ie physical characterisation) tests and that the "Fines sampled seemed to be significantly contaminated with non-qualifying material".

154. Officer Turner, who has extensive experience of fines at many sites, formed the view that it was "very mixed". However, he said, and we believed him, that he had had an open mind as to whether, on the basis of visual examination (and of course, touch and smell), the fines might be qualifying material.

155. The detailed analysis in the Bundle includes not only photographs of the samples before sorting, but also the following analysis:

Sample ID	Purpose	Site 37 – Sample 1	
Component	**SLfT**	**Weight (g)**	**Percentage**
<4mm*	Group 1	610.90	72.91%
Ceramics	Group 2	14.50	1.73%
Glass	Group 2	12.20	1.46%
Metal	Non-Qualifying	4.90	0.58%
Mineral Fibres	Group 3	0.80	0.10%
Miscellaneous	Non-Qualifying	6.40	0.76%
Paper/Card	Non-Qualifying	9.85	1.18%
Plant Tissue	Non-Qualifying	3.20	0.38%
Plasterboard	Non-Qualifying	80.20	9.57%
Plastic	Non-Qualifying	2.75	0.33%
Stone	Group 1	85.20	10.17%
Wood	Non-Qualifying	7.00	0.84%
Total Qualifying		723.60	86.36%
Total Non-Qualifying		114.30	13.64%

*<4mm assessed as a mixture of crushed aggregate

156. The result of the LOI test that was done was that the sample lost 5.4% of its mass.

157. As can be seen there are seven non-qualifying components albeit small percentages by weight. As it is not an analysis by volume, the impact of that is that, for example, in a mixed load containing metal and polystyrene, the polystyrene might be a far greater component by volume but the far smaller by weight.

158. The Officers' evidence was that a lot of the material falling from the trommel was light and was seen to be "floating" down.

159. We then had pictures of each of the component parts of the sample having been segregated.

160. The component described as <4mm, which is assessed as crushed aggregate, counts as a qualifying material although, as a matter of fact, it will, or may, include non-qualifying material such as, for example, metal in the forms of screws etc or small pieces of plastic. In this instance it did, as the photographs demonstrate.

161. The component labelled as "plastic" includes expanded foams such as polystyrene. Polystyrene is white but plastic is different colours.

162. We heard evidence from Mr Paterson that the 9.57% of plasterboard should be classified as gypsum and therefore a qualifying material. That is not the case as he readily conceded when he was shown the law. The Schedule to the 2015 QMO makes it clear that it is not a qualifying material if it is disposed of in a landfill which accepts biodegradable waste, which it was.

163. On 16 and 17 February 2016, accompanied by Revenue Scotland officers, Officers Turner and Johnston headed up a team which took part in a SEPA audit at Patersons. Again they took photographs of the MRF and the mixed inputs of waste to it. Their key

concern was that there was minimal separation of the waste in that it amounted to separation by size only.

Discussion

Arguments no longer addressed

164. In Closing Submissions, Mr Simpson conceded that he no longer advanced an argument on Patersons' reliance on advice from KPMG. As we have indicated at paragraph 11 above, Mr Thomson conceded that he was no longer seeking penalties on the basis of deliberate inaccuracies but rather he argued that there were careless inaccuracies.

The application dated 1 November 2021

165. The evidence having been concluded, the parties reconvened for Closing Submissions on Tuesday 2 November 2021. After close of business the previous evening, Patersons' representatives had lodged with the Tribunal and Revenue Scotland, a third witness statement from Mr Tom Paterson which extended to five pages but included appendices extending to 365 pages.

166. Before hearing Closing Submissions, Mr Simpson spoke to the application to admit that witness statement with appendices. He argued that the whole question of WM2 tests and the suggestion that the appellants had not performed those tests had been raised only in examination of Officers Turner and Paterson and had not been presaged previously. Furthermore, the Tribunal had requested confirmation of the position in regard to WM2 tests. The witness statement and appendices responded to that.

167. Understandably, Mr Thomson vigorously objected and confirmed that, although Officer Turner had only had a very short opportunity to look at the material, it could only be described as "not uncontentious". If the witness statement were to be admitted then Revenue Scotland would seek an opportunity to recall Officer Turner.

168. Firstly, we certainly disagreed with Mr Simpson. It is indeed the case that, in the Bundle, there was no material mention of WM2 tests other than in the flowcharts and KPMG's correspondence.

169. However, Mr Stickler had commenced his evidence-in-chief by stating very clearly that Patersons had conducted WM2 tests. In cross-examination he insisted that WM2 tests had been done. Mr Thomson put it to him that he would be asking witnesses with scientific knowledge, which Mr Stickler conceded that he did not have, whether the WAC tests were the same as the WM2 tests and they would say that they were not. Mr Stickler reiterated that the WAC tests were WM2 tests.

170. Mr Paterson also said that WM2 tests had been done by Patersons and the WAC tests had fed into that. We had had the benefit of a reading day and there was no evidence that we could see about WM2 tests done by Patersons in the Bundle or the witness statements other than the comments to which we have alluded and assertions by KPMG that they had been done. In that regard, however, they had only produced the WAC test results.

171. It was for that reason that on the third day of the hearing, before hearing from Revenue Scotland witnesses, we had specifically asked for clarification as to the relationship, if any, between the WAC tests, being the only test results in the Bundle, and the WM2 tests. We also asked who had done the tests and what records had been kept.

172. Unsurprisingly, Mr Thomson had gone on to explore with Officers Turner and Johnston whether the two types of tests were the same and their clear evidence was that they were not.

173. If there was any ambush, as alleged by Mr Simpson, the ambush was on the part of Patersons by introducing evidence that they had conducted WM2 tests.

174. The witness statement, having been considered by the Tribunal *de bene esse*, appeared to indicate that, notwithstanding the oral evidence, WM2 tests, *per se*, had not been conducted.

175. Furthermore the witness statement strayed into other matters which had not been canvassed elsewhere such as whether the Site was similar to an inert landfill site (referred to in the WAC tests).

176. We therefore refused the application indicating that we would proceed to Closing Submissions and Mr Simpson would be free to remake his application on conclusion thereof if he deemed it appropriate. In the event he decided not.

Overview

177. We heard, and read, many and diverse arguments. Mr Simpson's Closing Submissions in bullet point form extended to 11 pages and neither Skeleton Argument was short, nevertheless, there is one single issue at the heart of this appeal. That issue is that SLfT is a self-assessed tax.

178. Patersons bear the burden of proof to establish that their tax returns were accurate and supported by the requisite records. In particular, given that it is not in dispute that there were taxable disposals, they must establish that they have the right to claim that the fines should be taxed at the lower rate.

179. Mr Simpson correctly argued, contradicting the Closure Notice and Revenue Scotland's assertions, that the question is not the material from which the fines originate. The question is whether there is sufficient evidence about what the fines comprise.

180. As Mr Thomson pointed out in his Skeleton Argument, Patersons had produced very little documentary evidence, given their assertions about WTNs and similar.

181. Before we turn to specific issues such as the WTNs, we look at some of the issues with the evidence.

The witness evidence

Mr Mike Paterson

182. The first witness for Revenue Scotland was Mr Michael Paterson. He joined Revenue Scotland on 26 March 2019 and the appeal in this instance had been lodged with the Tribunal two months previously on 14 January 2019. His witness statement is dated 27 August 2021 and he stated that he was giving evidence "…on behalf of Revenue Scotland" because Officer Hoey, the decision maker in this matter was not available. No reason was given as to why. He argued that, over a period of months he had reviewed all of the evidence, including the correspondence, witness statements and documentation and he had formed an independent view and he was speaking to that.

183. In his Skeleton Argument, Mr Simpson had raised two issues namely:-

(a) Witnesses should be witnesses of fact, not giving evidence "on behalf of" a party; and

(b) Explanations by Mr Paterson as to what Ms Hoey did or did not do should not be given any weight unless admitted or corroborated.

184. Mr Simpson argued that Mr Paterson was partisan and argued Revenue Scotland's case rather than giving evidence.

185. Repeatedly, Mr Simpson interrupted him when he attempted to give opinion evidence on matters on which he was not competent to opine. For example, he tried to argue as to how non-ferrous metal could be removed from waste with magnets. He also tried to advance arguments on SEPA's composition analysis. On more than one occasion he used the words "I would argue that…". He has no science or environmental qualifications and no landfill experience.

186. Mr Simpson repeatedly pointed out to him that he had cut and pasted a significant number of paragraphs from Officer Hoey's unsigned witness statement. He had.

187. We compared the statements and with the exception of the first five paragraphs which speak to his experience and what he had looked at in preparation for this hearing, almost every single other paragraph is either identical, or very similar, to Officer Hoey's witness statement. Many of Officer Hoey's paragraphs have been lifted verbatim and minor tweaks have been made in others.

188. Regrettably, one of the few items Mr Mike Paterson did not transfer from Officer Hoey's witness statement was the record of Mr Stickler telephoning her to try and ensure that the first SLfT return was accurate. We were not convinced that his witness statement was either fair or balanced in that context and that certainly is an issue in the context of penalties.

189. When we asked him about his approach to penalties, his explanation was that he had taken a "broad brush approach" because he had agreed with Officer Hoey's findings which he endorsed. Her findings were minimal and in our view, as we explain later, inadequate. He did not rectify that.

190. Another problem, is his paragraph 80 where he stated, as had Officer Hoey at her paragraph 125, that "Officer Ross had concluded that the fines produced using this treatment process [the MRF] process would be representative of the waste input and was not aware of any treatment process that could produce qualifying fines from mixed waste."

191. What Officer Ross said, and it is very important since it has never been Paterson's case that the fines were wholly qualifying material, was that "At this time [23 August 2017], I am unaware of any process or technology which could produce wholly qualifying material based on the input (or process) described above."

192. He initially argued that it was a subtle difference. It is not, it is a key difference. Whilst it was open to him to report the content of Officer Ross' email the minimum requirement would be that he should do so faithfully. He did not manage that and ultimately he had to concede that he had erred.

193. Furthermore, if he had read all of the documentation, he should have recognised not only that the wrong question had been asked of Officer Ross, in terms of "wholly" and "mainly" but also that HMRC's Brief 15/12 states clearly:

> "For lower rating, you must hold evidence that the fines meet the requirements and conditions set out in paragraphs 4.1 and 4.4. This does not automatically mean that the inputs to the mechanical treatment process must meet these requirements."

Given that HMRC had published that Guidance in 2012, and we know that Officer Turner agrees with that analysis, Revenue Scotland should have posed questions addressing that. We revert to that in regard to Mr Pask's evidence.

194. In any event, although Mr Mike Paterson referred to numerous documents, the parties had agreed in the Statement of Agreed Facts that the documents in the Bundle speak for themselves. They do including Officer Hoey's letters.

