



TC03252

Appeal number: TC/2011/06083

Excise duty – new owner – fuel present on acquisition – reasonableness at time of decisions – credibility of new evidence – lack of verification

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OMAC OILS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR JOHN ADRAIN**

**Sitting in public at Tribunals Unit, 3rd floor, Bedford House, 16-22 Bedford
Street, Belfast, BT2 7DS on 17 January 2014**

Mr Gary Kelly Director of the Appellant in person

**Mr Richard Adkinson BL, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. The Appellant is appealing two decisions of H M Revenue & Customs (HMRC).
5 Both decisions were made by Mrs Louise Bines, a Higher Officer based at Maidstone, Kent. The first decision was dated 27 June 2011 and the second decision was dated 10 May 2012.

2. Both decisions were to restore 3,194 litres of petrol and 2,144 litres of white diesel only upon payment of a fee of £1,159.00 representing unpaid duty but not to restore
10 2,901 litres of marked gas oil (MGO). The second decision arose as a result of the Appellant submitting additional information under cover of a letter to H M Courts & Tribunal Service dated 20 January 2012.

The Facts

3. Mr Mark Colhoun, an officer with HMRC gave evidence under oath and confirmed the following information from his witness statement. On 21 April 2011 he
15 visited the Appellant's filling station at 128 Newry Road, Armagh. Mr Colhoun noted the premises were unmanned and comprised new self-service fuel pumps only. Mr Colhoun checked two pumps and found the litre-age totaliser was not working. He found a discarded VAT receipt which enabled him to trace Mr Gary Kelly through
20 HMRC's records. Mr Colhoun telephoned Mr Kelly and advised him that he needed access to inspect fuel.

4. After Mr Kelly arrived on the site he informed Mr Colhoun that his company had opened the station at the end of March 2011. The Appellant had purchased the derelict site earlier and had spent money installing new pumps as the site was to be unmanned
25 with payment being made only by either credit card or debit card.

5. During the course of the visit Mr Kelly informed Mr Colhoun that there was 'maybe roughly 1,000 to 1,500 per tank, I don't know' of fuel when the Appellant took over the site. When Mr Colhoun asked had he started with thousands of pounds of fuel possibly Mr Kelly responded that there could have been a thousand litres in
30 each tank. There were four tanks, two petrol and two diesel. Mr Kelly was unable to provide evidence of UK duty having been paid on any of the opening stock of fuel.

6. The site was not Rebated Dealer in Controlled Oils (RDCO) approved and therefore the Appellant should not have held any MGO on site whether or not it was available for sale.

7. Accordingly HMRC seized 2,144 litres of diesel, 3,194 litres of petrol, 2,901 litres of MGO and 2 pump units, being the litre-age of fuel as read from the fuel gauge for each tank.
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8. Although Mr Kelly had indicated that there may have been between 4,000 and 6,000 litres on site when the site was taken over. Mr Colhoun agreed to accept duty on
40 2,000 litres amounting to £1,159.00 calculated at the then current rate of 57.95 pence

per litre. Mr Colhoun gave Mr Kelly seven days to pay. The 2,144 litres of diesel and 3,194 litres of petrol were restored after Mr Kelly had sent £1,159.00 to Mr Colhoun in cash by registered post though without any covering letter.

- 5 9. By letter dated 14 May 2011 Mr Kelly advised HMRC that he wished to appeal the decision to charge duty of £1,159.00 on an estimated figure of 2,000 litres of fuel on the grounds that Mr Colhoun had given him an ultimatum that if he did not agree to pay the duty the fuel would be removed and the site closed and that he understood the duty to be paid was for an estimated amount of MGO on site.

The First Review

- 10 10. As a result Mrs Louise Bines carried out a review (the First Review Decision) in accordance with the provisions of sections 14 and 15 of, and schedule 5 to, the Finance Act 1994 (the 1994 Act). Mrs Bines concluded that Mr Kelly had been unable to provide any evidence that UK duty had been paid on the petrol and white diesel on the site when the Appellant took over the site

- 15 11. Mrs Bines correctly advised the Appellant that she could not look at the legality or correctness of the seizure as the Appellant had not challenged the legality of the seizure in the Magistrates' Court within one month of the date of seizure.

- 20 12. Mrs Bines concluded that the Appellant had been unable to produce any evidence that UK duty had been paid on the petrol and white diesel present when it had acquired the site and was therefore not aware of the duty status of the fuel before starting to sell it on. The price of the fuel appeared to be significantly cheaper than at nearby filling stations.

- 25 13. Mrs Bines informed the Appellant that it was HMRC policy not to restore seized fuel other than in exceptional circumstances so that the decision to do so in this case in return for payment of the duty was a generous decision. The decision treated the Appellant no more harshly or leniently than anyone else in similar circumstances.

14. Mrs Bines could find no reason to vary the decision and accordingly upheld the original decision by letter dated 27 June 2011.

Further Review

- 30 15. By Notice of Appeal dated 3 August 2011 addressed to the Tribunal the Appellant appealed the First Review Decision on the grounds that the duty imposed was based upon an estimate of fuel already in the tanks when it took over the site, that the estimate had been decided by the Officer after insisting repeatedly that Mr Kelly guess the amount, that Mr Kelly was advised by his contracted engineer that there was
35 about 600 to 700 litres of waste and that Mr Kelly agreed to pay the duty because he was told that the site would be closed down if the duty was not paid.

16. On 24 January 2012 the Appellant provided some additional documents to HMRC. These documents had not been seen by Mrs Bines when she carried out her review in June 2011. As a result HMRC decided to carry out a further review.

17. Upon examination of the additional documentation the wet stock records on 21 April 2011 were stated to be:

| | <u>Petrol</u> | <u>Diesel</u> |
|--------------|---------------|---------------|
| Start of day | 13.45 | 7,179.62 |
| Delivery | 18,997.00 | 9,997.00 |
| End of day | 15,282.09 | 15,522.81 |

5 18. During the visit by Mr Colhoun on 21 April the stock was measured by way of the station's newly fitted electronic gauges. Mr Kelly declared the amounts to be 3,194 litres of petrol and 2,144 litres of diesel.

10 19. Among other additional documents produced by the Appellant were copies of credit notes and invoices from LCC Oil in respect of deliveries of fuel on 29 March, 5 April and 13 April. However no credit note or invoice was produced in respect of the delivery on 21 April. There was also an unsigned letter from Forecourt Services dated 19 December 2011 confirming it had supplied and installed 24 hour unmanned pumps and a computerised system control. Forecourt Services had also found a small amount of water/fuel (sludge) at the bottom of each tank. The letter concluded that full details of all works carried out or the process of any works could be forwarded if required.

15 20. Merchant settlement reports for the period 1 April 2011 to 17 April 2011 and Pay at Pump Transaction reports were also produced.

20 21. Mrs Bines by letter dated 10 May 2012 advised that she was not satisfied with the authenticity of the pump transaction reports and the wet stock record. She was of the opinion that the declared amounts on 21 April were untrue as they could not possibly tally with the wet stock record. She therefore upheld the original decision.

25 22. By email dated 4 August 2012 addressed to this Tribunal, Mr Kelly advised that the Appellant wished to continue its appeal with the Tribunal on the grounds that the electronic dipping system had proved to be giving an inaccurate reading on one of the fuel tanks and that as a result they had on occasion run out of fuel. They had since installed a new manual dipping gauge system. This was why the dip readings taken by HMRC were inaccurate and as a result the Appellant did not knowingly make a false declaration.

Evidence at Hearing

23. Mr Kelly indicated he did not intend calling any witnesses.

30 24. Mr Colhoun, after being sworn, confirmed that his witness statement had been prepared by him and he believed everything in it was correct. On cross-examination by Mr Kelly as to his attitude during his site visit Mr Colhoun denied having been

hostile but did remember being asked why he was visiting to which he replied that the filling station had had two previous illegal detections and that it was the practice of HMRC to visit a site after ownership had changed. Mr Colhoun confirmed that OMAC had not been involved when the two previous detections had occurred.

