



TC04798

Appeal number: TC/2010/01716

PROCEDURE –preliminary issue- admissibility of evidence – HMRC's expert evidence – sampling – compliance with BSI 812 – 104 –sample size smaller than recommended – whether evidence inadmissible – whether alleged flaws in expert evidence such that it should be excluded on the grounds of unfairness – no – any unfairness can be addressed by cross-examination

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OMAGH MINERALS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MR DAVID MOORE**

Sitting in public at The Royal Courts of Justice, Belfast on 16 October 2015 and subsequent written submissions

Frank O'Donoghue QC, instructed by Elliott Duffy Garrett, Solicitors, for the Appellant

Christopher McNall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. This is a decision on two preliminary issues in accordance with the directions of this Tribunal issued on 10 July 2015 (Judge Peter Kempster), following earlier directions issued on 5 June 2013 (Judge David Demack).
2. The first preliminary issue is whether the Appellant's application to join the Aggregates Levy Credit Scheme, and its treatment by the Department of the Environment for Northern Ireland ("DoENI"), is justiciable by this Tribunal in this appeal (the "Justiciability Issue").
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3. The second preliminary issue is whether the evidence of Capita Symonds and Professor Doyle is admissible (the Admissibility Issue").

The Factual Background

- 15 4. The factual background taken from the witness statements and documents before us is as follows. We did not have the benefit of hearing live evidence from the witnesses nor was any of the evidence subject to cross-examination. We did not understand these facts to be in dispute although we are conscious that they may be more fully explored at the hearing of the substantive appeal and fuller findings of fact made.
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5. The Respondents ("HMRC") have assessed the Appellant in the sum of £304,290 (plus interest of £4,454 and a penalty of £15,214.50) under Schedule 5 Finance Act 2001 ("FA 2001") in respect of alleged arrears of aggregate levy for periods 01/09 and 04/09. The assessment in question is dated 5 October 2009.
- 25 6. The Appellant owns approximately 180 acres of land at Cavanacaw Mine, Omagh, Tyrone, Northern Ireland. The mine is an open pit goldmine. On 3 May 1995 planning permission was given to the Appellant for "Opencast pit for the extraction of gold and silver and associated minerals, with associated plant in storage." That planning permission was made subject to a number of conditions.
- 30 7. The Appellant's mining operations required them to remove surrounding rock (which was referred to at the hearing as "overburden") away from the seams which contained gold ore. The rock so removed was mainly retained on-site to enable subsequent restoration of the mining site. However, the Appellant found that there was a surplus of approximately 40% of the excavated overburden.
- 35 8. From 26 May 2008 until February 2009 the Appellant permitted a local road contractor, PT McWilliams ("the Contractor") to remove the surplus overburden which was then used in road construction.

9. After a meeting between the Appellant, the Contractor and HMRC on 18 November 2008, the Appellant apply for registration as an aggregates levy trader. This would have protected the Appellant if the overburden extracted by the Contractor did not fall within an exemption from aggregates levy.

5 10. The Contractor arranged for a site survey by Ground Check Ltd ("GCL") to be carried out. GCL reported its conclusions in a letter dated 23 February 2009 stating that the rocky material was a combination of shale and slate and therefore exempt from aggregate levy.

10 11. HMRC decided to commission another survey. On 28 July 2009, HMRC officers accompanied by Mr Andrew Thrower (a geologist employed by Capita Symonds Ltd ("CSL")) visited the mine. The Appellant's general manager, Mr Hardie, identified stockpiles of aggregate which he considered representative of that removed by the Contractor and also the area of the site where the Contractor had extracted the aggregate. It was agreed that Mr Thrower would base his report on samples taken
15 from the areas identified by Mr Hardie. Mr Thrower proceeded to take samples as agreed. He was accompanied at the time by Mr James McFarlane, the Appellant's geologist.

12. A formal sampling agreement was signed acknowledging that any assessment would be based on the analysis of the samples that had just been taken.

20 13. The samples of rock so collected were transported to Professor Peter Doyle for analysis. The results of Professor Doyle's analysis were contained in the Capita Symonds report dated 25 August 2009. The report concluded that the sample contained 84.85% coarse aggregate, comprised of a mixture of Mica Schist and Vein Quartz, the remaining 15.15% consisting of fine aggregate. Mica Schist and Vein
25 Quartz are not, we were informed, material exempt from the aggregate levy.

14. Professor Doyle's witness statement states as follows:

30 "5. On 28 July 2009 I was instructed by Capita Symonds to carry out an analysis of an aggregate sample to be collected by them from Cavanacaw Mine, Omagh, Tyrone, Northern Ireland, with a view to identifying the lithologies (rock types) within the sample supplied and determining the percentage of each in accordance with BS 812: part 104, which is the relevant standard for lithological analysis. The sample was delivered to my premises on 8 August 2009, and comprised four bulk aggregate bags stated to be approximately 15 kg
35 each. The actual mass of the sample was 51.2 kg. BS 812: part 104 recommends minimum sample sizes of laboratory samples according to maximum particle size contained within them. It specifies that the minimum mass for aggregates samples with particles sizes of 40.0 mm be 100 kg. The sample supplied by Capita Symonds Ltd was less than
40 that recommended by this standard, but given the dominance of a single lithology in the sample it is unlikely that a greater mass would materially affect the outcome of the analysis.

...

5 8. The coarse fraction of the sample was therefore found to comprise 100% mica schist or vein quartz.... With no other lithologies present, it is reasonable to assume that the fines are also composed of fine fragments of either mica schist or quartz, and in my opinion the sample therefore comprises 100% non-exempt lithologies. Though the mass of the sample supplied by Capita Symonds was less than the minimum specified by BS 812:104, it is unlikely that this would materially affect the outcome of the analysis, given the dominance of non-exempt lithologies."

10 15. We have reviewed BS 812:104 and, as Professor Doyle states, it recommends that the sample size for particle sizes of 40.0 mm should be 100 kg.

The Justiciability Issue

15 16. Although both issues were argued before the Tribunal at the hearing, it was agreed that a subsequent joint written submission should be made by the parties in respect of the Justiciability Issue. In the event, the Appellant (by a letter from the solicitors dated 13 November 2015) stated that it had decided not to proceed with the Justiciability Issue.

17. Therefore, the answer to the Justiciability Issue question is "no".

20 18. It follows that the following paragraph shall be struck out from the Appellant's Amended Grounds of Appeal:

25 "Further and in the alternative if the aggregate that was removed by P T McWilliams Limited ('PTMcW') in the period May 2008 to February 2009 is not exempt from the Aggregates Levy for the purposes of Section 17(4) of the Finance Act 2001, which is denied, the amount of the Aggregates Levy should be reduced from £304,290 to £[blank in the original] as the Department of the Environment for Northern Ireland ('DOENI') wrongfully refused the Appellant membership of the Aggregates Levy Credit Scheme ('the Scheme') by letter dated 29 January 2010 in which it invited the Appellant to appeal to HMRC. A copy of DOENI's said letter to the Appellant is exhibited in the Schedule to this Amended Notice of Appeal".

19.

The Admissibility Issue

35 20. Mr O'Donoghue submitted that the Tribunal should exclude the sample, the findings of the lithological analysis and the opinions that flowed therefrom from the evidence. Mr O'Donoghue argued that the sample and the analysis, by not complying with BS 812:104, was flawed. He further argued that there was no evidence as to how the samples, when taken, were stored or secured. Mr O'Donoghue also noted that Professor Doyle stated that four bulk aggregate bags of approximately 15 kg each
40 were delivered to him but he recorded the aggregate mass is being 51.2 kg. This almost 9 kg difference, said Mr O'Donoghue, raised questions as to the integrity of the sample.

21. For these reasons, Mr O'Donoghue submitted that the analysis was fatally compromised. He argued that Professor Doyle should have rejected the sample and this gave rise to questions about his independence as an expert witness, bearing in mind that he was contracted to Capita Symonds which was itself contracted to HMRC.

Decision on the Admissibility Issue

Applicable legal principles

22. This Tribunal has the power to admit expert evidence: Rule 15(1)(c) The Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Rules"). Rule 15(2)(b)(iii) allows the Tribunal to exclude evidence that would otherwise be admissible where it would otherwise be unfair to admit the evidence. Furthermore, Rule 15(2)(b)(i) provides that the Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom.

23. We also bear in mind the general principle that the key question is the relevance of the material in question and that there is a presumption that all relevant evidence should be admitted before this Tribunal unless there is a compelling reason to hold to the contrary: *Mobile Export 365 Ltd v Commissioners for HMRC* [2007] EWHC 2664 (Admin) per Lightman J at [20] cited with approval by Ryder LJ in *Atlantic Electronics Ltd v HMRC* [2013] EWCA Civ 651 at [31].

Application of the legal principles

24. In our view, the evidence which the Appellant seeks to exclude is not strictly inadmissible. It is relevant to the issues in dispute. There is therefore a presumption that it should be admitted and not be excluded.

25. Should the evidence be excluded because it would otherwise be unfair to admit it? In our view it would not be unfair. It seems to us that the issues relating to the weight of the sample are matters which can and should be explored in cross-examination of the witnesses. Thus any potential unfairness can be dealt with adequately by cross-examination. The probing of HMRC's witnesses in cross-examination and the opportunity afforded to the Tribunal to ask its own questions will allow the Tribunal to assess the strength of and weight to be given to the evidence of Professor Doyle and the Capita Symonds report. Indeed it is hard to see how the Tribunal could at this stage conclude, for example, that Professor Doyle's evidence was so flawed as to be unfair without hearing the Professor explain the reasons for his conclusions. In addition, issues in relation to the independence of Professor Doyle should, in fairness, be put to him in cross-examination.

26. We see no other compelling grounds why this evidence should be excluded.

27. Accordingly, we decided the Admissibility Issue against the Appellant and in favour of HMRC and that the answer to the Admissibility Issue is "yes".

28. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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GUY BRANNAN

**TRIBUNAL JUDGE
RELEASE DATE:**

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