195. In summary, as Mr Thomson put to him in re-examination, Mr Paterson had had to recognise the force of at least some of Mr Simpson's criticisms. We agree with Mr Simpson and find that Mr Paterson did not apply independent thought to the information before him. His evidence did not assist us.

Mr Pask

196. Mr Pask gave evidence in place of Officer Ross whose signed 2019 witness statement was in the Bundle but who, for reasons unknown to both us and Mr Pask, was not available to give evidence.

197. Mr Pask confirmed that he had reviewed Officer Ross' witness statement, an email from Officer Hoey to Officer Ross, her reply and Revenue Scotland's Guidance SLfT2006. We do not know which version he reviewed.

198. Mr Pask had not visited the Site and his only information about the MRF was the description of the MRF process given in her e-mail by Officer Hoey who, herself, did not give evidence.

199. Whilst we agree with Mr Thomson that Mr Pask was wholly credible and did his best, his evidence was provided in an attempt to make good the general proposition that outputs from an MRF will broadly be the same as the inputs. As we have indicated above, HMRC recognise that that is not necessarily the case as did Officer Turner.

200. In any event, Mr Pask departed from that proposition and said that potentially one could get qualifying material from the waste but he doubted that could be achieved on a consistent basis given the input material. The issue with that is the extent to which he knew about the input material.

201. He had been working on the basis of the categorisation of the waste and he had been told that that included mixed municipal waste. His witness statement is dated 30 August 2021 and it had been agreed by the parties at the meeting on 11 April 2018 that there was no municipal waste, just mixed waste, so he did not have accurate information. He was asked if that would have made a difference to his analysis and said that he thought not. However, he confirmed that his evidence was simply a broad view and not specific.

202. Another issue was that his experience related to a trommel screen of a maximum of 55mm whereas in this case we were dealing with a trommel screen of 20mm. He was unable to comment on the difference when using a bigger screen. He again conceded that his opinion was simply a broad view and was not specific.

203. He said that his starting point was that he would assume that material would be non-qualifying until proven otherwise but he could not explain why, other than to say that he would require more analysis of the material going into the MRF.

204. Given that, as we have indicated, he had inaccurate information, it did not assist us.

205. Mr Simpson pointed out in his Skeleton Argument that Mr Pask had not been provided with SEPA's own composition analysis, and nor it would seem had Mrs Ross. We are not unduly perturbed about the lack of provision of the SEPA composition analysis for either Mr Pask or Officer Ross since, as the parties have agreed, it is simply a snapshot on a particular day.

206. Mr Pask is employed to provide specialist technical and professional advice within a particular regulatory regime and his specialty is waste shipments and MRFs. The value of his evidence is best summed up by his closing words which were to the effect that Patersons' MRF did not fall within the MRF Code of Practice that he oversees. In summary whilst his evidence was clear and straightforward, it did not assist us.

Mr Huggins

207. Mr Huggins was a straightforward witness and confirmed that he occasionally covered for the weighbridge operator when he was on holiday but he was not qualified to cover the banksman.

208. In writing this decision we were surprised to find in the SEPA Audit Report in February and March 2016 that Mr Huggins did not "… possess a technically competent qualification" to be in his position. That was a breach of Condition 2.6.5 of the PCC and had to be remedied.

209. In his witness statement he had said that the "…landfill site takes in loads of mixed construction and demolition wastes" whereas, of course, it takes in more than that.

210. He also said that when the waste arrives on site, the EWC code and the waste is checked by the weighbridge operator to ensure that the WTN is a "true reflection of the waste being delivered", and then the operator visually inspects the load.

211. In an ideal world, no doubt that would be the case but as can be seen from our findings in fact, enclosed vehicles cannot be checked and EWC codes can be incorrect or missing.

212. Mr Huggins confirmed that he spent a large percentage of his day in the area where the hydraulic grabs operate and either he or his assistant, Mr Smith, would be in that area for most of the day. As we have indicated, if the banksman or weighbridge operator have a problem he would be consulted. However, his evidence was that he had not mentioned that fact in his witness statement because it was a rare occurrence.

213. Both Mr Stickler and Mr Tom Paterson had said that the important part of Mr Huggins' role was to inspect the fines and he confirmed that he did so several times a day. Again that had not been mentioned in his witness statement although he had referenced the process.

214. On further questioning as to exactly what his visual inspection amounted to, he confirmed that essentially he would be looking for the percentage of stones. If the stones were bigger then he would be concerned that there might be a potential breakage in the trommel screen. He would check whether the fines looked "acceptable".

215. When he was asked by Mr Thomson what percentage would be acceptable he initially denied saying he would look for a percentage of qualifying material. The Tribunal pointed out to him that he had said that and then he confirmed that he was not looking for a percentage but purely whether the fines were acceptable. In cross-examination he confirmed that when looking at the quality of the fines he was not asking himself whether the fines were qualifying or non-qualifying material.

216. Mr Simpson endeavored to retrieve the position in re-examination but that was wholly unsuccessful in that when he asked Mr Huggins what he looked for in the fines, he said soils, stones etc and inert materials. He was asked what the percentage of "acceptable fines" should be and said that 90% "should be that". He was then asked if he recalled what percentage would have had that and he said that he struggled to remember. It was abundantly clear to us that he did not know what was, or was not, qualifying or non-qualifying material and that he was effectively looking for inert materials and soils and stones of an appropriate size.

217. Although Mr Huggins was the only witness who was actively involved in the process for waste on a daily basis and he was a credible witness, as Mr Thomson said in Closing Submissions, Mr Huggins was unable to support the integrity or robustness of Patersons' procedures in relation to identifying quantities of qualifying and non-qualifying materials.

Officer Turner

218. In his original witness statement he said that the summary sheets of customer details for the period April 2015 to June 2015 that they were shown at the visit on 17 August 2015 showed "good detail" for customers. We found Officer Turner not only to be wholly credible and straightforward but his evidence was very balanced and fair.

219. For example, Revenue Scotland's line throughout had been that if the input to the MRFs was largely non-qualifying material then it was not possible to have qualifying fines. In his supplementary witness statement dated 26 August 2021 he said that he had stated at a meeting on 11 April 2018 that "… it was possible in principle to produce general fines from mixed waste but that whether qualifying fines were actually produced depended on the process in any given case".

The remaining witnesses, or not

220. Why do we say, or not? One of the problems in this appeal is that the onus of proof lies with Patersons and they have produced very little documentary evidence or oral evidence from those actually involved in the process.

221. Mr Stickler told us that the visual inspection at the weighbridge was very important as was the discussion with the driver. He stated that Mr Huggins would speak to that aspect as he supervised the weighbridge operator and they were both based in the same office so Mr Huggins would hear the discussions with the drivers. In fact, Mr Huggins' evidence was to the effect that he spent most of his time at the MRF and we know nothing about the conversations with the drivers.

222. In oral evidence great stress was put on the importance of visual inspection of the waste loads before and on tipping and then of the fines.

223. The witnesses who might have told us about that were the weighbridge officer, the banksman and Mr Smith and Mr Stickler had told the Tribunal that they all made visual inspections, as did Mr Huggins.

224. Mr Paterson told the Tribunal that when he visited the Site once or twice a week he would look at the volume, quality and type of waste. Initially, in examination-in-chief, he said that he would give the fines a cursory glance on those visits because he relied on others to report to him. Later he stated that when looking at the fines he would want to be sure that the fines were the right size and that they did not smell as that would be an indicator of contamination with, say, oil. He said that he would always be looking at product quality. He confirmed in cross-examination that he had said that he gave the fines a cursory glance but in re-examination he said that it was more than a cursory glance.

225. He said that Mr Smith would check the fines multiple times on a daily basis looking for stones, their size and contamination. His role was to ensure that the fines looked "like qualifying fines or mainly such". Mr Huggins would also check the fines. Crucially, he stated that although Mr Huggins was not at the MRF all the time, it was a "critical part of the process" that Mr Smith and the operator of the mechanical grab were able to inspect the waste once it was tipped over the tipping wall.

226. Although we heard from Mr Huggins, and we have commented on his evidence, we did not have the evidence of any of the others and it would have been of considerable assistance to have heard from them. That was a significant gap in the evidence.

227. Furthermore, there is no documentary evidence of visual inspections or of training or instructions as to the standards to be applied. All that we were told by Mr Paterson was that there was no written procedure for inspection of the fines; it had simply evolved.

228. Mr Stickler gave detailed evidence about the journey for waste but he had no practical experience of it. He said that he visited the Site approximately once a month but gave no detail as to where or why. He said that he had derived his knowledge from Mr Tom Paterson and the long years of dispute before this hearing. When he was asked why his witness statement had described fines as being "screened rocks, soils, silts, glass, concrete, ceramics; materials which are inert" he said that he had handled fines numerous times during the enquiry. That did not assist and, in any event, the test is not whether the materials are inert.

229. Furthermore his evidence was that qualifying materials tended to be darker whereas Mr Paterson's evidence, which was in line with the SEPA officers' evidence, was that they would be soil or sandy coloured but they could be dark if it was wet. It depended on the input. The photographs supported the latter view.

230. Pertinently, Mr Thomson argued that Mr Stickler was both partisan and argumentative. Mr Stickler's witness statement was one of the reasons why at the outset of the hearing we had pointed out to both counsel that the witness evidence which amounted to opinion would be disregarded unless there was relevant expertise. In that regard, of course, we were referring not only to Mr Stickler but also to both Messrs Paterson.

231. Large parts of Mr Stickler's witness statement constituted criticism of Revenue Scotland, their approach to this matter and his own views on the law. To a lesser extent that is also true of Mr Tom Paterson.

232. As Mr Thomson accurately pointed out in his Skeleton Argument, this Tribunal has no jurisdiction to review the practices and conduct of Revenue Scotland and arguments about the competency of Revenue Scotland's officers are irrelevant. The issue for the Tribunal is simply whether SLfT and penalties are due or not. It is for the Tribunal to decide on the applicable law.

233. As both Leading Counsel agreed, witnesses in Courts and Tribunals, unless experts, speak only to facts of which they have knowledge.

234. Mr Thomson accurately stated that nothing turned on the credibility of the remaining witnesses in terms of the substantive issue.

235. Mr Simpson confirmed that Officers Turner and Johnston were credible although he argued that they had occasionally strayed into argument or opinion. In particular, he challenged Officer Johnston when she pointed out that the SEPA analysis was by weight not by volume. Not only had Officer Turner already made that point but that was an accurate fact and assisted the Tribunal. We found that both officers gave clear, dispassionate and professional evidence.

Reliance on prevailing practice and on HMRC and SEPA visits

236. Section 102(2)(b) RSTPA states that an assessment cannot be made "if the return was in fact made on the basis prevailing, or in accordance with the practice generally prevailing, at the time it was made."

