



Response to the HM Revenue & Customs consultation on whether to bring illegal waste sites within the scope of the Landfill Tax, March 2017

1. The UK Environmental Law Association (“**UKELA**”) aims to make the law work for a better environment and improve understanding and awareness of environmental law. UKELA’s members are involved in the practice, study and formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to Government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party.
3. UKELA welcomes the opportunity to comment on the proposals for bringing illegal waste sites within the scope of landfill tax and makes the following comments on the proposals.

PRELIMINARY OBSERVATIONS

4. Overall, UKELA supports the aim of the proposals of supporting legitimate operators by removing the advantage that waste criminals have in the waste management sector, which UKELA believes will create a more level playing field for legitimate operators in the sector. It also welcomes the proposed changes being introduced alongside equivalent changes in Scotland and Wales, if that creates regulatory consistency across the UK and prevents England and Northern Ireland becoming more attractive jurisdictions than Scotland or Wales for illegal waste operators to operate in.
5. That said, UKELA has concerns that there is a risk that the exercise of the powers that are proposed to be given to HM Revenue & Customs (“**HMRC**”) may see money allocated to the Environment Agency for tackling waste crime being diverted to HMRC, to which the Environment Agency will have no access. Within the UK, there is already a mechanism under the Proceeds of Crime Act 2002 for removing any pecuniary advantage obtained by illegal waste site operators, including avoidance of tax. The Environment Agency currently gets to keep a proportion of any monies recovered through confiscation orders, which can be reinvested in tackling waste crime. This would be lost if HMRC uses its powers to impose landfill tax on illegal waste site operators, as there cannot be double recovery. UKELA also notes that the consultation paper overlooks Step 5 of the Sentencing Council’s “Environmental Offences Definitive Guideline”, which specifically allows the court to remove any economic benefit derived from the offence and specifically mentions avoided costs and operating savings, over and above any fine.
6. UKELA has the following specific comments on the proposals in the consultation.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



CONSULTATION QUESTIONS

Q1

6. UKELA is an organisation – please see above for further information.

Q2

7. Not applicable.

Q3

8. Not applicable.

Q4) ARE YOU AWARE OF ANY CIRCUMSTANCES WHERE IT WOULD BE DIFFICULT TO DISTINGUISH BETWEEN A SITE THAT IS ILLEGALLY OPERATING WITHOUT A PERMIT OR LICENCE, AND A SITE THAT IS EXEMPT?

9. There are several ways in which a site may be exempt from the requirement to hold an environmental permit – registered exemptions, Non-Waste Framework Directive exemptions, low risk positions and Regulatory Position Statements. UKELA believes that such exemptions should be treated on the same basis as a permit or licence, i.e. a site operating under one of these exemptions should not be treated as an illegal waste site for landfill tax purposes. Whether a site is operating within the terms of an exemption does not necessarily determine if it is in fact exempt. Its listing on the exemption register suffices. Therefore the listing of a site on the register would distinguish it from an illegal site, provided that the activities taking place are consistent with the exemption register. However it is often the case that multiple exemptions are registered for a single site, making distinction much more difficult. UKELA would support the tightening of the exemptions system to address this confusion.

Q5) DO YOU AGREE THE ABOVE DEFINITION WOULD PROVIDE A GOOD STARTING POINT FOR HMRC? CAN YOU SUGGEST ANY OTHER HALLMARKS THAT SHOULD BE INCLUDED?

10. If the suggestion is that this definition should be used in the Finance Act, then UKELA believes that it is too poorly drafted to be appropriate for a piece of legislation and too complex for what it needs to achieve in defining an "illegal site". Tax legislation needs to leave those who may be liable to pay the tax certain about their liability. The proposed definition is also not helpful in identifying those at whom the proposals are targeted - persons who engage in the illegal disposal of waste on land, thereby avoiding landfill tax liabilities. The proposed definition would catch sites where illegal treatment and storage (but not disposal) activities are taking place, and may even catch permitted waste sites (other than landfill sites) that are in breach of their permit conditions relating to the deposit, treatment, storage or disposal of waste. The proposed definition gives rise to a number of important questions:

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



- (a) What is an "*appropriate permit*"? This needs defining.
- (b) What constitutes "*multiple*"? Are 2 or 3 loads sufficient?
- (c) What constitutes a "*load*"? Is a single black bin bag sufficient?
- (d) Tax legislation requires certainty. It "*appearing*" to the Environment Agency that an activity is taking place in an "*organised manner*" is simply too vague.
- (e) What does "*in an organised manner*" mean? What if the activities are all carried out by one person acting on their own? Is it the fact that they are bringing in "*multiple loads*" that gives the appearance of the activities being "*organised*"? If so, then a requirement for multiple loads, or a minimum volume or tonnage requirement (of waste being deposited) would be sufficient for the definition, which does not need to be complicated by the addition of a requirement that the activity takes place "*in an organised manner*".
- (f) The second sentence does not make it clear what "*activities*" there are that the landowner or legal occupier should know about. In UKELA's view a landowner or legal occupier should have knowledge of the deposit of waste for disposal in order for a landfill tax liability to be imposed. Examples which should not fall within the definition of an "*illegal site*" such that landfill tax is payable include:
 - (i) An owner of land may have waste tipped onto their land without their knowledge. When they discover it and understand that it is waste, then they will be storing waste without an "*appropriate permit*".
 - (ii) A landowner may accept material onto their land (for example, material that was sold to them as topsoil) without knowing that the material is waste. They will have known about the "*activity*" of importation and tipping, but not that the material was waste and that the tipping was therefore unlawful. Once spread, such material can be very difficult to assess.
 - (iii) UKELA is aware of a number of scams where third parties have persuaded landowners, sometimes for a fee (but a fee for storage, not the equivalent of a landfill gate fee), to take what turns out to be waste onto their land for temporary storage. The person importing the waste then disappears. Examples of such scams include farmers asked to store plastic-wrapped silage bales, which when they arrive turn out to be plastic-wrapped bales of waste instead. Another example is where waste is brought onto a site which has a valid environmental permit for the short-term storage and onward transfer of waste in the belief that the waste is to be exported for reprocessing. The owner of the waste then disappears, leaving the site operator with the waste on their site.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



12. While UKELA would therefore support the principle of landfill tax liability being imposed on those who have imported waste onto land knowing it to be waste and who have then deposited the waste on the land for the purposes of disposal with no regulatory authorisation to do so, UKELA does not believe that landfill tax liability should be imposed on landowners/occupiers who have been left with waste on their land and who did not know either that the material was waste or (if they did know that the material was waste) that it was being deposited there for the purposes of disposal. It is important that the legislation is clearly drafted so as not to impose liability on such landowners/occupiers.

Q6) WHAT DO YOU THINK ABOUT THE PROPOSAL TO TAX ALL OF THE MATERIAL DEPOSITED AT AN ILLEGAL WASTE SITE, REGARDLESS OF WHETHER THE PERSON MAKING THE DEPOSIT INTENDED TO DISPOSE OF THAT MATERIAL?

13. Please see response to Q7 below.

Q7) ARE THERE ANY RISKS OR WIDER CONSEQUENCES WE SHOULD BE AWARE OF WITH THIS “DEEMED DISPOSAL” APPROACH?

14. UKELA has concerns about the aspect of the proposal that the operator must prove that they are undertaking an exempt activity, as this shifts the burden of proof onto the operator. Where sites are not exclusively occupied by one person or entity there is a risk that a third party who is legitimately storing non-waste materials on site could have landfill tax levied on their materials. UKELA believes that, instead, the burden of proof should be on HMRC to prove that: (a) the material is waste, (b) the material has been deposited with the intention of disposal and (c) the site is operating without the necessary regulatory authorisation and does not benefit from an enforcement dispensation.

Q8) WHAT ARE YOUR VIEWS ON HOW HMRC SHOULD DEAL WITH THE POSSIBILITY OF DOUBLE TAXATION?

15. UKELA believes that “innocent” landowners (i.e. those who have not knowingly permitted waste to be deposited on their land for the purpose of disposal without the necessary regulatory authorisation or enforcement dispensation being in place), local authorities and legitimate operators taking over sites which have been subject to illegal waste deposits should not be subject to double taxation, and supports the proposed credit system. To prevent such a system being abused, UKELA suggests that it is only available in respect of waste removed by or on behalf of a local authority, “innocent” landowner or legitimate operator taking over a site which has been subject to illegal waste deposits. There would need to be a system of prior approval or prior notification whereby the movement of waste which had already been subject to landfill tax from the illegal site to a legitimate landfill site was signed off in advance of such movement.

