



TC02402

Appeal number: TC/2012/02625

*Excise Duty – Rebated gas oil (red diesel) – mobile cranes – whether a load
– yes – Appeal dismissed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIGHTWAYS (CONTRACTORS) LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

MEMBER: IAN MALCOLM, BSc, BA, JP

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday
14 November 2012**

Richard Spence, for the Appellant

**Ian Mowat, Solicitor, Office of the Advocate General for Scotland, for the
Respondents**

DECISION

1. The subject matter of this Appeal is the disputed decision of HMRC to assess
5 Lightways (Contractors) Limited (the Company) in the sum of £51,708.00
representing excise duty on rebated oil used in the Company's tower wagons of
greater than 3,500 kilograms revenue weight contrary to Section 12(2) Hydrocarbon
Oil Duties Act 1979 (HODA) in the period 1 April 2008 to 5 August 2011. That
assessment was issued on 11 November 2011.

10 2. Neither the quantum of the assessment nor the facts in this case were in dispute.
Between 1 April 2008 and 5 August 2011 the company operated a number of mobile
elevated work platforms (MEWPs) often known in the industry as tower wagons or
mobile cranes or indeed by a number of other descriptions. These MEWPs were used
to maintain and repair street lighting for five local authorities in Scotland.
15 Throughout the period in question the company fuelled these vehicles with rebated
marked gas oil (red diesel). Other vehicles were fuelled with unrebated oil (white
diesel).

3. The Tribunal had the advantage of hearing the very clear evidence of Mr Duffy,
the Operations Manager of the company, and Mr McLauchlan, the Director of the
20 company responsible for financial and commercial aspects of the business. They
explained the photographs which had been produced to the Tribunal and how the
operator of a MEWP utilised the vehicle on a typical day.

4. The vehicles do not necessarily depart from the depot since the operators can
and do, on occasion, especially when on call, keep the vehicles at their homes.
25 Although there is more than one type of such MEWP utilised by the company, all
their MEWPs are covered vans with a cherry picker hydraulic arm and platform, as
illustrated in the photographs. A common feature of the MEWPs is that there are two
doors at the back, only one of which can be opened unless the hydraulic arm is in use,
and a sliding door on the side. The hydraulic equipment is in the centre of the vehicle
30 because the stability of the vehicle, when in use, requires that. Some of the MEWPs
have been modified, as was indicated in the photographs, with the construction of a
wooden compartment on the side of the vehicle at the rear in order to ensure safe and
secure storage for the transport of boxes of lamps. Each box of lamps contains 12
new or used lamps (see the following paragraph). In one type of MEWP operated by
35 the company, the depth from the back door to the protection for the hydraulic
equipment was measured as being 40 inches long. Pictures of a different MEWP
showed the available space at the back containing a 90 watt and a 55 watt lantern,
which were estimated by Mr Duffy to be approximately 4 foot and 2 foot long
respectively, a ladder, a spare wheel and road signs. There were also five boxes of
40 lamps ranging in length from approximately 1 foot to just under 3 foot in the wooden
compartment. The bulkhead behind the driver was fitted with plastic trays for
capacitors, ballast, screws and other small equipment. There were tools and cabling
nearby.

5. The company considers it to be an imperative that every operator has an appropriate lamp or lantern on board the vehicle in order to effect any designated repair. Accordingly operators carry a selection of lamps and lanterns with them at all times. On a typical day, an average MEWP would carry between three or four lanterns and five or six boxes of lamps. When a lamp or lantern is removed in the course of a repair then, for health and safety reasons, it is replaced in the sleeve or box from which the replacement has been removed. Mr Duffy confirmed that where a significant number of lanterns required to be transported then that would be done in a separate company van, due to lack of space in the MEWP.

6. Health and safety is a major concern of the company because the lamps and lanterns must be kept dry at all times because of a risk of fire. The company must and did, comply with the European Directive on Waste Electrical and Electronic Equipment (WEEE) (2000/96/EC), as amended and the Guidance on Best Available Treatment Recovery and Recycling Techniques (BATRRRT) issued, amongst others, by the Scottish Executive. Accordingly, the lamps and lanterns were always transported in a covered MEWP or separate van. HMRC did not dispute that it is a health and safety requirement that the lamps and lanterns are transported under cover.

7. There was no dispute between the parties that the MEPWs are road vehicles and that the only circumstances in which section 12(2) HODA would not apply would be if they were “excepted vehicles” being those noted at Schedule 1 HODA. Where Section 12(2) HODA applies then so also does Section 13(1A) HODA. They read as follows:

12(2)No heavy oil on whose delivery for home use rebate has been allowed (whether under section 11 above or 13AA(1) below)—

- (a) be used as fuel for a road vehicle; or
- (b) be taken into a road vehicle as fuel,

Unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.

Section 13(1A) of The Hydrocarbon Oil Duties Act 1979 states:

13(1A)Where oil is used, or is taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may—

- (a) assess an amount equal to the rebate on like oil at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle, and
- (b) notify him or his representative accordingly.

8. On 13 April 2000 HMRC wrote to the company stating that the MEWPs then used by the Company could not be treated as “mobile cranes” within the then statutory definition of the term. The reason for that was that the lamps, lanterns and other items associated with the repairs and maintenance of street lighting were deemed to be loads which did not fall within the then statutory criteria which was Schedule 1 HODA at that time. That stated “when so proceeding does not carry any load except as necessary for its propulsion or equipment”. The company appealed that ruling.

9. On 19 September 2000 HMRC wrote to the company, having reconsidered how the MEWPs should be classified, and stated that MEWPs used solely for installing and repairing street lighting fell within the definition of “road construction vehicles” as contained in paragraph 12 Schedule 1 HODA and therefore (provided there was compliance with the statutory provisions) they could be fuelled with red diesel.