237. In their representations dated 7 September 2018, when seeking a review of the Closure Notice, KPMG, for Patersons, continued to argue that:

(a) HMRC had not raised any concerns regarding the taxation of fines and Patersons' MRF activities had not changed,

(b) the EWC codes used merely reflect industry practice as it relates to mixed commercial/industrial waste and "mixed municipal waste", as a code, is widely used across the industry,

(c) "their recycling processes during the enquiry period were entirely in line with industry practice at that time",

(d) Revenue Scotland had not asked for details of visual inspections which were "daily/weekly",

(e) "The use of the credit mechanism previously agreed with HMRC was not strictly in line with either the UK landfill tax or SLfT guidance but a pragmatic solution.

238. We deal with point (d) elsewhere in this decision. The very belated concession that the use of the credit mechanism did not comply with Regulation 17 of the Administration Regulations is telling. It did not comply. As have pointed out, we doubt that HMRC were aware that the fines were not being removed from the Site.

239. Mr Tom Paterson argued in his response to Revenue Scotland's View of the Matter letter dated 24 October 2018 that the flowchart in SLfT2006 "starts at the point of disposal (i.e. the output from the treatment process / MRF)". Mr Stickler also told the Tribunal that the SLfT2006 Guidance commenced in the trommel bay at the end of the MRF.

240. Notwithstanding the fact that we heard a lot of debate about SLfT2006, we have no evidence that that was the industry practice. In any event, since it is tertiary legislation, it is for the Tribunal to decide that issue. As it happens, as we explain, we agree with Patersons but not on the basis of industry practice.

241. We have no real evidence of industry practice and the Representations do not assist us, as we explain.

242. Mr Stickler, and to a lesser extent Mr Tom Paterson, relied heavily on the fact that from August 2011 to March 2015, HMRC had visited the Site four times including a "comprehensive assurance visit" and two site visits. Since HMRC had apparently not challenged Patersons it was argued that there had been no significant compliance issues and Patersons were entitled to rely on the fact that they were doing everything properly. Therefore if they carried on in the same way, which they did, everything would be in order for SLfT. In summary, they had argued that the tax returns were made on the basis of the practice generally prevailing, at the time they were made.

243. We are not referred to the case but Judge Brooks in *Hargreaves v HMRC* [6] includes at paragraphs 20 to 24 a lengthy explanation of what would be required to establish "the practice generally prevailing", albeit in relation to discovery assessments. The same principles apply. We adopt his arguments and do not set them out at length here. Simply put, the burden of proof lies with the taxpayer to establish not only the practice "generally prevailing" but also that the returns were filed in accordance with that practice. That practice must be "relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike".

244. The documentary evidence largely consisted of assertions by KPMG and Patersons. The only relevant letter from HMRC that we have traced in the Bundle, and to which we were not referred, was dated 4 August 2011 when HMRC were confirming arrangements for a visit and intimated that in regard to the credit, ie fines, they would be looking at "Landfill Tax Credit for waste later removed for recycling, incineration or re-use". We have added the emphasis. The fines were never removed as they were used for daily cover on the Site. That letter suggests that HMRC were not aware that the fines were retained on the Site. The visit took place on 11 November 2011. We have no details.

245. The only oral evidence about HMRC was from Messrs Stickler and Paterson.

246. In cross-examination, Mr Stickler was asked what HMRC had said about the fines being taxed at the lower rate and he said that he could not recall. All he could say is that they had not raised any questions or challenged Patersons' approach.

247. Similarly, whilst recalling driving the HMRC officers around the Site, Mr Tom Paterson said that his recollection was sketchy and he could not recall what they had said or the depth of the discussion. All that he could say was that no concerns were raised.

248. As Mr Thomson said, at its highest, the most that can be said is that it appears that HMRC did not challenge Patersons' application of the lower rate. As we have found in paragraph 141(h)(i) above, as long ago as 2018, Revenue Scotland pointed out that there was no evidence that Patersons had informed HMRC that they were reusing fines as daily cover or of any agreement from HMRC to the lower rate being applied.

[6] [2019] UKFTT 0244 (TC)

249. Mr Stickler was asked by Mr Thomson if Patersons had sought any evidence from HMRC or indeed cited HMRC officers to give evidence if they believed that such evidence existed. They had not.

250. This is a specialist Tribunal. We are very well aware that the fact that HMRC have conducted compliance or assurance visits and raised no concerns certainly does not preclude them from subsequently opening enquiries covering the years of the visits. Pre Covid (because that halted visits) that happened on a regular basis in regard to VAT in particular.

251. In summary, in the absence of any evidence as to what precisely HMRC knew, asked and advised, we do not accept that Patersons can rely on the fact that HMRC never raised any concerns and therefore what they did was established industry practice.

252. In any event, the issue is not what HMRC did, or did not, do since in general that would be irrelevant as they have their own care and management discretion and that does not impact on Revenue Scotland. The only relevance would be if Patersons could have established that they had an agreement, or as KPMG expressed it, an easement with HMRC which would, or could, be continued in the transitional period. They have not established that.

253. Both Mr Stickler and Mr Paterson argued that, prior to the enquiry periods, SEPA had visited the Site at least once or twice a month and had never raised any concerns that the fines were not qualifying material. That does not assist. SEPA's concern on those visits was not the tax status of the fines but rather whether they were inert and fit for purpose as daily cover.

254. In summary, we cannot make any findings as to prevailing industry practice and nor do we find that Patersons were entitled to rely on the visits by HMRC and SEPA.

WTNs and EWC codes

255. Mr Thomson took both Mr Stickler and Mr Paterson to section 4 of HMRC Brief 15/12, which opens by referring to LFT1 which "sets out the evidence required to apply the lower rate of tax to any particular disposal of waste and the Landfill Tax treatment of mixed loads" and, in particular, to the passages that read:-

> "Where the landfill operator is not able to demonstrate that the load is of material exactly as described in the 2011 Order, the standard rate of Landfill Tax should be applied"
>
> and
>
> "Inspection of loads is the responsibility of the landfill site permit holder. The inspection should ensure that the waste description on the transfer note matches the material <u>delivered</u> to the site." (emphasis added)

256. Whilst Mr Stickler acknowledged that HMRC attached "particular weight" to WTNs he continued to insist that, because of the EWC codes, they were not appropriate for

mixed loads. Both gentlemen stated that Patersons had complied with that Guidance but argued that the WTN that mattered was the one for output from the MRF only, being their own Season Ticket WTN.

257. We disagree. Firstly, in our view the wording is very clear and the description on the WTNs at the point of delivery to Site is required to be accurate. Even if there was any doubt about that, as we have pointed out, by no later than the issue of HMRC Brief 18/12, they should have been in no doubt about it.

258. Furthermore, they should have been aware that, in deciding whether the standard or lower rate of tax applied, HMRC would have looked at the description on the WTN for the delivery. In the event, of course, HMRC did not enquire.

259. Mr Thomson referred Mr Paterson to HMRC's Brief 18/12 which makes it explicit that "The remaining or residual materials from this process by their very nature are variable..." and therefore some of the resultant fines may be qualifying material and others not.

260. Mr Paterson agreed but said that he would qualify that because it depends on how the MRF is operated and "all our checks are there to take away some of the variability".

261. Undoubtedly, the waste stream is not from a fixed process because the input varies from day to day and therefore the feedstock varies.

262. Of course, to a marked extent the checks relied upon are largely visual, given that neither Mr Stickler nor Mr Paterson considered the WTNs with the EWC codes to be fit for purpose in describing what might be in a mixed load and most of their waste is received in mixed loads. They were both clear in stating that the use of EWC codes by their customers was often unreliable and, sadly, we can see that. As Mr Thomson correctly pointed out, Patersons are simply wrong in stating that they had to accept what the customers stated. The Guidance makes that clear.

263. We noted that in their email dated 21 November 2016, KPMG stated:-

> "Under the old arrangement, the waste description / EWC code was noted at the weighbridge with an initial assessment of the recyclable potential of the material taking place at that point, but this was not critical to the process. The load would then be driven to the tipping point, where the banksman would assess the content of the load (based on a discussion with the driver/historic deliveries from the same customer) and if the load was deemed to be suitable for recycling then it would be tipped on the MRF (or "clean") side. If it was not thought suitable for recycling it would go to the landfill (or "dirty") side. Once tipped, Patersons would then have another opportunity to visually assess the load…".

They went on to say that the WTNs were simply documents prepared by third parties and Patersons had no control over that.

264. That is undoubtedly true but the fact is that in accordance with the Guidance, whether that of HMRC or Revenue Scotland, it was for Patersons to challenge the WTN

if it was inaccurate. A further issue is that, as we have found, some EWC codes inserted into the WTNs by Patersons' weighbridge operator were not accurate.

265. As we have indicated, quite a number of WTNs included the wrong EWC code and some had none. It is a statutory requirement that the EWC code is included in the WTN. The Guidance, north and south of the border states that the WTN must be accurate. Quite a number were not.

266. Messrs Paterson and Stickler told the Tribunal, as they had argued throughout, that the WTNs were not appropriate for mixed loads because of the EWC codes and that the purpose of the WTNs was only to ensure safe handling and transport of waste. They are entitled to their opinions but, in short, that does not absolve Patersons from complying with the law.

267. We also have a problem with the Season Ticket WTN. As we have indicated, the waste description is "Screened subsoil and particles of stone, ceramics and concrete containing an incidental amount of paper, wood and plastic-lower rate".

268. Of course, we accept that a WTN is required when the fines leave the NDA to be used as cover. Patersons argue that at all times they followed HMRC's Guidance. Section 4 of both of HMRC's Briefs 15/12 and 18/12 state that the WTN must accurately describe the waste regardless of any incidental material.

269. We accepted the very clear evidence from not only Mr Huggins, but also Officers Turner and Johnston, that the fines included glass. Since ceramics, stone and concrete have been identified in that WTN, it follows that glass should be identified in the WTN and it is not.

270. We also know, as do Mr Tom Paterson and the Officers, that the fines would often, if not always, include small quantities of plaster, as SLfT2006 recognises. In all probability, since garden waste is included in the incoming waste stream, small quantities of grass will be included in the fines and that too is recognised in the SLfT2006. Furthermore it is not disputed that there will be screws, nails and shards of metal included in the fines.

271. If the HMRC Guidance was being followed, as Patersons allege, all of those should have been recorded in the Seasonal Waste WTN and they are not.

272. As we have indicated at paragraph 39 above, Revenue Scotland's Guidance SLfT2005 makes it clear that the WTN must accurately describe the waste. It was argued for Patersons that that was merely Guidance and did not have the force of law.

273. Mr Thomson conceded that it was Guidance and not a direction. We find that, because it highlighted the reference to section 14 LTSA, it is at least arguable that it was a direction and therefore had the force of law. However, ultimately, whether it is merely guidance or not is not a material issue since the substantive issue in this appeal turns on other matters.

