

Aggregates Levy – A new reason to make a precautionary claim

Background

- The legality of the Aggregates Levy is currently subject to challenge before the EU Court of First Instance. The challenge is being made by the BAA, advised by leading law firm Herbert Smith. One possible outcome of the case is that the Aggregates Levy will be found to constitute illegal state aid, and as such would be illegal and repayable in whole or in part.
- The judgment of the EU Court of First Instance is expected within the next few months.
- The UK legislation contains a limitation on recovery of Aggregates Levy. If this limitation is valid, only Aggregates Levy paid less than three years before a claim is made can be recovered.
- The BAA has been advising its members to make precautionary claims for repayment now, so that Aggregates Levy paid within the last three years does not become time barred before the judgment of the EU Court of First Instance is available, and has negotiated a discounted fee arrangement with Herbert Smith. More than 40 quarries have so far instructed Herbert Smith to make claims on their behalf.
- The BAA considers that the three year limitation period is, by itself, sufficient reason to make precautionary claims now.

New development

- Developing EU law jurisprudence in the context of illegal taxes suggests that the European Court may restrict any right to recover Aggregates Levy to those levy payers who make an early claim. In other words taxpayers who have not claimed before the judgment is handed down might find that they are not able to make a claim at all.
- This will not be an issue for those BAA members and other levy-payers who have already made a claim.
- The risk for future claimants can only increase the longer they wait to make a claim.
- The BAA has been advised that although there are arguments why no such restriction should be applied in the context of the Aggregates Levy, as this is a

developing area of European law it is not worth taking the risk of not lodging claims.

- The BAA considers that this is yet another reason why all aggregates levy payers should make precautionary claims now, as most of its members have already done.
- Recent QPA circulars to members come to the same conclusion, supporting the position already taken by the BAA and its adviser, leading law firm Herbert Smith.

Don't believe everything you read

- There are some written statements circulating within the industry which are not entirely correct.
- **Some errors**
 - It is not correct that a quarry must agree to reimburse customers as a precondition to recovering Aggregates Levy.
 - It is not correct that any Aggregates Levy recovered will necessarily be payable to Customers.
 - In many cases, the claimant may well be able to retain all that it recovers.
- **The correct position**
 - Tax law is never simple.
 - Agreeing to reimburse customers is one option available to a quarry. "Reimbursement arrangements" can help to maximise the amount of Aggregates Levy repayable, but also mean that the Aggregates Levy repaid is passed to the quarry's customer. The quarry might not wish to go down this route.
 - If a quarry does not enter into reimbursement arrangements, the amount of Aggregates Levy recoverable may be reduced if HMRC successfully argue that quarries have "passed on" the cost of Aggregates Levy to their customers.
 - There is strong European case law which shows that "passing on" does not provide a foolproof defence for HMRC.