Devolving Further Powers to Scotland – The Aggregates Levy

Background Brief

The aggregates levy was introduced by the Westminster Government in 2002 as a so-called “environmental tax.” So called because it appeared to do very little to enhance the environment and in fact in many cases had a negative effect on the environment. The principal of the levy was to encourage users of aggregates to turn away from natural or “virgin” aggregates to so-called secondary aggregates such as china clay sand, slate waste and shale. The use of recycled aggregates was also to be encouraged but recycled aggregates needed little encouragement as the recently introduced landfill tax and the advent of tracked crushers meant that demolition sites within urban areas could be cleared of C&D waste and “instant” aggregates provided for the new brownfield site.

Regretfully the architects of the levy failed (or refused) to understand that aggregates from the china clay workings in Cornwall and the slate workings in North Wales had always been part of the aggregate supply chain. They failed to realise that shale was not just some waste found on old coal sites but was in fact in the vast majority of cases a sound solid rock such as that found in the Caithness Shale Beds of northern Scotland and the Greywacke deposits found throughout the land.

The aggregate levy was initially a sum of £1.60 per tonne charged on the extraction of “primary” or “virgin” aggregates whilst the aggregates (“secondary aggregates”) from china clay, slate and shale were exempt. The architects of the scheme did not appreciate that china clay, slate and shale aggregates were all virgin in that they came from the ground and that levied primary aggregates such as whinstone also had its own secondary aggregates in the form of crushed fines and scalpings that could not be used as a quality product; nevertheless the whinstone secondary was still subject to levy, unlike the secondary from the slate and china clay workings.

In April 1992 the British Aggregates Association went to the High Court in London to have the aggregates levy ruled illegal on the basis that it contravened EU State Aid rules by favouring one product over another on the basis of simple geological difference. The BAA did not win that case but at the time Justice Moses suggested that an Appeal be lodged where the whole matter could be looked at in more depth by judges more experienced in this area. Unfortunately that avenue was blocked when The Treasury announced that they had received a “phase one” (simple rubber stamp approval with no consultation) approval from the EC saying that the levy did not breach State Aid rules; and so began a long legal battle in the European Courts to overturn that EC decision.

Ten Years Later

Eventually some ten years on after fighting in three European Courts, the BAA won and the EC were told to reconsider their original decision. In July 2013 the EC announced that they were carrying out a Phase Two investigation into the exemptions of the aggregate levy. In April 2014 The Treasury announced that it was suspending the exemptions on aggregates from china clay, slate, shale and clay used in construction purposes. The levy on aggregates was now £2.00 per tonne and this was hurting many operators who had not come out of the recession, particularly those in areas of rural Scotland. HMRC had already put one company in Skye into liquidation because they could not afford to pay all of the penalty charges.
imposed because of late payment of the levy. (It should be noted that the levy is paid by the operator on every tonne of extracted material. It is not based on the sales price. If the operator sells at a loss or even gives the stuff away the levy still has to be paid. If the customer fails to pay the operator on time, the levy still has to be paid. This often leads to late payments to HMRC and subsequent penalty charges). To date we still await the decision from the EC on whether or not the exempted aggregates did indeed breach EU State Aid rules. We were promised a decision last November, then January this year and now we are told it will be “very soon” which is not very satisfactory from a commercial or legal point of view. If the EC do decide in the BAAs favour then the BAA still have the original Appeal open to them in the High Court in London. One would assume that this would amount to a simple decision to overturn the original Justice Moses decision of 2002. That then of course begs the question has the aggregate levy been illegal since April 2002, the time of the first court case in London?

Conclusion
The aggregates levy has been and is a very bad tax both here and in Northern Ireland where an even more bizarre situation arose. The sad thing is that Westminster has offered it as a devolved tax to Scotland, particularly as the current coalition government stated that it would drop the levy if it came to power.

The fact is we all need aggregates whether we like it or not, they are needed for the infrastructure, for homes, for schools and for hospital etc. If we did not need aggregates then there would be no need to did the stuff out of the ground. Over 50% of aggregates go into the public sector and for every mile of three lane motorway built with 150,000 tonnes of aggregate, the government taxes itself to the tune of £300,000; it is nonsense.

Interestingly if the BAA does get the 2002 legal judgement overturned it could lead to some very difficult final choices for HM Treasury if the levy was deemed to be illegal. Would they have to pay back all of the tax paid (now running in excess of four billion pounds) to the operators who paid it in the first place? If not then we know that EC law demands the tax be paid by those operators who were exempt in the first place (to create a level playing field). This would have the effect putting a number of operators out of business as their tax bills could run into millions. HMT may not want to do this but it is not their decision, it is the ECs and we know from recent experience the EC are very hot in enforcing this, even to the tune of chasing creditors. It could even mean the Scottish Government having to pay Whitehall two million pounds for the million tonnes of red shale it used for the New Forth Crossing.

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