274. The key point, as made by Mr Thomson, and agreed by us, is that the Guidance, whether that of HMRC or Revenue Scotland to keep sufficient evidence, reflects the statutory scheme relating to the maintenance and production of records.

275. Lastly, the taxable residual waste going to landfill is not identified. It is an output from the MRF. It may be that there was a separate WTN for that but, if so, it has not been produced. As we have indicated, Revenue Scotland have been pointing out since at least September 2017 that it should have been identified in the pre-acceptance questionnaire and the WTN (and the waste data returns). It is not. We make no comment on the other documents but it should have been in the pre-acceptance questionnaire and the Season Ticket WTN.

276. That was the reason for the production of the Spreadsheet (which had been supported by 18 pages of supporting reports from the weighbridge system analysed by customer/waste stream to which we refer at paragraph 141(a) above.

277. Of course, once the NDA was in place there were records.

SLfT2006

278. As we indicate the parties accepted that a direction in terms of section 14 LTSA was issued by Revenue Scotland and that has to be the starting point since in the absence of a direction the appeal cannot succeed. In terms of section 14(4) LTSA whether a quantity of non-qualifying material is "small" is to be determined in accordance with the direction.

279. We therefore agree with Revenue Scotland that we do not need to define "small". Compliance with SLFT2006 either confirms that or not.

280. The position from 1 October 2015 is relatively straightforward. As can be seen from paragraph 34 above, and Appendix 3, not only does the October 2015 version specify that it is a direction and <u>all</u> of the conditions in the flowchart must be met but the flowchart provides a hyperlink to WM3 technical guidance. It also states that evidence of non-hazardous WM3 classification must be obtained and retained to support the lower rate of SLfT.

281. Since Patersons did not do WM3 testing, they did not comply with the conditions in the flowchart.

282. The version of SLfT2006 issued on 15 September 2015 was less explicit but also stated that it was direction. It stated that the flowchart had to be used and step 2 was to carry out a WM2 test. Patersons did no WM2 tests.

283. Therefore the SLfT return for quarter 2 of 2015/16, which was filed with Revenue Scotland on 12 November 2015 and the subsequent returns, had not complied with the directions which had the force of law.

284. The issue therefore is the return for the first quarter which was filed with Revenue Scotland on 13 August 2015 since the April 2015 version was in place at that juncture and it is not a model of clarity.

285. In his Skeleton Argument, Mr Simpson argued at paragraph 44 that "It is at least doubtful that the guidance itself is the direction…there is no indication in the text that it has the force of law". However, in Closing Submissions he accepted that the flowchart was part of the direction, whatever it might have been.

286. Mr Thomson agreed that the April 2015 version did include a direction and that the flowchart was part of it. However, he argued that the wording in Box 1 of the flowchart is crucial. That was because it states that before one gets to Step 1 in the flowchart not only does there only have to be a small amount of non-qualifying material but the use of the word "and" means that there must be compliance with the "General Guidance" and "Qualifying fines" heading of the April 2015 version. Therefore, he argues that it is probably a direction in its entirety.

287. We agree, but as with SLfT2005, it is not material in relation to the substantive issue.

288. The wording in Step 2 is not opaque. It states clearly that to determine whether waste is hazardous, or not, a WM2 test must be done. None was ever done. It does not say that it should be done only in cases of doubt.

289. Mr Simpson argued that prior to the hearing, Revenue Scotland had never even suggested that Patersons had failed to complete WM2/3 tests. It would appear that they had not and that is to be deprecated, as is the lack of clarity in regard to their understanding, or not of their own Guidance.

The issues for decision

290. The Tribunal's powers in any appeal are set out in section 244(2) RSTPA which provides that:-

> "The tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be-
>
> (a) upheld
> (b) varied, or
> (c) cancelled."

That is a wide jurisdiction. As Mr Simpson accurately said in Closing Submissions, ultimately the question is not what is said in the Closure Notice or Review Conclusion letter, it is whether:-

> (a) Patersons have proved their case on applying the lower rate of tax on the fines, and
>
> (b) Whether Revenue Scotland have proved that any inaccuracies in the returns were as a result of careless behaviour on the part of Patersons.

Have Patersons proved their case?

291. The short answer is that we find that they have not.

292. They bear the burden of proof and one of their problems is the paucity of relevant records. As we have pointed out LFT1 specified that records that required to be kept include evidence of WTNs, pre-acceptance checks and evidence of visual inspections.

293. The WTNs were the only commercial documentation before the Tribunal and we have already discussed them and the pre-acceptance check for the MRF. Messrs Stickler and Paterson argued that their other pre-acceptance checks included the process at the weighbridge and the repeated visual inspections. We agree with Mr Thomson that the evidence of the pre-acceptance checks was high level and anecdotal. As we have pointed out we did not hear from anyone who actually did those checks and we had no evidence of any training or quality control measures in that regard. We also know that where the weighbridge operator did add EWC codes to the WTNs they were not always accurate.

294. We were not impressed by the suggestion (see paragraph 237(d) above) that Revenue Scotland had not asked for evidence of daily/weekly visual inspections. The point is that Patersons should have had such records. Patently, they did not.

295. Officers Turner and Johnston agreed with Patersons that visual inspection was an important part of the process. We agree. The problem is that we had no documentary evidence of any visual inspections by Patersons.

296. It was accepted by the parties that because of the variability of the input to the MRF, then the output would vary. That was why it was agreed that the SEPA composition testing could only be a snapshot for that particular day. We have set out the detail at paragraphs 145 *et seq.* We can see from the many photographs that there is variability. The problem is that Patersons have produced nothing other than their witness evidence.

297. A fatal flaw in their thinking throughout, and in the evidence before the Tribunal, is that Patersons appear to have proceeded on the basis that they have equated inert materials with being qualifying material. Hence Mr Stickler's statements:-

(a) in oral evidence that not much gets through the trommel screen that is non-qualifying material, and

(b) in his witness statement that "A smaller size fraction makes it harder to visually identify the materials, but that's why you have the LOI test to support the visual assessment."

298. As can be seen from the section of this decision on WAC, WM2/3 and LOI tests, LOI tests are not a test of the composition of the material. Officer Turner's evidence, which we accepted, was that qualifying material is not always inert and *vice versa.* In his oral evidence he said that the indicators of non-qualifying material would be plastics, organic material, plasterboard and polystyrene balls, and of course those were identified on the first site visit and thereafter and can be seen in the photographs.

299. We do not know why Patersons argued that the WAC tests were WM2/3 tests. In his witness statement Mr Stickler had stated:-

> "The LOI testing regime was introduced as a proxy for compositional analysis following three years of consultation between 2012 and 2015 because regular compositional analysis was not considered practical or feasible".

No doubt, that was his view, but the problem for Patersons is that Revenue Scotland introduced the LOI test in the April 2015 version and it is clear from every flowchart, including that one, that the LOI test is the step to be undertaken after the WM2/3 test.

300. In Scotland, at no stage was the LOI test a proxy for the WM2/3 tests. We cannot comment on the position in England.

301. In that regard, we do not accept the indication in the Representations that, in April 2015, Revenue Scotland had adopted an informal position that HMRC Guidance should be followed until further Guidance was issued. The April 2015 version was stated to be a direction and therefore had the force of law. Regardless of any dispute as to what precisely comprised that direction there is no dispute that the flowchart was part of the direction and it prescribed the WM2 test.

302. The Representations, on which Patersons relied, are therefore incorrect in stating that the LOI test was mandatory but not statutory.

303. Revenue Scotland have consistently argued that the output from the MRF will reflect the input but the SEPA analysis alone does not support that proposition given that the output consisted as to 86.36% qualifying material and, on the evidence we have heard, it is inherently unlikely, as Mr Simpson pointed out, that the input would have been at that level. Mr Simpson correctly argued that the question is not the material from which the fines originate but rather whether there is sufficient evidence as to what they are. Sadly, for him and Patersons, notwithstanding the years of correspondence, the huge amount of paperwork that has been produced and the many hours expended on this issue, Patersons have not complied with their statutory obligations.

304. Mr Simpson argued that the photographs provided by Revenue Scotland in the Bundle supported the oral evidence given for Patersons. Whilst they were interesting and gave us an understanding of the process, they did not assist us to make a finding as to the level of non-qualifying material. By contrast Mr Thomson argued that the photographs made good the findings of Officers Turner and Johnston. They did, because we could understand why they had expressed concerns, but that is in the context that they said that they had open minds. For precisely that reason the photographs, which are merely snapshots on only two days, which were noted to have different outcomes, certainly are not determinative in Patersons' favour.

305. We agree with Mr Thomson that the point of the Guidance, whether that of Revenue Scotland or of HMRC is to establish whether there is only a small quantity.

306. SLfT2006, in all its versions, states effectively that the taxpayer must take all reasonable and practical steps to remove non-qualifying materials. The fact that Patersons introduced the smaller screens, an air separation unit and an over band magnet demonstrates practical and reasonable steps that could have been taken earlier.

The fact that they did so because of the imminent reduction in the level for LOI does not detract from that because as we have explained, they failed to understand that the LOI result does not determine whether material is qualifying or not.

307. We have no record of visual inspections within the periods with which we are concerned and both sets of Guidance require that. Nor do we have WM2 or 3 reports. We only know that the fines were largely inert and of a small size and we only know that from parole evidence and correspondence. That does not suffice. That would have been unlikely to have sufficed if the input to the MRF never changed but it did and all of the time.

308. There were no reliable records of what went into the MRF until the NDA was created but it is not disputed that there was variability on a day to day and a quarter to quarter basis.

309. We do not recap our findings in fact but, whilst we note Mr Stickler's statement in his witness statement that "We were comfortable that we fully complied with the detailed HMRC guidance" we simply cannot accept that there was compliance with either HMRC's or Revenue Scotland's Guidance.

310. It is accepted by Patersons that the fines were never wholly qualifying materials.

311. In the Closure Notice, Officer Hoey stated as her conclusion:-

> "…you have not kept or produced sufficient evidence and records to support paying the lower rate of SLfT in respect of all of the fines produced at the MRF…".

312. We agree and we simply do not have the evidence to establish that the fines were qualifying materials with only a small quantity of non-qualifying materials. The burden of proof lies with Patersons. They have failed to discharge that.

313. Therefore, the standard rate of tax must be applied to the fines.

Decision on SLfT

314. The appeal is dismissed. For the reasons set out above, the Closure Notice, as revised on review, is upheld.

Penalties

315. The Penalty Notice was incorporated in the Closure Notice and assessment. Officer Hoey stated that the four SLfT returns contained inaccuracies relating to the application of the lower rate of tax to fines produced at the MRF and that had led to an understatement of the liability to SLfT.