10. The Tribunal accepted, as did HMRC, that until HMRC visited the company’s premises on 5 August 2011, no one in the company was aware that the Excepted Vehicles (Amendment Schedule 1 to HODA 1979) Order 2007/93 had removed the road construction vehicle exception. Both parties agree that the new relevant category is “mobile cranes”. The new legislation which took effect from 1 April 2008 is at paragraph 9 and reads as follows:-

20 9(1) A mobile crane is an excepted vehicle.

(2) In sub-paragraph (1) above “mobile crane” means a vehicle which is designed and constructed as a mobile crane and which—

25 (a) is used on public roads only as a crane in connection with work carried on at a site in the immediate vicinity or for the purpose of proceeding to and from a place where it is to be or has been used as a crane ...

(b) when so proceeding does not carry any load except such as is necessary for its propulsion or the operation of built-in lifting apparatus, and

30 (c) has a revenue weight exceeding 3,500 kilograms.

(3) In sub-paragraph (2)(c) above “revenue weight” has the meaning given by *section 60A* of the Vehicle Excise and Registration Act 1994.

35 The company argues that the MEWPs used by them in excess of 3.5 tonnes are mobile cranes. Certainly HMRC accepted that they were vehicles designed and constructed as a mobile crane but the only point in dispute is the application of paragraph 9(2)(b).

11. The question for the Tribunal, therefore, was to decide whether or not the MEWPs carried “any load” and, if so, whether such a load was “necessary for its propulsion or the operation of built-in lifting apparatus”. HMRC’s argument was quite simple and that was that the lamps and lanterns did constitute a load and that it

was not necessary to consider the ladders and other items in the vehicle since clearly the transportation of the lamps and lanterns meant that the MEWPs did not fall within the exception.

5 12. The Company argued that their mobile cranes did not have any “load carrying capacity” whatsoever, that the internal construction of the crane completely prevented loads being carried and that no operator would ever consider using their vehicles to carry any loads or hire such vehicles to carry loads. In summary, their contention was that the vehicles were not in any way suitable for any commercial load carrying function and had no use other than as a mobile crane. They argued strenuously that
10 the meaning of load had to import a commercial element.

13. The word “load” is not defined in the legislation. HMRC argued that reference should therefore be had to the natural and ordinary meaning of the word and produced the definition of the noun “load” from the Shorter Oxford Dictionary. The Tribunal accepts the definition found therein which is that a load is “a thing laid on or taken up
15 by a person or animal or put in a vehicle to be carried”. Load is also defined in the Collins English Dictionary as “something to be borne or conveyed; weight”. The Tribunal had no hesitation in finding that the lamps and lanterns carried on a daily basis in the MEWPs used by the company did constitute a load. We did not accept the argument that a load would have to be a commercial load, albeit the lamps and
20 lanterns are used in the company’s business and are therefore a load with a commercial purpose. If Parliament had wished to define a load as having to be a commercial load, then the wording would have been used in the legislation. The fact that it was implausible that an MEWP would be hired out, or adapted to carry a commercial load because that would not make economic sense was considered by us
25 to be irrelevant.

14. It was not argued by either party that if the lamps and lanterns were a load then they were required for either the propulsion of the MEWP or the operation of the lifting apparatus. Accordingly, since the MEWPs routinely carried a load they cannot fall within the definition of a mobile crane in the statute. Therefore, they cannot be an
30 excepted vehicle and consequently they cannot utilise red diesel.

15. The Company argued that it would be wholly inequitable and make no sense legally, morally or otherwise to prevent them carrying lamps and lanterns in the MEWPs for safety reasons. It is simply not the case that they are prevented from carrying them. Of course they are entitled to carry them but, in doing so, the
35 consequence is simply that the MEWPs cannot qualify as an excepted vehicle.

16. Lastly, the Tribunal noted that the Company had been unaware of the change in the legislation. No oral argument was advanced by the Company on that point although it was implicit in the papers that the Company’s officers believed that they should have been advised of that by HMRC or the Freight Transport Association
40 (FTA) of which they are members. The proposed changes were put out for public consultation in 2004 long before implementation and road construction vehicles and mobile cranes were separately and clearly identified therein. FTA formally responded. This was not an arcane change and HMRC was under no obligation to

write to the Company when the change in the law rendered the letter of 19 September 2000 redundant.

5 17. In all those circumstances, as its quantum was not disputed, the assessment falls to be confirmed. For all these reasons the Appeal fails on the statutory point in dispute.

10 18. In the course of the hearing, and in the documentation lodged with the Tribunal, the Company argued that they were being unfairly treated by comparison with other taxpayers, that the legislation was unfair and placed them at a significant commercial and financial disadvantage to other competitors and lastly that the public purse would suffer if they could not use red diesel since they would have to pass such costs on to the local authorities for whom they worked.

15 19. The Tribunal has no jurisdiction to consider such matters. HMRC relied on the decision in *HMRC v Hok Ltd* 2012 UKUT 363. This Tribunal agrees entirely with the detailed reasoning in that decision. In summary, that decision makes it explicit that this Tribunal does not have any judicial review jurisdiction. Consideration of matters of fairness, administrative actions taken by government bodies such as HMRC and matters affecting the public purse are all matters which can only be considered in the context of judicial review. The Tribunal's sole jurisdiction in this case is to consider the application of the statutory principles and this we have done as described above.

20 20. 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
25 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30 **ANNE SCOTT, LLB, NP**
TRIBUNAL JUDGE

RELEASE DATE: 3 December 2012

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