

23 July 2009

BAA Press Release -Immediate - Aggregates Levy Update

Following the positive outcome in the European Court of Justice, the British Aggregates Association (BAA) continues to advise its members on how best to protect their position pending the final outcome in the Court of First Instance. The CFI is due to reconsider the legality of the Aggregates Levy later this year. However, given that the ECJ was highly critical of the original decision, that the Levy did not involve State Aid, it is unlikely to survive in its present form.

BAA have been advised by their lawyers, Herbert Smith LLP, that protective claims should be made in respect of levy already paid. With regard to future payments, quarry operators may continue to make payments of the levy followed by protective claims for repayment. However, quarry operators may also wish to make future payments of aggregates levy conditional. This type of payment is a possible counter to the "undue enrichment" argument which has been mooted as an obstacle to repayments if the Levy is indeed found to be illegal.

A number of companies are already following the BAA's legal advice and all quarry operators are advised to contact the association for more information.

BAA Director Robert Durward;

"Although the Treasury must now realise that the Levy has only a limited time left, they seem determined to collect every last penny possible. In many parts of the country, the price of aggregates and concrete products have now fallen to pre-Levy levels. In these difficult times, operators are more than justified in doing whatever they can to protect their viability."

Note:

".....it is almost inconceivable that the CFI will do anything other than conclude that the UK levy does constitute illegal State Aid and will have to be scrapped altogether or radically changed."

The legality of the UK's aggregates tax still hangs in the balance after an earlier ruling was overturned by the European Court of Justice. Minerals lawyer Robert Camp looks at the case

In 2002, the UK government introduced the Aggregates Levy (with the approval of the European Commission) in an effort to improve the environmental performance of its mining industry. Unpopular from the outset, it includes a tax in the form of a levy on aggregates, with an exemption for spoils resulting from the extraction of certain minerals (including slate, shale, ball clay and china clay).



The British Aggregates Association (BAA) has been fighting the levy for more than seven years. It argues that the tax constitutes State Aid because it penalises some UK operators financially but not others, therefore inhibiting competition and intra-community trade.

The dispute was referred to the European Court of First Instance (CFI) which ruled, in September 2006, that the UK Aggregates Levy was lawful and did not constitute State Aid.

The court cited the validity of the UK government's aim to protect the environment, and it also disagreed with the logic that a disadvantage to one business would necessarily constitute an advantage to its neighbour.

"Not surprisingly BAA, having seen some £600million (€709million) in levies extracted from its members every year by the UK treasury"

Not surprisingly BAA, having seen some £600million (€709million) in levies extracted from its members every year by the UK treasury, appealed the CFI's judgment before the European Court of Justice (ECJ). On 22 December last year advocate general Paolo Mengozzi quashed the earlier ruling and referred the entire case back to the CFI.

BAA's legal team say the CFI's judgment contained two fundamental legal errors. The first concerned the use of an incorrect definition of state aid, namely that a member state does not trigger the application of EU state aid law if it imposes an environmental tax on one sector causing environmental harm, but not on other sectors causing the same environmental harm.

State Aid is generally defined as aid from a member state to business which is generally incompatible with the common market because it has the potential to distort competition and affect trade between EU member states. The European Commission regulates the actions of member states and governments for actions which could inhibit competition and intra-community trade, and uses Article 87(1) of the European Convention as its weapon of choice. Article 87(1) is a broad piece of legislation that its interpretation was always going to be open to debate.

However, according to the ECJ, sectors that cause the same environmental damage must be treated similarly, but since it can be argued that the UK Aggregates Levy does the opposite, the inevitable conclusion is that the levy involves the grant of State Aid.

According to the BAA, the CFI's other fundamental legal error was that it did not conduct a comprehensive review of the legal basis of the Commission's original decision to allow the UK to introduce the levy in the first place, and that had impugned the very basis of the CFI's ruling.

The CFI is now in the position of having to 'reconsider' its earlier judgement. Based on the ECJ's comments, it is almost inconceivable that the CFI will do anything other than conclude that the UK levy does constitute illegal State Aid and will have to be scrapped altogether or radically changed.

If it is assumed that sectors that cause the same environmental damage must be treated similarly, then in order to comply with State Aid legislation under Article 87(1) many believe the levy might have to be applied retrospectively to sectors of the industry that are currently exempt, including china clay and slate.

BAA is now urging the UK government to suspend the levy altogether in light of the ECJ's comments and enter into talks with the industry.

CONTACT

Robert Camp heads the minerals team at Stephens Scown solicitors in the UK which has more than 70 years' experience representing mining and minerals clients. He can be contacted on +44 (0)1392 210700 or email robert.camp@stephens-scown.co.uk

Published in Aggregates Business Europe May/June 2009 Vol. 3 Issue No. 3

<http://www.aggbusiness.com/articles/features/equipment-focus/taxing-issues-1445/>