316. The first issue is whether Officer Hoey had formed an honest and reasonable view that the assessment to SLfT was insufficient. For the reasons set out above, we find that she did, albeit some of her thinking was not correct, such as assuming that if the input to the MRF was not wholly (or mainly) qualifying material then the output could never be such.

317. A core argument for Revenue Scotland, and certainly repeatedly articulated by Officer Hoey was that Patersons simply had not retained the requisite statutory records. As we have found, given that they did not comply with the tertiary legislation, they failed to keep the records that were required of them by law.

318. We do find that Officer Hoey did have grounds to believe that the assessment to SLfT was insufficient.

319. Accordingly, Condition A of section 182(2) RSTPA is satisfied.

320. SLfT is a self-assessed tax. It is not disputed that the assessment provisions in RSTPA are materially the same as the discovery assessment provisions in section 29 Taxes Management Act 1970 ("TMA"). Therefore the UK jurisprudence is relevant.

321. An assessment under section 98 RSTPA may be made only where an insufficiency of tax was brought about "carelessly or deliberately" by the taxpayer (section 102(1) RSTPA).

322. Given Mr Thomson's concessions that Revenue Scotland were now not considering deliberate penalties, as far as the penalties assessment is concerned, section 182(3)(b) RSTPA refers to a "careless inaccuracy" in an SLfT return or claim. The question is simply whether Patersons had been careless. If they have then the maximum penalty in each of the quarters would be £77,002, £149,424, £115,632 and £25,512, a total of £367,570.

323. Separate penalties have been imposed for each quarter. The first SLfT return was filed on 13 August 2015 and the return for the second quarter on 12 November 2015. As can be seen the October 2015 version had been published before then.

324. The wording of the October 2015 version is explicit and Patersons simply did not comply with it. It is recognised in the Representations that it was published, and that was in response to industry representations, and Patersons state that they were actively involved in workshops etc. They certainly should have known about it.

325. We find that Patersons were indeed careless in not taking cognisance of the October 2015 version. They knew that Revenue Scotland had grave reservations about the fines. Therefore we find that in relation to the last three quarters, given that there was a loss of tax, then a penalty is exigible in relation to those three periods and those penalties were timeously and competently assessed.

326. Accordingly, Condition B of section 182(3) RSTPA is satisfied for those quarters.

327. That leaves the first quarter. As we have pointed out, Mr Stickler was anxious to ensure that the returns were correct and contacted Officer Hoey for advice in advance of the submission of the return for the first quarter. He was advised to proceed on the same basis as they had done with HMRC on the basis that the return could be amended. Patersons did precisely that.

328. On the one hand SLfT is a self-assessed tax. Patersons were professionally advised. We do not know what that advice might have been or what KPMG knew about the WM2 tests, although it seems that they thought that they had been done. Even if they

had not been so advised the wording of the SLfT2006, in any of the versions of the flowchart, in terms of WM2/3 tests, is in very plain English. The test is required. It was not done. The Representations considered that it was mandatory.

329. However, given that we had lengthy debate about the April 2015 version, and it was a time of considerable uncertainty, we find that on the balance of probability, the inaccuracies in the first return were not careless.

330. Accordingly, for the first quarter, Condition B of section 182(3) of RSTPA is not satisfied.

331. The question then is whether the level of reduction in the other three penalties was appropriate.

332. As we have indicated, Mr Mike Paterson had simply adopted Officer Hoey's findings. In fact, he said remarkably little on the subject other than to say that he agreed with her that the inaccuracies in the SLfT returns were deliberate and that it was appropriate to reduce the penalties chargeable by 50%. When we asked him why he agreed with Officer Hoey as to the level of reduction he could not comment beyond stating that he had taken a broad brush approach.

333. We are unsurprised at that since all that she had said in her witness statement was that she had made that decision "based on all the facts and circumstances of the case". That was not enlightening.

334. All that was said was that she had considered whether there should be a reduction for the qualifying disclosure of the inaccuracies and that a 50% reduction was "proportionate in all of the circumstances". She added that although the disclosure of the inaccuracies had been prompted, Patersons had given reasonable help to Revenue Scotland in quantifying them and complied with requests to change the process and designate the MRF as a NDA.

335. The Statement of Case simply states at paragraph 72 that Revenue Scotland had carefully considered all of the evidence and had reduced the penalty to reflect the quality of the disclosures of inaccuracies by the appellant and referenced section 192 RSTPA in a footnote.

336. Obviously, we have no information on Revenue Scotland's thinking, which is lamentable, given that, in terms of section 244(2) RSTPA the Tribunal has the power to uphold, vary or cancel any penalty imposed by Revenue Scotland.

337. As the Tribunal has pointed out previously, at a minimum, Revenue Scotland should set out the parameters of their decision-making on penalties, just as they should on the substantive issues. It makes the Tribunal's job more difficult and it does not assist Revenue Scotland. In conclusion, on this point, we observe as a point of reference, given that we are bound to take into account UK jurisprudence, HMRC routinely explain in at least some detail their reductions in penalties. Again, we commend that practice.

338. We did carefully consider whether the reduction at 50% reflected the timing, nature and extent of the disclosure by Patersons. Admittedly, there was extensive disclosure over a prolonged period of time but it was undoubtedly prompted, repeatedly so.

339. Patersons did co-operate with Revenue Scotland but at times it could certainly be described as being at best "testy". Although we have looked at all the circumstances that have been brought to our attention we have been given no persuasive reasons to allow a reduction of more than 50% in relation to the timing, nature and extent of the disclosure by Patersons.

340. The next issue is the question of whether there should be a "special reduction" in terms of section 191 RSTPA. Officer Hoey did not use the words "special reduction" but we do know that Officer Hoey did consider whether there was evidence to warrant a special reduction in the penalties payable. The Closure Notice states:-

> "I do not consider there to have been an event which is something out of the ordinary, uncommon, abnormal or unusual so as to warrant a reduction of the penalties on the basis of special circumstances in terms of section 191 of RSTPA".

We observe that there is no definition of the "special circumstances" that would warrant a special reduction.

341. Officer Hoey applied the correct legal test. Case law going back to *Clarks of Hove v Bakers' Union*[7] held (at page 1216) that in the context of "special circumstances" the word "special" means "something out of the ordinary something uncommon". In *Crabtree v Hinchcliffe*[8] (at page 976) it was held that "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'". In the same case, Viscount Dilhorne said (at page 983) "For circumstances to be special they must be exceptional, abnormal or unusual …".

342. Mr Simpson, creatively, argued that since SLfT replaced an almost identical tax, and HMRC had raised no issues with Patersons, then that would amount to exceptional circumstances. Quite apart from our views on HMRC's involvement that we have articulated above, we have no hesitation in rejecting that argument. Every landfill operator in Scotland was affected by the long heralded devolution of the tax on landfill.

343. We therefore find that there are no reasons for a reduction on the basis of special circumstances in terms of section 191 RSTPA.

Decision on Penalties

344. We find that Revenue Scotland have proved that the inaccuracies in the returns for quarters 2, 3 and 4 only were as a result of careless behaviour on the part of Patersons. The appeal is upheld in respect of the penalty for quarter 1 and dismissed in respect of the penalties for quarters 2, 3 and 4 of 2015/16. For the reasons set out

[7] [1978] 1 WLR 1207
[8] [1971] 3 All ER 967

above, the Closure Notice dated 9 August 2018, as varied by a review decision dated 17 December 2018, is upheld to the extent of £145,284.

Conclusion

345. For all of these reasons, we uphold the Closure Notice dated 9 August 2018, as varied by the review decision dated 17 December 2018, but only to the extent of:-

(a) in relation to SLfT for quarters 1 to 4 inclusive of 2015/16 in the sum of £1,225,232, and

(b) in relation to penalties for careless inaccuracies in quarters 2, 3 and 4 of 2015/16 in the sum of £145,284.

346. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT

President

RELEASE DATE: 22 November 2022

Decision as reviewed in terms of Rule 40 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 on 20 December 2022

Appendix 1 - The Legislative background

1. Landfill Tax (Scotland) Act 2014

3 Charge to tax

(1) Tax is to be charged on a taxable disposal made in Scotland.

(2) A disposal is a taxable disposal if—

(a) it is a disposal of material as waste (see section 4),
(b) it is made by way of landfill (see section 5), and 29
(c) it is made at a landfill site (see section 12).

(3) For the purposes of subsection (2)(c), 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.

4 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) the person on whose behalf the disposal is made is to be treated as making the disposal.

(4) The reference in subsection (3) 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.

5 Disposal by way of landfill

(1) A disposal of material is a disposal of it 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) applies whether or not the material is placed in a container before it is deposited.

(3) Subsection (1)(b) 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.

(5) The Scottish Ministers may, by order, make provision varying the meaning of the disposal of material by way of landfill.

(6) The order may modify any enactment (including this Act).

(7) In this section, "land" includes land covered by water where the land is above the low water mark of ordinary spring tides.

(8) In this section, "earth" includes similar matter (such as sand or rocks).

6 Prescribed landfill site activities to be treated as disposals

(1) The Scottish Ministers may, by order, prescribe a landfill site activity for the purposes of this section.

(2) A "landfill site activity" means any of the following descriptions of activity, or an activity that falls within any of the following descriptions—

(a) using or otherwise dealing with material at a landfill site,
(b) storing or otherwise having material at a landfill site.

(3) If a prescribed landfill site activity is carried out at a landfill site, the activity is to be treated—

(a) as a disposal of the material involved in the activity as waste,
(b) as a disposal of that material made by way of landfill, and
(c) as a disposal at the landfill site of that material.

(4) An order under this section may prescribe a landfill site activity by reference to conditions.

(5) Those conditions may, in particular, relate to either or both of the following—

(a) whether the landfill site activity is carried out in a designated area of a landfill site,
(b) whether there has been compliance with a requirement to give information relating to—

(i) the landfill site activity, or
(ii) the material involved in the landfill site activity,
including information relating to whether the activity is carried out in a designated area of a landfill site.

(6) In subsection (5), "designated area" means an area of a landfill site designated in accordance with—

(a) an order under this section, or
(b) regulations under section 30, 32 or 33.

(7) An order under this section may modify any enactment (including this Act).

13 Amount of tax

(1) The amount of tax charged on a taxable disposal is to be found by multiplying the standard rate by the weight in tonnes of the material disposed of.

(2) The standard rate is the sum specified for the purposes of this section in an order made by the Scottish Ministers.

(3) Where the material disposed of consists entirely of qualifying material, the amount of tax charged is to be found by multiplying the lower rate by the weight in tonnes of the material disposed of.

(4) Qualifying material is material listed (in one or more category) in an order made by the Scottish Ministers.

(5) The lower rate is the sum specified for the purposes of this section in an order made by the Scottish Ministers.

(6) An order under subsection (5) may set different lower rates for different categories of qualifying material.

(7) The Scottish Ministers must—

(a) Set criteria to be considered in determining from time to time what material is to be listed as qualifying material,
(b) Keep those criteria under review,
(c) Revise them whenever they consider they should be revised, and
(d) Publish the criteria (and any revised criteria).

(8) In determining from time to time what material is to be listed as qualifying material, the Scottish Ministers must have regard to—

(a) the criteria (or revised criteria) published under subsection (7)(d), and
(b) any other factors they consider relevant.

14 Qualifying material: special provisions

(1) This section applies for the purposes of section 13.

(2) The Tax Authority may direct that where material is disposed of it must be—

(a) treated as qualifying material if it would in fact be such material but for a

small quantity of non-qualifying material,

(b) treated as qualifying material of one category if it would in fact be such material but for a small quantity of qualifying material of another category.

(3) The Tax Authority may at the request of a person direct that where there is a disposal in respect of which the person is liable to pay tax the material disposed of is to be—

(a) treated as qualifying material if it would in fact be such material but for a small quantity of non-qualifying material,

(b) treated as qualifying material of one category if it would in fact be such material but for a small quantity of qualifying material of another category.

(4) Whether a quantity of non-qualifying material or (as the case may be) qualifying material of another category is small is to be determined in accordance with the terms of the direction.

(5) A direction under subsection (3) may apply to all disposals in respect of which a person is liable to pay tax or to such of them as are identified in the direction.

(6) If a direction under subsection (3) applies to a disposal, any direction under subsection (2) is not to apply to it.

(7) The Scottish Ministers may, by order, provide that material must not be treated as qualifying material (or as qualifying material of a particular category) for the purposes of this section unless conditions specified in the order are fulfilled.

(8) A condition specified under subsection (7) may relate to any matter the Scottish Ministers think fit (such as the production of a document which includes a statement of the nature of the material).

15 Weight of material disposed of

(1) The weight of material disposed of on a taxable disposal is to be determined in accordance with regulations made by the Scottish Ministers.

(2) The regulations may—

(a) specify rules for determining the weight,

(b) …

2. <u>The Scottish Landfill Tax (Administration) Regulations 2015</u>

Part 5
Credit: permanent removals etc of

17.—Entitlement to credit

(1) An entitlement to credit to credit arises under this Part where—

(a) a registered person has accounted for an amount of tax and, except where the removal by virtue of which sub-paragraph (b) below is satisfied takes place in the accounting period in which credit arising under this Part is claimed in accordance with Part 4 of these Regulations, the registered person has paid that tax; and

(b) In relation to the disposal on which that tax was charged, either—

(i) the reuse condition has been satisfied; or …

(2) The reuse condition is satisfied where—

(a) the disposal has been made with the intention that the material comprised in it [would be]—

(i) […] recycled or incinerated;
(ii) Removed for use (other than by way of a further disposal) at a place other than a relevant site; or
(iii) Removed for use in restoration of a relevant site and the material involved has previously been used to create or maintain temporary hard standing, to create or maintain a temporary screening bund or to create or maintain temporary hard standing, to create or maintain a temporary screening bund or to create or maintain a temporary haul road;

(b) that material, or some of it, has been recycled, incinerated or permanently removed from the landfill site, as the case may be, in accordance with that intention;

(c) that recycling, incineration or removal—

(i) has taken place no later than one year after the date of the disposal; or
(ii) where water had been added to the material in order to facilitate its disposal, has taken place no later than five years after the date of the disposal; and
(iii) the registered person has, before the disposal, notified Revenue Scotland in writing that the registered person intends to make one or more removals of material in relation to which sub-paragraphs (a) to (c) above will be satisfied.

(3) For the purpose of paragraph (2)(a)(ii) above a relevant site is the landfill site at which the disposal was made or any other landfill site.

3. <u>The Scottish Landfill Tax (Qualifying Material) Order 2015</u>

Qualifying material

2.— (1) Subject to paragraphs (3) and (4), the material(2) listed in column 2 of the Schedule is qualifying material for the purposes of section 13(4) of the Landfill Tax

(Scotland) Act 2014.

(2) The Schedule is to be construed in accordance with the notes contained in it.

(3) The material listed in column 2 of the Schedule must not be treated as qualifying material unless any condition set out alongside the description of the material in column 3 of the Schedule is met.

(4) Where the owner of the material immediately prior to the disposal and any operator of the landfill site at which the disposal is made are not the same person, material must not be treated as qualifying material unless it meets the relevant condition referred to in paragraph (5).

(5) The relevant condition is that a transfer note includes in relation to each type of material of which the disposal consists a description of the material which—

(a) accords with its description in colum 2 of the Schedule;
(b) accords with a description listed in a note to the schedule (other than by way of exclusion); or
(c) is some other accurate description.

Schedule

Column 1	**Column 2**	**Column 3**
Group	**Description of material**	**Conditions**
1	Rocks and soils	Naturally occurring
2	Ceramic or concrete materials	
3	Minerals	Processed or prepared
…	…	…
7	Calcium Sulphate	Disposed of in a landfill cell where no biodegradable waste is accepted

Notes

(1) Group 1 comprises only—

(a) rock;
(b) clay;
(c) sand;
(d) gravel;
(e) sandstone;
(f) limestone;
(g) crushed stone;
(h) china clay;
(i) construction stone;
(j) stone from the demolition of buildings or structures;
(k) slate;
(l) sub-soil;

(m)silt; and
(n) dredgings.

(2) Group 2—

(a) comprises only –

(i) glass, including fritted enamel;
(ii) ceramics, including bricks, bricks and mortar, tiles, clay ware, pottery, china and refactories; and
(iii) concrete, including reinforced concrete, concrete blocks, breeze blocks and aircrete blocks; and

(b) does not include—

(i) glass fibre and glass-reinforced plastic; or
(ii) concrete plant washings.

(3) Group 3—

(a) comprises only –

(i) moulding sands, including used foundry sand;
(ii) clays, including moulding clays and clay absorbents (including Fuller's earth and bentonite);
(iii) mineral absorbents;
(iv) man-made mineral fibres, including glass fibres;
(v) silica;
(vi) mica; and
(vii) mineral abrasives; and

(b) does not include –

(i) moulding sands containing organic binders; or
(ii) man-made mineral fibres made from glass-reinforced plastic and asbestos …

(7) Group 7 includes calcium sulphate, gypsum and calcium sulphate based plasters but does not include plasterboard.

4. <u>The Scottish Landfill Tax Act (Prescribed Landfill Site Activities) Order 2014</u>

3. Prescribed landfill site activities

(1) The following landfill site activities are prescribed for the purposes of section 6 of the LT(S) Act 2014 (prescribed landfill site activities to be treated as disposals)—

(a) the use of material to cover the disposal area during a short term

cessation in landfill disposal activity; …

5. <u>The Environmental Protection (Duty of Care) (Scotland) Regulations 2014</u>

3. Transfer Notes

(1) The transferor and the transferee must ensure that a document as described in paragraphs (3) and (4) is completed in writing and signed by each of them in respect of the waste being transferred ("a transfer note").

(2) A transfer note must be prepared at the same time as the written description is transferred in accordance with section 34(1)(c) of the Act [The Environmental Protection Act 1990].

(3) A transfer note must—

(a) give the name and address (including the postcode) of the transferor and the transferee;
(b) give the date and place (including the postcode) of the transfer;
(c) state whether the transferor is the producer of the waste;
(d) state whether the transferor is the importer of the waste;
(e) describe the type, composition and quantity of the waste being transferred (including, where the waste is in a container, the type of container);
(f) identify the waste being transferred by reference to the appropriate six-digit code in the European Waste Catalogue; and
(g) identify the activity carried out by the transferor in respect of the waste being transferred by reference to the SIC code for that activity.

5. <u>The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2015</u>

2. For the purposes of section 13 of the Landfill Tax (Scotland) Act 2014—

(a) the standard rate is £82.60; and
(b) the lower rate is £2.60.

6. <u>The Scottish Landfill Tax (Administration) Regulations 2015</u>

12.—Non-disposal areas

(1) An officer of Revenue Scotland is authorized to require a person to designate a part of a landfill site (a "non-disposal area"), and a person must designate a non-disposal area if so required.

(2) Where material at a landfill site is not going to be disposed of as waste and Revenue Scotland considers, or one of its officers considers, there to be a risk to the collection of landfill tax—

(a) the material must be deposited in a non-disposal area; and

(b) a registrable person must give Revenue Scotland, or one of its officers, information and maintain a record in accordance with paragraph (4) below.

(3) A designation ceases to have effect if a notice in writing to that effect is given to a registrable person by Revenue Scotland.

(4) A registrable person must maintain a record in relation to the non-disposal area of the following information, and give this information to Revenue Scotland or to one of its officers if requested—

(a) the weight and description of all material deposited there;
(b) the intended destination or use of all such material and, where any material has been removed or used, the actual destination or use of that material;
(c) the weight and description of any such material sorted or removed.

17.—Entitlement to credit

(1) An entitlement to credit arises under this Part where—

(a) a registered person has accounted for an amount of tax and, except where the removal by virtue of which sub-paragraph (b) below is satisfied takes place in the accounting period in which credit arising under this Part is claimed in accordance with Part 4 of these Regulations, the registered person has paid that tax; and
(b) in relation to the disposal on which that tax was charged, either—

(i) the reuse conditions has been satisfied; or
(ii) the enforced removal conditions has been satisfied.

(2) The reuse condition is satisfied where—

(a) the disposal has been made with the intention that the material comprised in it

(i) would be recycled or incinerated;
(ii) removed for use (other than by way of a further disposal) at a place other than a relevant site; or
(iii) removed for use in restoration of a relevant site and the material involved has previously been used to create or maintain temporary hard standing, to create or maintain a temporary screening bund or to create or maintain a temporary haul road;

(b) that material, or some of it, has been recycled, incinerated or permanently removed from the landfill site, as the case may be, in accordance with that intention;

(c) that recycling, incineration or removal—

(i) has taken place no later than one year after the date of the disposal; or

(ii) where water had been added to the material in order to facilitate its disposal, has taken place no later than five years after the date of the disposal; and

(d) the registered person has, before the disposal, notified Revenue Scotland in writing that the registered person intends to make one or more removals of material in relation to which sub-paragraphs (a) to (c) above will be satisfied.

(3) …

7. Revenue Scotland and Tax Powers Act 2014

85 Notice of enquiry

(1) A designated officer may enquire into a tax return if subsection (2) has been complied with.

(2) Notice of the intention to make an enquiry must be given-

(a) to the person by whom or on whose behalf the return was made ("the relevant person"),
(b) before the end of the period of 3 years after the relevant date.

(3) The relevant date is-

(a) the filing date, if the return was made on or before that date, or
(b) the date on which the return was made, if the return was made after the filing date.

(4) A return that has been the subject of one notice under this section may not be the subject of another, except a notice given in consequence of an amendment of the return under section 83.

(5) A notice under this section is referred to as a "notice of enquiry".

93 Completion of enquiry

(1) An enquiry under section 85 is completed-

(a) when a designated officer informs the relevant person by a notice (a "closure notice") that the enquiry is complete and states the conclusions reached in the enquiry, or
(b) no closure notice having been given, 3 years after the relevant date.

(2) A closure notice must be given no later than 3 years after the relevant date.

(3) A closure notice must either-

(a) state that in the officer's opinion no amendment of the tax return is required, or

(b) make the amendments of the return required to give effect to the officer's conclusions.

(4) Where a closure notice is given which makes amendments of a return as mentioned in subsection (3)(b), section 83 does not apply.

(5) A closure notice takes effect when it is issued.

(6) The taxpayer must pay any amount, or additional amount, of tax chargeable as a result of an amendment made by a closure notice before the end of the period of 30 days beginning with the day on which the notice is given.

(7) In subsections (1) and (2) "relevant date" has the same meaning as in section 85.

98 Assessment where loss of tax

(1) This section applies if a designated officer comes to the view honestly and reasonably that-

(a) an amount of devolved tax that ought to have been assessed as tax chargeable on a person has not been assessed,

(b) an assessment of the tax chargeable on a person is or has become insufficient, or

(c) relief has been claimed or given that is or has become excessive.

(2) The designated officer may make an assessment of the amount, or additional amount,that ought in the officer's opinion to be charged in order to make good to the Crown the loss of tax.

102 Conditions for making Revenue Scotland assessments

(1) A Revenue Scotland assessment may be made only where the situation mentioned in section 98(1) or 99(1) was brought about carelessly or deliberately by-

(a) the taxpayer,

(b) a person acting on the taxpayer's behalf, or

(c) a person who was a partner of the taxpayer.

105 Assessment procedure

(1) Notice of a Revenue Scotland assessment must be served on the taxpayer.

(2) The notice must state-

(a) the tax due,
(b) the date on which the notice is issued,
(c) the date by which-
(i) the amount, or additional amount, of tax chargeable as a result of the assessment (as mentioned in section 98(2)), or
(ii) the amount of tax or interest repaid that ought not to have been (as mentioned in section 99(1)),
must be paid, and
(d) the time within which any review or appeal against the assessment must be requested.

(3) The-

(a) amount, or additional amount, of tax chargeable as a result of the assessment (as mentioned in section 98(2)), or
(b) amount of tax or interest repaid that ought not to have been (as mentioned in section 99(1)),

must be paid before the end of the period of 30 days beginning with the date on which the assessment is issued.

(4) After notice of the assessment has been served on the taxpayer, the assessment may not be altered except in accordance with the express provisions of this Part or of Part 5.

(5) Where a designated officer has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, the officer may entrust to some other designated officer the responsibility for completing the assessment procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.

182 Penalty for inaccuracy in taxpayer document

(1) A penalty is payable by a person ("P") where-

(a) P gives Revenue Scotland a document of a kind mentioned in the table below, and
(b) Conditions A and B below are met.

(2) Condition A is that the document contains an inaccuracy which amounts to, or leads to-

(a) an understatement of a liability to tax,
(b) a false or inflated statement of a loss, exemption or relief, or
(c) a false or inflated claim for relief or to repayment of tax.

(3) Condition B is that the inaccuracy was-

(a) deliberate on P's part ("a deliberate inaccuracy"), or

(b) careless on P's part ("a careless inaccuracy").

(4) An inaccuracy is careless if it is due to a failure by P to take reasonable care.

(5) An inaccuracy in a document given by P to Revenue Scotland, which was neither deliberate nor careless on P's part when the document was given, is to be treated as careless if P-

(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform Revenue Scotland.

(6) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

	Tax	*Document*
… 2.	Scottish landfill tax	(a) Return under regulations made under section 25 of the LT(S) Act 2014. (c) Amended return under section 83 of this Act. (d) Claim under section 106, 107 or 108 of this Act …

(7) Section 183 applies in the case of a document falling within *item 1 or 2* [any item] of the table.

191 Special reduction in penalty under this Chapter [3]

(1) Revenue Scotland may reduce a penalty under this Chapter if it thinks it right to do so because of special circumstances.

(2) In subsection (1) "special circumstances" does not include-

(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential 0ver-payment by another.

(3) In subsection (1) the reference to reducing a penalty includes a reference to-

(a) Remitting a penalty entirely,
(b) suspending a penalty, and
(c) agreeing a compromise in relation to proceedings for a penalty.

(4) In this section references to a penalty include references to any interest in relation to the penalty.

(5) The powers in this section also apply after a decision of a tribunal or a court in relation to the penalty.

192 Reduction in penalty under this Chapter [3] for disclosure

(1) Revenue Scotland may reduce a penalty under this Chapter where a person makes a qualifying disclosure.

(2) A "qualifying disclosure" means disclosure of-

(a) an inaccuracy,
(b) a supply of false information or withholding of information, or
(c) a failure to disclose an under-assessment.

(3) A person makes a qualifying disclosure by-

(a) telling Revenue Scotland about it,
(b) giving Revenue Scotland reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
(c) allowing Revenue Scotland access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

Appendix 2 – The April 2015 version

SLfT2006 Qualifying materials containing a small amount of non-qualifying material

Note: the following "General guidance" applies for SLfT purposes to all waste loads which wholly consist of qualifying material apart from a small amount of non-qualifying material.

In this context:

- "qualifying material" means material which is listed in and meets the conditions set out in The Scottish Landfill Tax (Qualifying Material) Order 2015; and

- "non-qualifying material" means material which is not listed (and does not meet the conditions set out) in that Order and which is, therefore chargeable at the standard rate.

If the waste load contains **fine material** then the guidance under the "Qualifying fines" heading also applies.

General guidance

We may direct that material disposed of can be treated as qualifying material if it would so qualify but for the presence of a small amount of non-qualifying material.

We are aware that some waste streams, which may otherwise be liable for tax at the lower rate, may arise with small amounts of non-qualifying (or standard-rated) materials contained within them as contaminants. This includes fines and contaminated soils, which generally contain a mixture of qualifying and non-qualifying materials, and which make the whole load liable for tax at the standard rate.

Where:

- It is unreasonable to have prevented this contamination at source; and
- It is subsequently unreasonable, or there is no practical way, for these contaminants to be removed,

then the whole load may be taxable at the lower rate. Any load which is hazardous waste as defined by Directive 2008/98/EC (see SLfT2004) must, however, be taxed at the standard rate.

Material of a standard taxable rate must not be added to material of a lower rate. For example, it must not have been deliberately or artificially blended or added to the qualifying material(s) after or in connection with removal from its originating site. Such an addition would make the entire load taxable at the standard rate. The only exceptions to this are when:

- standard-rated material needs to be used to contain the lower-rated waste; or
- standard and lower-rated material at a Materials Recycling Facility are mixed prior to treatment to enable their treatment and segregation.

In cases of doubt the waste will be taxed at the standard rate unless you can demonstrate that the waste qualifies for the lower rate of tax and that all reasonable and practical measures have been taken to remove contaminants contained within the waste.

The lower rate of tax may only be applied to a load containing a small amount of standard-rated material if the standard rate material was formed with the lower-rated waste at the same time, or it is used as necessary packaging and all reasonable and practical measures have been taken to prevent, reduce and remove the standard-rated material from the lower-rated material.

For example, we would accept the following as qualifying for the lower rate:

- a load of bricks, stone and concrete from the demolition of a building that has small pieces of wood in it and small quantities of plaster attached to bricks as it would have not been feasible for a contractor to separate them. (Note: large pieces of wood or plaster which could be removed by hand or other means would make the entire load taxable at the standard rate);
- a load of sub-soil that contains small quantities of grass. (Note: turfs of grass which could have been removed prior to the load of sub-soil being created would make the entire load taxable at the standard rate);
- waste such as mineral dust packaged in polythene bags for disposal; and
- a load of sub-soil and stone from street works containing small amounts of tarmac (Note: large pieces of tarmac which could be removed by hand or other means would make the entire load taxable at the standard rate).

It is not possible for us to advise you on every disposal. It is your responsibility to decide whether a particular load disposed of at your site contains any standard-rated material.

If it does contain such waste you need to satisfy yourself that the load:

- is not hazardous waste; and
- contains only a small quantity of non-hazardous non-qualifying (or standard-rated) waste, which was formed with the lower-rated material and either could not be removed or is necessary for packaging reasons.

  The difficulty in separating the standard-rated components from the lower-rated waste is a factor that you can take into account, but this cannot be used to justify applying the lower rate of tax if the standard-rated waste is hazardous or it is more than a small amount of the total load. You will need to justify your decisions to us.

LT(S)A 2014 section 14

Qualifying fines

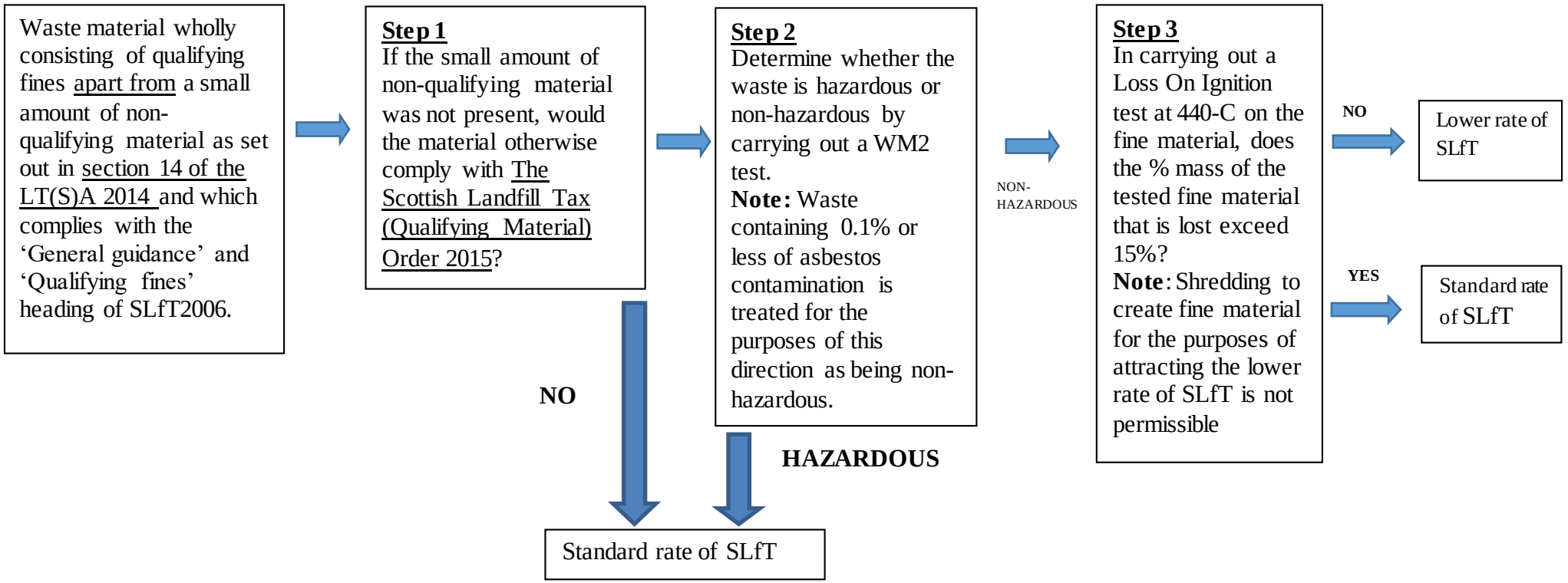
Note: From 1 April 2015, and under a direction made under section 14 of the LT(S)A 2014, we will require you to use the following flowchart in order to determine whether a waste load containing fine material is chargeable at the standard or lower rate.

For SLfT purposes, fines are particles produced by a waste treatment process that involves an element of mechanical treatment.

Qualifying fines are:

- a mixture that consists of:
    - fines that consist of materials listed in the Schedule to The Scottish Landfill Tax (Qualifying Material) Order 2015; and
    - no more than a small amount of fines that consist of any other (ie non-qualifying) material,
- and where:
    - the qualifying fines must not result from any deliberate or artificial blending or mixing of any material prior to disposal at a landfill site; and
    - the qualifying fines must not be hazardous waste.

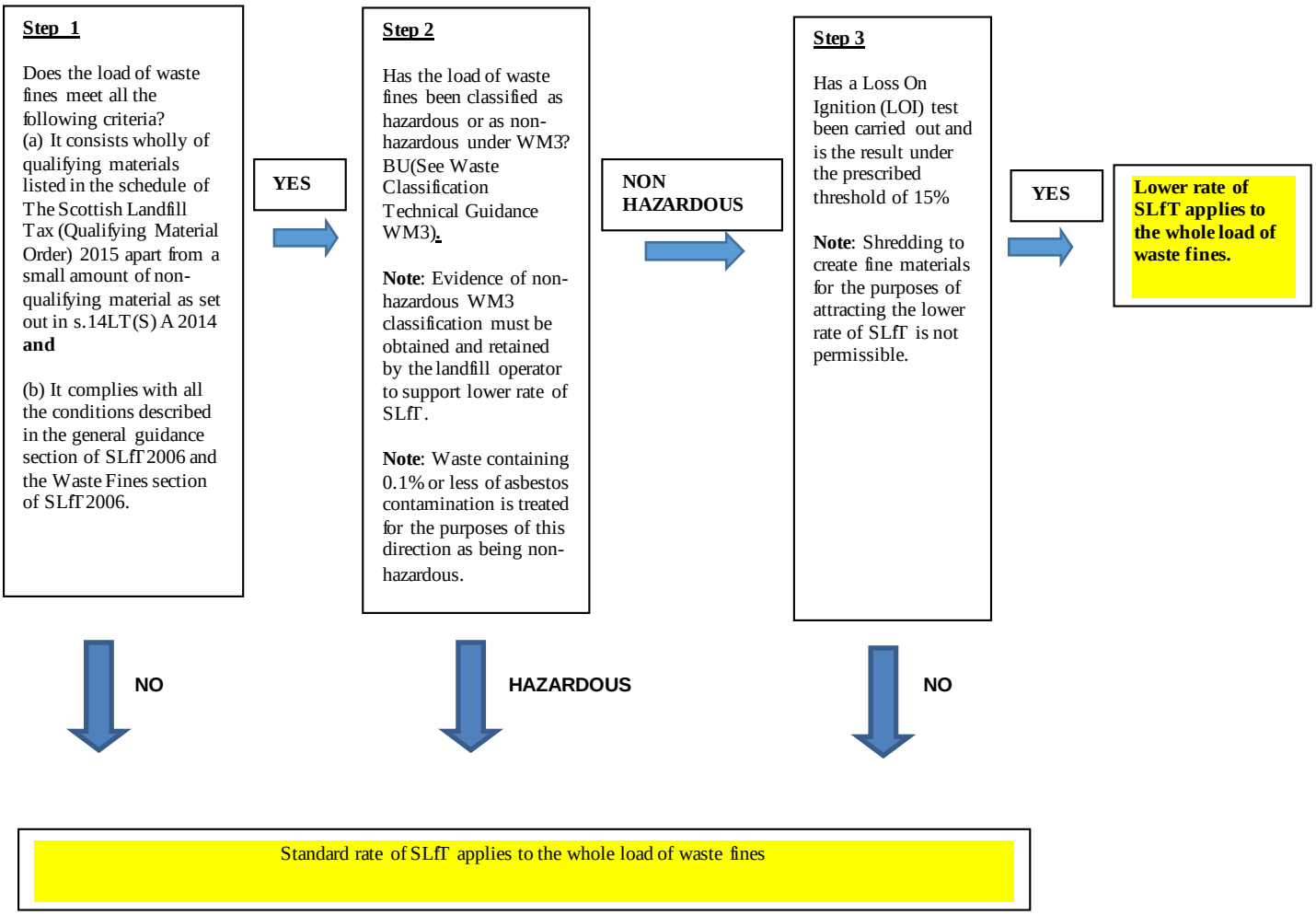
Flowchart to determine the Scottish Landfill Tax rate for waste loads containing fine material



Appendix 3 – Flowchart from the October 2015 version

Flowchart for determining the rate of SLfT chargeable per load of waste fines

All of the conditions of the qualifying fines flow chart must be met in order for each load of waste fines to be liable at the lower rate of SLfT.



Appendix 4 - SLfT 2005 Evidence required for the lower rate

You must keep and provide sufficient evidence to substantiate applying the lower rate of tax to any particular disposal of waste. If sufficient evidence cannot be provided to demonstrate how the waste qualifies for the lower rate, the standard rate of tax will be payable.

This includes obtaining (and then keeping and providing when required) sufficient evidence to substantiate that the lower rate of tax should apply after following the guidance outlined in SLfT2006 (for waste disposals wholly consisting of qualifying material part from a small amount of non-qualifying material). For example, you will need to obtain (and then keep and provide when required) records relating to any Loss On Ignition ("LOI") test that is required where the waste material consists of qualifying fines apart from a small amount of non-qualifying material.

The only determining factor as to whether waste is qualifying material chargeable at the lower rate of SLfT is whether it is listed in and complies with the criteria contained within The Scottish Landfill Tax (Qualifying Material) Order 2015 (the material listed in the Order reflect criteria that the Scottish Ministers have set in relation to determining what can be listed as qualifying material – see SLfT2004).

Whether or not waste is considered to be inert for environmental protection purposes is not relevant to matters of tax liability. Equally, the fact that waste is listed in the Order does not mean that the waste is inert for environmental protection purposes.

To qualifying for the lower rate, the waste transfer note (which is required to accompany all movements of waste) must accurately record the composition of the load of waste, setting out specifically which qualifying materials are contained in the load so that it can be related to the terms used in the Order. The waste transfer note must accurately describe the waste for standard rate too.

The waste transfer note may cover individual loads or it may be a "season ticket" covering a number of loads sent for disposal to a landfill site over a period of time.

If you operate an in-house landfill site and have applied the lower rate to waste which you have disposed of in that site, you will need to provide evidence (such as production records and testing analysis) to show that the waste qualifies for that rate.

The requirements relating to the waste transfer note described above are for tax purposes. They in no way override or affect any obligations in relation to the waste transfer note in environmental protection law, including the requirement to define the waste source by reference to the European Waste Catalogue codes.

Some waste streams may be sufficiently complex in nature that analysis may be required to demonstrate that they qualify for the lower rate of tax. For example, trommel fines (the residual materials left after processing activities are undertaken at waste transfer stations, waste recycling/treatment facilities or material recovery facilities) may need to be subjected to a loss on ignition test to demonstrate that the fines are sufficiently non-polluting to be taxed at the lower rate.
LT(S)A 2014 section 14

Appendix 5 – Extract from LFT1 – A general guide to Landfill Tax dated 27 March 2015 taking effect from 1 April 2015

3.2 Evidence for lower rate

You must keep sufficient evidence to substantiate applying the lower rate of tax to any particular disposal of waste.

To qualify for the lower rate the waste transfer note, which is required to accompany most movements of waste in the UK, must accurately describe the waste **so that it can be related to the terms used in the Landfill Tax (Qualifying Material) Order 2011**. The waste transfer note may cover individual loads or it may be a "season ticket" covering a number of loads sent for disposal to your site over a period of time.

If you operate an in-house site and have applied the lower rate to waste which you have disposed of in that site you will need to provide evidence that the waste qualifies for that rate.

The requirements relating to the waste transfer note described above are for tax purposes. They in no way override or affect your obligations in relation to the waste transfer note in environmental protection law including the requirement to define the waste source by reference to the European Waste Catalogue codes.

Note: the only determining factor as to whether waste is lower rated is whether it is listed in the Landfill Tax (Qualifying Material) Order 2011. Whether or not waste is considered to be inert for environmental protection purposes Is not relevant to matters of tax liability. Equally, the fact that waste is listed in the Landfill Tax (Qualifying Material) Order 2011 does not mean that the waste is inert for environmental protection purposes.

3.3 Mixed loads

Where a disposal to landfill contains both standard rated and lower rated materials, tax is due on the whole load at the standard rate. However, you may ignore the presence of an incidental amount of standard rated waste in a mainly lower rated load, and treat the whole load as taxable at the lower rate. For example, we would accept as qualifying for the lower rate:

- a load of bricks, stone and concrete from the demolition of a building that has small pieces of wood in it and small quantities of plaster attached to bricks as it would have not been feasible for a contractor to separate them
- a load of sub-soil that contains small quantities of grass
- waste such as mineral dust packaged in polythene bags for disposal, and
- a load of sub-soil and stone from street works containing tarmac (hoiwever, a load of tarmac containing soil and stone would not qualify).

It is not possible for us to advise you on every disposal. It is your responsibility to decide whether a particular load disposed of at your site contains a reasonable incidental amount of standard rated case – you need to satisfy yourself that the load contains only a small quantity of such waste. The difficulty in separating the standard rated components from the lower rated waste is a factor that you can take into account, but this cannot be used to justify applying the lower rate of tax if the standard rated waste is more than a small amount of the total load. You will need to justify your decisions to us.