Q9) DO YOU THINK A CREDIT SYSTEM WOULD BE WORKABLE?

16. Yes, provided it is limited to local authorities, “innocent” landowners and legitimate operators taking over sites which have been subject to illegal waste deposits.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Q10) WHAT EVIDENCE COULD BE PRODUCED THAT THE MATERIAL HAS BEEN TAXED UNDER THE ILLEGAL WASTE PROVISIONS?

17. UKELA presumes that HMRC will be maintaining records evidencing the payment of tax under the illegal waste provisions and suggests that the provision of such documentation together with the corresponding waste transfer notes or consignment notes for removal of the illegally deposited waste should be sufficient evidence under the proposed credit system. UKELA suggests that some form of receipt should be issued upon payment of landfill tax on the illegal site. The receipt would need to specify the Ordnance Survey grid reference of the illegal site (i.e. the location of the waste for which landfill tax is being paid). That receipt could then be used as proof of payment and proof to the legitimate landfill site operator that landfill tax has already been paid on the waste.

Q11) DO YOU THINK A CREDIT SYSTEM COULD BE EXPLOITED? IF SO, HOW?

18. UKELA believes that it would be difficult to exploit the system if it is limited to local authorities, “innocent” landowners and legitimate operators taking over sites which have been subject to illegal waste deposits. The proper application of the waste hierarchy would limit the risk of encouraging the landfilling of waste removed from illegal waste sites rather than recycling or recovery.

Q12) WE ARE INTERESTED IN YOUR VIEWS ON WHETHER IT WOULD BE APPROPRIATE TO EXTEND THE LIABILITY TO PEOPLE OTHER THAN THE ILLEGAL WASTE SITE CONTROLLER?

19. As stated above, UKELA believes that liability should not fall on local authorities, “innocent” landowners and legitimate operators taking over sites which have been subject to illegal waste deposits, and should not be extended to waste producers unless they are in breach of their duty of care obligations under section 34 of the Environmental Protection Act 1990. The key point is that liability should fall only on persons who are knowingly involved in the illegal deposit of the waste. Anyone who is to be liable for the tax must have the requisite knowledge and intent when it comes to the activities in question. Their state of mind should be such that they know and intend that the deposit of the waste materials is unlawful.
20. UKELA believes that landowners/occupiers who become responsible for the continuing keeping or storing of waste on their land because it has been brought onto or left on their land against their wishes or expectations should not be liable for the tax.
21. UKELA also believes that there should be no landfill tax liability for illegal operators of activities that would not be subject to landfill tax if they were carried out legally, principally recycling and recovery activities.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Q13) OTHER THAN THE ILLEGAL WASTE SITE CONTROLLER, WHO IN THE SUPPLY CHAIN DO YOU THINK SHOULD BE LIABLE FOR THE LANDFILL TAX? HOW FAR UP THE SUPPLY CHAIN DO YOU THINK LIABILITY SHOULD BE EXTENDED?

22. UKELA believes that it would add “teeth” to the proposals if liability could be extended to producers who fail to comply with their section 34 duty of care obligations and to complicit landowners. However, before liability can be imposed on these persons, UKELA believes that the burden of proof should be on HMRC to prove a breach of the duty of care by a waste producer and to prove complicity by a landowner.

Q14) WE ARE INTERESTED IN YOUR VIEWS ON DUE DILIGENCE, AND WHETHER THE EXAMPLES ABOVE ARE REPRESENTATIVE OF THE TYPES OF STEPS THAT A RESPONSIBLE PERSON SHOULD TAKE. DO YOU THINK DUE DILIGENCE PROVISIONS COULD BE STRENGTHENED WITHOUT ADDING UNNECESSARY BURDENS AND/OR PRESENT OPPORTUNITIES THAT COULD BE EXPLOITED?

23. UKELA believes that waste producers should not have to go beyond their duty of care obligations (which would require changes to the duty of care regime in any event). It would not be appropriate for waste producers who can demonstrate they have taken all reasonable steps to comply with their duty of care obligations to be at risk of liability for landfill tax if the waste they produce ends up being deposited unlawfully.

Q15) CAN YOU PROVIDE ANY PRACTICAL SUGGESTIONS FOR HOW HMRC COULD ESTIMATE THE WEIGHT OF MATERIAL AT ILLEGAL WASTE SITES?