5 25. Where there had been illegal detections and the site changed hands HMRC was always concerned as the change of ownership was often to someone to carry on the same activity. However on 21 April he took a fresh approach.

26. Mr Kelly asked Mr Colhoun why he insisted on a fine to which the reply was that normally HMRC do not give any opportunity to recover illegal fuel but on this
10 occasion Mr Colhoun decided to assess the duty without VAT. Mr Kelly asked Mr Colhoun why he had not given him the opportunity of contacting Forecourt Services to ascertain the volume of fuel in the four tanks when they started work on the site after it had been acquired by OMAC. Mr Colhoun replied that this had never been suggested by Mr Kelly at the time of the visit. Mr Kelly responded by saying he did
15 not realise where the questioning was going.

27. Mr Colhoun advised the Tribunal that OMAC needed a licence to hold MGO. Even though OMAC had lodged an application for a RDCO licence it was illegal to simply have any MGO on site. This was the reason why the MGO was seized and subsequently removed.

20 28. Mrs Bines was then sworn and confirmed that she believed her witness statement to be correct.

The Law

29. Section 152 of the Customs and Excise Management Act 1979 (the 1979 Act) states that HMRC may as they see fit ... restore subject to such conditions (if any) as
25 they think proper, anything forfeited or seized.

30. Section 154(2) of the 1979 Act states that 'where in any proceedings relating to customs or excise any question arises as to whether or not any duty has been paid or secured in respect of any goods.....the burden of proof shall lie upon the other party to the proceedings.' This means that it is for OMAC to prove that duty had been
30 paid on the fuel in the four tanks at the time the fuel station was acquired by it.

31. Section 14 of the 1994 Act gives OMAC the right to seek a review of any decision made by HMRC under section 152 of the 1979 Act. Section 15 of the 1994 Act empowers HMRC, upon review, to confirm, withdraw or vary the decision.

32. Section 16 of the 1994 Act gives OMAC the right to appeal to this Tribunal but
35 subsection 4 states that the powers of this Tribunal are confined to a power, where the Tribunal is satisfied that HMRC or other person making that decision could not reasonably have arrived at it, to do one or more of three specified options. Thus it is for the Tribunal to decide whether at either 27 June 2011 or 10 May 2012 HMRC could not reasonably have come to the decisions which it did.

Decision

33. This Tribunal has decided that the decision dated 27 June 2011 by HMRC to uphold the original decision to restore the petrol and diesel after payment of the duty amounting to £1,159.00 was reasonable at the time as OMAC was unable to produce any proof that duty had been paid on the contents of the four tanks at the time it acquired the site.

34. The Tribunal finds that there was no evidence of duress by Mr Colhoun which resulted in Mr Kelly feeling he had no option but to pay the duty if he wished to keep the filling station operational. In cross-examination Mr Colhoun denied being hostile towards Mr Kelly during the site visit.

35. The Tribunal further finds that the decision dated 10 May 2012 by HMRC to uphold the original decision was also reasonable at the time as the further evidence produced by OMAC did not bear examination. Mr Kelly had advised Mr Colhoun during the site visit that there would have been between 1,000 litres and 1,500 litres in each of the four tanks at the time OMAC acquired the site. On the basis of Mr Kelly's evidence it would have been possible for Mr Colhoun to assess duty on 6,000 litres instead of only 2,000 litres. The pump transaction reports and the wet stock record produced by OMAC did not appear to be authentic and none of the additional documentation produced by OMAC which was considered by Mrs Bines before reaching her decision on 10 May 2012 was independently verified.

36. No satisfactory evidence has ever been produced by OMAC that the electronic dipping system had been giving an inaccurate reading. The only indication that the system was giving inaccurate readings was in an email dated 4 August 2012 from Mr Kelly to this Tribunal. Mr Kelly produced no evidence at the hearing to support this claim.

37. Accordingly the Tribunal dismisses the appeal.

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

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 22 January 2014