24. Surveying and industry estimation tools to convert volume to tonnage would need to be used. Waste input records may also exist.

Q16) DO YOU AGREE THAT IT WOULD BE REASONABLE TO APPLY THE STANDARD RATE OF LANDFILL TAX TO ALL MATERIAL DISPOSED OF AT AN ILLEGAL WASTE SITE? IF NOT, CAN YOU SUGGEST A METHOD FOR DETERMINING THE STANDARD AND LOWER RATED MATERIALS?

25. UKELA does not believe that this approach would be fair and reasonable, particularly for sites where much or all of the waste is inert and can be converted into aggregates following processing. If tools for estimating volumes and tonnages of materials could be developed as suggested in the response to Q15, then it would be possible to apply the different rates of tax to different materials disposed of at an illegal waste site.

Q17) DO YOU AGREE THAT IT WOULD BE APPROPRIATE TO EXTEND THE PENALTY PROVISIONS TO ILLEGAL WASTE SITES?

26. Yes, but only to sites used for the deposit of waste for disposal and not to any other classes of sites, such as sites used for recycling or recovery activities, or permitted/exempt sites in breach of permit/exemption conditions.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Q18) DO YOU THINK THAT THE ABOVE MIX OF CIVIL AND CRIMINAL SANCTIONS PRESENTS A STRONG DETERRENT TO TACKLING THE RISK OF TAX LOSS AT ILLEGAL WASTE SITES? IF NOT, CAN YOU SUGGEST ANY OTHER WAYS HMRC COULD STRENGTHEN ITS RESPONSE?

27. Yes, although as noted above there is already a strong deterrent provided in the Proceeds of Crime Act 2002. The Proceeds of Crime Act is arguably a greater deterrent, because if the court orders a confiscation order which includes landfill tax avoided and the defendant fails to pay, then the defendant's personal realisable assets may be seized, which could include their home. UKELA believes that duplication of regulation should be avoided where possible and suggests that HMRC and the Environment Agency agree a working protocol for dealing with illegal waste sites. If HMRC uses its powers to recover landfill tax and the Environment Agency then prosecutes the illegal operator, then the Environment Agency will be unable to recover avoided landfill tax under the Proceeds of Crime Act because of the prohibition on double recovery, thereby depriving the Environment Agency of funds for tackling other illegal waste sites.

Q19) WHILE IT IS TOO EARLY TO ASSESS THE IMPACT OF THESE APPROACHES, WE WOULD BE INTERESTED IN WHETHER THERE ARE ANY ASPECTS OF THE SCOTTISH AND WELSH APPROACHES THAT YOU THINK WE SHOULD CONSIDER FURTHER?

28. In general, UKELA supports the consistent proposals across the UK, in order to prevent "waste tourism". However it believes that the position in Wales set out in paragraph 8.9 of the consultation document, whereby a person is considered to have knowingly caused or knowingly permitted the disposal if they owned, leased or occupied the land where the disposal was made, is unduly harsh on "innocent" landowners.

Q20) ARE THERE ANY UNINTENDED CONSEQUENCES THAT WE NEED TO BE AWARE OF TO HELP INFORM OUR UNDERSTANDING OF THE IMPACTS?

29. Difficulties in estimating taxable amounts could lead to the over-recovery of landfill tax, which could in turn result in more appeals.
30. The threat of the imposition of tax on abandoned legacy waste piles may act as a deterrent to legitimate operators to take over sites to clear the waste properly. As stated above, UKELA believes that such operators should benefit from an exemption from tax too.
31. As highlighted above, there is also a risk that the exercise of HMRC's powers may deprive the Environment Agency of funds for tackling waste crime.

5 May 2017

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Contacts:

Angus Evers
c/o Shoosmiths LLP, 1 St Martin's Le Grand, London EC1A 4AS
Telephone: 020 7205 7038
Email: angus.evers@shoosmiths.co.uk

Peter Harvey
c/o Practical Law Company, 19 Hatfields, London SE1 8DJ
Telephone: 020 7202 1237
Email: peter.j.harvey@thomsonreuters.com

Anna Willetts
c/o Slater and Gordon (UK) LLP, Northgate House, 450-500 Silbury Boulevard, Milton Keynes MK9 2AD
Telephone: 01908 354 172
Email: anna.willetts@slaterguson.co.uk

Co-Convenors, UK Environmental Law Association Waste Working Party

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill