



**TC03459**

**Appeal number: TC/2012/07628**

*CUSTOMS DUTY – red diesel used in farm tractor to remove demolition rubbish – no evidence as to red diesel – tractor used for agricultural purposes – calculation based on wrong period of transport – appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHARLES SHAW**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DAVID S PORTER  
MISS SUSAN STOTT**

**Sitting in public at Alexandra House, Manchester on 24 February 2014**

**The Appellant appearing in person**

**Mr Simon Charles, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

1. Mr Charles Shaw (Mr Shaw,) having successfully appealed on 11 January 2013 for this appeal to be heard out of time, appealed against an assessment, reduced to £9,883, being duty arising from the use of rebated fuel in his tractor on the basis that his tractor was being used for agricultural purposes and that the assessment was incorrect. The Respondents (HMRC) said that the tractor had been used to remove rubbish from a demolition site and for the purposes of Mr Shaw's demolition business. The tractor could not, therefore, use rebated fuel at all and that the assessment had been correctly calculated using information provided by Mr Shaw.

2. Mr Shaw appeared in person and provided the Tribunal with various documents. Mr Simon Charles (Mr Charles), of counsel, appeared for HMRC and produced a bundle of documents and a skeleton argument. Mr Charles has produced the case of *Taylor v HMRC* [2012] UKFTT 588 (TC).

15 Evidence was given, on oath, on behalf of HMRC by the following officers:-

- Mr Richard Tidmarsh, an assurance officer based in Birmingham
- Mr Lee Stamps, an officer assigned to the Road Fuel Testing Unit based in Birmingham.
- Mr Andrew Harper, an officer assigned to the Road Fuel Testing Unit based in Birmingham.
- Mr Charles Dunn, an officer of the Appeals & Reviews Unit, based in Glasgow.
- Mr Andrew Simber, an officer assigned to the Road Fuel Testing Unit based in Hull.

25 Mr Shaw gave evidence under oath and called John Copeland, a mechanic, who gave evidence under oath as to the fitting of the hour and mile meter in the tractor

### **Preliminary issue.**

3. Mr Shaw wished to produce to the Tribunal a hand written statement, dictated to Mr Shaw by Mr Copeland, relating to the removal of the computerised engine management control from Mr Shaw's tractor and the substitution of a new one. The original control had, apparently, become contaminated whilst the tractor had been in the custody of HMRC. Mr Charles objected to the introduction of the evidence because it was too late and he had not had the opportunity of considering the same with HMRC. We noted that HMRC was relying on the readings from the new hourmeter. As Mr Shaw was unrepresented and was not familiar with the Tribunal procedures we decided to admit the evidence as it appeared to be relevant to the readings used by HMRC for the purposes of the appeal.

4. During the hearing, Mr Shaw also produce two photographs of the hour and mileage meter which revealed that the hour meter has a six figure recording facility and he alleged that the meter tripped back to zero when it had recorded 999999 hour. Although the photograph itself was not very clear it was clearly of the hour and mileage meters and we allowed its introduction. It was not clear from the photograph whether the 6 digits represented hours or whether one or two of the last digits also recorded the minutes. Mr Shaw also sought to introduce three photographs of the heavy machinery that he used for his demolition business. We also admitted those.

### **The Case**

10 5. We were referred to the following case:

*Peter Taylor-and-The Commissioners for Her Majesty's Revenue and Customs*  
TC02265

*Corby Castle estate –and- The Commissioners for Her Majesty's Revenue and Customs*

### **The Law**

6. **Section 12 (2)** of the Hydrocarbon Oil Duties Act 1979 (“HODA”) provided that:

No heavy oil on whose delivery for home use rebate has been allowed shall-

(a) be used as fuel for a road vehicle, or

(b) be taken into a road vehicle as fuel

20 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 the purposes of this section.

**Section 13 (1A)** HODA provides that where oil is used, or is taken into a road vehicle, in contravention of section 12 (2) above, the Commissioners may-

25 (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.

**Section 13 (6)** HODA provides that-

30 Any heavy oil-

(a) taken into a road vehicle as mentioned in section 12 (2) above or supplied as mentioned in subsection (2) or(3) above; or

35 (b) taken as fuel into a vehicle at a time when it is not a road vehicle and remaining in the vehicle as part of its fuel supply at a later time when it becomes a road vehicle,

shall be liable to forfeiture.

**Section 27 (1)** HODA provides. In the relevant part, as follows-

“road vehicle” means a vehicle constructed or adapted for use on road, but does not include any excepted vehicles.

**Paragraphs 1 and 2 of Schedule 1** to HODA provide as follows:

5 A vehicle is an excepted vehicle while-

- (a) it is not used on a public road...
- (b) no licence under the Vehicle Excise and Registration Act 1994 is in force in respect of it , and
- (c) it is kept by a person who has furnished such particulars and made such declarations as may be prescribed by regulations under section 22 (1D) of that Act.

10 (2) A vehicle in respect of which there is current a certificate or document in the form of a licence issued under regulations under section 22(2) of the Vehicle Excise and Registration Act 1994 shall be treated for the purposes of sub-paragraph (1) above as a vehicle in respect of which a licence under that Act is in force.

**Schedule 1 – Excepted Vehicles HODA**

Tractors

(1) A vehicle is an excepted vehicle if it is –

- 20 (a) An agricultural tractor
- (b) ....

(2) In sub-paragraph (1) above “agricultural tractor<sup>2</sup> means a tractor which-

- 25 (a) Is designed and constructed primarily for use otherwise than on roads, and
- (b) Is used on public roads solely for –
  - (i) Purposes relating to agriculture, horticulture or forestry;
  - (ii) ....
  - 30 (iii) ....

**Section 139** of the Customs and Excise Management Act 1979 (“CEMA”) provides, in the relevant part, as follows;

35 (1) Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s armed forces or coast guard.

**Section 141** CEMA provides as follows-

(1)...where any thing has become liable to forfeiture under the  
Customs and Excise Acts –

(a) any ship, aircraft, vehicle...which has been used for the carriage handling  
,deposit...of the thing so liable for forfeiture...and

5 (b) ..any other thing mixed, packed or found with the thing so liable shall also  
be liable to forfeiture.

**Section 152(b)** CEMA provides that the Commissioners may as they see fit , restore,  
subject to such conditions (if any) as they think proper, any thing forfeited or  
10 seized.

**Schedule 3** of CEMA provides, in so far as relevant, as follows;

(3) Any person claiming that any thing seized as liable to forfeiture is not  
so liable shall, within one month of the date of the notice of seizure or,  
where no such notice has been served on him, within one month of the  
15 date of the seizure, give notice of his claim in writing to the  
Commissioners at any office of customs and excise.

(5) If on the expiration of the relevant period under paragraph 3 above for  
the giving of notice of claim in respect of any thing no such notice has  
been given to the Commissioners, or if, in the case of such notice given,  
20 any requirement of paragraph 4 above is not complied with, the thing in  
question shall be deemed to have been duly condemned as forfeited.

### **The Facts**

7. Mr Lee Stamps (Mr Stamps) told us that he was on duty at Rothersay Road, Stoke  
–on –Trent on 9 December 2009 when he observed a yellow JCB tractor pulling a  
25 trailer through Longton, Stoke-on –Trent town centre and onto Rothersay Road,  
where it came to a halt at a building site. The index on the trailer was R578 UNT and  
belonged to Mr Shaw. Mr Shaw got out of the vehicle, entered the site and moved  
machinery around and he then drove away again. He then returned some 10 minutes  
later and loaded the trailer with rubbish from demolished houses, using a digger on  
30 the site. He approached Mr Shaw, who confirmed that the rubble was required for  
agricultural use to build a farm track and it was his first load for this purpose. Under  
cross-examination by Mr Shaw, Mr Stamps confirmed that he had seen Mr Shaw back  
the tractor about 100 yards into a field and off-load the rubble near to an electrical  
pylon. Mr Stamps did not know whether the field was wet or not, but conceded that  
35 the tractor had passed over a hard core track.

8. A sample of the fuel in the tractor’s tank was taken. Judge Porter asked what colour  
the fuel was and he was told it was red. We note that his witness statement merely  
states that it was red. He inspected the hours meter on the dashboard of the tractor and  
noted that the reading was 2295.5 hours. Mr Shaw was offered, but decline, a choice  
40 of the three samples, Mr Stamps had drawn from the tank. Mr Stamps had decided not  
to seize the tractor, although he had reservations about the use of the rubble, as it did  
not appear that a track was being built, but that Mr Shaw had just unloaded the rubble  
in the field. No evidence of the sample was provided to the Tribunal.

9. On 27 January 2010 (some 7 weeks later) he was on duty again at Rothersay Road, he observed the tractor travel from Rothersay Road to another construction site at Western Coyney Road, Stoke-on-Trent, where the load on the trailer was off loaded. When question at interview, Mr Shaw stated that the rubble in the trailer was from his  
5 farm and that he did not remember loading any rubble on the trailer from the building site at Rothersay Road. He said that he did not have a contract to work on the site and that he was there to repair machinery. He said that the trailer had been empty when he arrived at Rothersay Road. He said that the journey to the site on Western Coyney Road was the first and only journey the vehicle had made that day.

10 In cross-examination Mr Shaw took issue with Mr Stamps as to why he thought the sites were building sites as there were no buildings on the sites and they had been levelled.

10. Mr Stamps seized the vehicle at 13.21 and issued Mr Shaw with from ENF 156, which identified that the vehicle had been seized and that the box confirming that  
15 Notice 12A had been given to him. Notice 12A explains what Mr Shaw needed to do if he wanted his vehicle back.it includes details of the need to apply to the magistrates court within one month of the seizure.

11. At 13.22 pm Mr Stamps restored the vehicle to Mr Shaw on the payment of £250. He wrote in his note book that he had explained the appeal procedure to him but it is  
20 not clear what that amounted to. The form, agreeing to the return of the tractor, states on the face of it:

“Following payment in full, the things listed above (the tractor) will be returned to me. I have read the notes printed on the back of this form and understand that there are restrictions on my rights over the things for one month after the date of  
25 seizure.”

13. The form is signed by Mr Shaw, but over some of the wording, and the copy in the bundle does not have the wording on the reverse side. We believe on the balance of probabilities given the immediacy of the return and the casual nature of the signature above the line provided for the signature, that Mr Shaw will not have read  
30 the information on the back of the form he was given.

14 Mr Andrew Harper (Mr Harper) gave evidence confirming that he was on duty at Western Coyney Road on 27 January 2010 and that he took a fuel sample in Mr Shaw’s presence. He also confirmed that the fuel was red in colour .He produced a Test Note which recorded that the fuel was red in colour. The fuel was divided into 3  
35 tins sealed with Customs seals. He understood, however, that because of the length of time that elapsed between the detection of the fuel in the vehicle and Mr Shaw appealing to the Tribunal, that the samples were destroyed without having been tested by the Laboratory of the Government Chemist. There was no evidence, other than the officers’ observations that the fuel was ‘red’ or ‘very red’, provided as to the actual contents in the tractor tank at the time of the inspection. There is no formal Test Note  
40 of the sample of fuel taken in relation to the fuel in the Tractor on 9 December 2009.

15. Mr Andrew Simber (Mr Simber) told us that he was on duty at the construction site at Rothersay Road when he saw Mr Shaw using a JCB to put rubble onto the back of his trailer. This observation had not been confirmed in Mr Stamps or Mr Harper’s

evidence. Mr Simber told us that he drove with Mr Stamps and Mr Harper to the building site at Western Coyney Road where he saw Mr Shaw taking the rubble out of the trailer at the building site. Mr Shaw stated that he had delivered the rubble, which he had loaded at his farm to that site because it was too wet to put it on his field. Mr Shaw told us that he had probably moved 3 or 4 loads onto the farm track.. When cross-examined by Mr Charles, Mr Shaw said that he had not used the tractor for some time and that he thought his brother would have put fuel in it. He did not know whether that was red diesel or otherwise.

16. We are satisfied from the evidence that the sites were building sites. There was considerable confusion as to whether the trailer was loaded, partly loaded or empty when it attended at the site on 27 January 2010. It would appear from Mr Simber's evidence that rubble was put in the trailer at that site before it was taken to Western Coyney Road. It is unclear why Mr Shaw would have partially loaded the trailer with rubble at his farm as he would, presumably, have taken that load directly to the field. There has, in any event, been no evidence as to the rubble being at his farm. It is also unclear why he would remove rubble from one building site merely to take it to another site. We are, however, satisfied from the evidence that Mr Shaw was constructing a track in one of the fields at the farm. Mr Shaw told us that he had to inspect the machinery at Rothersay Road. In those circumstances we have decided that wherever the rubble was loaded, Mr Shaw intended to use the rubble to construct the track at the farm. In his evidence, referred to later, he indicated that, although he was not required under his contract with the Mosque to remove the rubble from the site, he had advertised it for sale. He had managed to sell the majority of it and he had taken some of it for his farm track. We have only been referred to two movements of rubble.

17. As Mr Shaw was unrepresented, Judge Porter suggested that he should move to where the witnesses sat and take the oath. Judge Porter explained that it would be necessary for Mr Shaw to give the Tribunal some background information and then give formal evidence as to what he understood the position to be. He explained that Mr Charles would then ask him some questions arising from Mr Shaw's evidence. Judge Porter was obliged to take Mr Shaw through his evidence and in so doing was careful not to lead.

18. By way of background. Mr Shaw told us that after his divorce he was, until recently, living with his 87 year old father at the farm. Unfortunately, his father was now in hospital. The farm is a 'beef farm' having some 50 cattle. They farmed 5 fields of approximately 20 acres each. The fields were used to grow grass and silage for the cattle and the cattle were put out to grass in them. He was obliged to move the cattle from time to time and did so with the farm tractor towing a trailer when the cattle could not walk to an adjacent field. There was very little income generated on the farm due to its size.

19. As a result, he ran a demolition contracting business. He produced to the Tribunal two photographs of his two very large excavating machines. He indicated that they weighed some 30 tons and could only be moved round sites on hired low loaders. HMRC had produced evidence of the demolition business .He has a web site relating

to his plant hire and groundwork contracting. He has professional bill heads, which identified in the title: "380" Excavators, JCB 3CX 4x4s, Breakers, Site dumper, Bulk Excavation & site clearance. The four billheads produced to the tribunal related to the work carried out for the Longton Mosque Association. He told us that he only owned  
5 three excavators and that he hired other machinery as and when he needed it. If he had rubble to remove from a site he would bring in haulage contractors to move it as his father's tractor and trailer were not sufficiently large or economical for the type of work.

20. HMRC produced a letter dated 10 June 2009 from Mr Asif Mehmood, the secretary of the Ghelani Noor Mosque agreeing the demolition of Denton Building for  
10 £27,950. We were told that the Denton Building was on the opposite side of the road to the Mosque and that it was being demolished so that a new Mosque could be built for the association on the site. Similar contractual documentation was provided for work for Green Contract Services; Crest Environmental Ltd; ACs Health Safety &  
15 Environment Ltd and GCA all in September and October 2009; all in relation to the demolition of the Denton Building. There was earlier correspondence in March 2009 with the University of Leicester, which had been asked to survey the Denton site for historical architectural purposes. We are satisfied from this evidence, and the contractual documents, that Mr Shaw relied on his contracting business for his  
20 livelihood and merely helped his father on the farm from time to time.

21. Mr Shaw also told us that his brother had a general skip hire business which Mr Shaw used from time to time in his own contracting business. His brother also helped out at the farm, but did not live there. Mr Shaw said that he does not use the farm tractor for his demolition work because it uses far too much fuel and is not  
25 economical. The tractor was used on the fields because it has large back wheels and is designed to carry out farm work. It was only ever used for farm work and agricultural purposes.

23. Mr Shaw told us that when he was stopped on the second occasion and the tractor was seized, he was given the opportunity to take it back on payment of £250. He paid  
30 the £250. He could not recall whether he was told about the consequences of the seizure but he agreed that he had received Notice 12 A, but he had not bothered to read it as he had got his tractor back.

24. Mr Shaw told us that the Tractor had been retained by HMRC between 16 May 2007 and 7 July 2008. HMRC had taken a reading from the 'hour and mileage meter'  
35 on 23 April 2007, at the time of the offence, and it had indicated that the tractor had worked for 4477 hours. By 27 January 2010 the reading had recorded 2228 hours. HMRC explained that the meter registered the hours in thousands and that it must have passed through 9999 between the two periods, which they calculated meant that it had worked 7751 hours by 27 January 2010.

40 25. Mr Shaw told us that as a result of the tractor being in the custody of HMRC, water had ingressed into the computer system and he had had to replace the time and mileage meter along with the engine management system. He had been allowed to introduce a picture of the dashboard to the Tribunal revealing the mileage and hour meter. The hour meter indicated 888888 hours. Mr Shaw assured us that the clock  
45 could not have passed through 9999 to return to zero, as it needed to reach 999999

hours. He also indicated that the mileage and hour meter showed 8888 and 888888 when the ignition was initially turned on and reverted to the actual readings within several seconds. HMRC produced evidence from Gunn JCB Ltd, who had been asked by Mr Shaw to inspect the current hour and mileage reading. They did so on Monday 5 21 March 2011 at their premises in Stoke-on –Trent and confirmed the readings to be ;-

Hours	3636
Mileage	3771.

26. We had allowed Mr John Copeland (Mr Copeland) to give evidence on oath. He 10 gave evidence to the effect that in early July 2008, he had installed the new unit for the computerised engine management system and that the new hour clock has a six figure recording facility. His evidence was not very coherent, but we accept that the management system was replaced with the consequence that the hour and mileage meters were at zero when he replaced the management system. From the assessments 15 identified in paragraph 28 below, it will be seen that the meter showed 4477 hours on 23 April 2007, when it had been retained by HMRC on an earlier occasion. On 27 January 2010, some 18 months after the hour and mileage meter had been changed by Mr Copeland, the reading was 2228. As a result, HMRC took the view that the meter must have gone past 9999 and started from zero again. Gunn JCB Ltd confirmed that 20 the reading on 21 March 2011 was 3636 hours. The letter is silent as to whether the hour meter had 4 or 6 figures.

27. The photograph that Mr Shaw produced to the tribunal demonstrated that the hour meter consisted of 6 digits. We are satisfied that the hour meter installed by Mr Copeland recorded a 6 digit detail. It is unclear whether the meter showed 4 hourly 25 digits and two digits showing the minutes, making a total of 6. Mr Stamps refers to a reading of 2295.5 which indicates that the hour meter identified the seconds as well. We have had no further evidence from either side, but in view of Mr Stamps' reading we accept that the meter showed 6 digits the last two representing the minutes.

28. We are unable to say whether the hour meter originally in the tractor in 2007 had a 30 4 or 6 digit read out. The evidence from John Roberts mentioned below was that JCB tractors had 4 digit meters, which indicates that it did not identify the minutes. The only evidence we have with regard to the actual meter is the photograph produced by Mr Shaw and the evidence from Mr Stamps. Mr Shaw stated that the reading of 2228 arose because the new hour meter had reverted to zero. The reading of 4477 on 35 April 2007 may well have been on a 4 digit meter, but as the engine management system had been replaced by Mr Copeland in July 2008, some 15 months later, the readings must have returned to zero on that date. If that was the case, then the reading of 2228 would be for the period from 8 July 2008 (date of release) to 27 January 2010 40 569 days. Given the evidence, we accept that the new meter had reverted to zero and the hours would have started to record again from its replacement.

29. Mr Richard Tidmarsh (Mr Tidmarsh), the assurance officer, raised the first assessment in relation to Mr Shaw's purported use of red diesel in the tractor. He had been provided with the case notes by Mr Stamps and had written to Mr Shaw on three occasions for further information. Mr Shaw had advised that his papers were with his 45 accountant and that he would respond when he received them back. As he had

received no reply he estimated the performance of and fuel required by the tractor. The vehicle's hours meter had been recorded on 23 April 2007 and the hours meter at that time showed 4477 hours. When the vehicle was detected on 27 January 2010 the hours meter showed 2228.

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30. On 26 May 2010 he spoke to John Roberts, the area service manager for JCB Ltd, who advised him that the hour meter resets at 9999 hours. Therefore, between 23 April 2007 and 27 January 2010 the tractor had performed 7751 hours over 1011 days. As a result the tractor had operated for an average of 7.666667 hours each day (7751/1011). He had referred to the Farm Management Pocketbook for 2009 which showed that vehicles between 101 – 120 horsepower consumed 17.8 litres of fuel per hour. Vehicles between 154 – 180 horsepower consumed 24.7 litres of fuel per hour. He had examined the horsepower of several JCB Tractors and established that the average horsepower is below 154. He therefore estimated the tractor's consumption at 17.8 litres. On that basis the tractor had used 128,822.27 litres over the period giving rise to duty for the rebated fuel of £55,341.

31. On 26 May 2010 Mr Tidmarsh issued a pre-assessment letter and schedule to Mr Shaw advising that an assessment of £55,341 would arise if no further information was forthcoming. He also raised a penalty of £250 for failing to produce the documentation when requested. Mr Shaw had written to HMRC on 19 May 2010 but the letter had been sent to the wrong team. The letter had indicated that HMRC should bear with him for a little longer as he was awaiting his documents from his accountant. As the letter was late in any event he decided to maintain the £250 penalty.

32. Mr Shaw never produced details of the V5 certificate although it was agreed that MOT details were not required for a tractor. He produced a receipt for 2000 litres of fuel from Potteries Fuels amounting to £976.50; the name and address of his accountant Mr Shah; and a postscript to the effect that "Your officer's reading of the vehicles hour meter is wildly incorrect". Mr Tidmarsh had requested the last three service reports, but he was advised that they had been destroyed in a minor workshop fire. As no further information was forthcoming, an assessment of £53,341 was issued on 20 July 2010.

33. Mr Shaw returned the assessment having written on it that it was "not applicable" as the tractor had been in HMRC's compound until July 2008 and that he had "been on holiday until 16 September 2008. A Notification of Discharge from prison reveals that Mr Shaw had been in prison from 11 July 2008 to 16 September 2008. Mr Tidmarsh was subsequently advised that the tractor had been stored at HMRC's compound from 16 May 2007 until 7 July 2008. Mr Tidmarsh wrote to Mr Shaw and advised that the assessment of £53,341 was to be withdrawn and that a new assessment would be raised based on the information that HMRC now had unless Mr Shaw provided further information. As no new information was provided, Mr Tidmarsh recalculated the assessment allowing for the period between 16 May 2007 and 17 July 2008 when the tractor was held in the compound. The new calculation was on the basis that the tractor had been operating over 13 hours per day for 7 days

per week and he advised Mr Shaw that a revised assessment of £57,124 would be issued.

34. Mr Shaw wrote to Mr Tidmarsh on 17 September 2010 indicating that a tractor could not work for that long without breaking down. He also asked where a farmer would find such work. Having checked the tractor readings from the notes provided to him, Mr Tidmarsh issued an assessment for £57,124. Mr Tidmarsh stated that the assessment had increased because the rate of duty had increased whilst the tractor was in the compound. Further if allowances were made for bank holidays and weekends the assessment would increase because there would be a reduced number of days to divide into the amount of fuel used. In a letter dated 19 December 2010, but received on 24 December 2010 Mr Shaw asked for an internal review.

35. On 7 January 2011 Mr Charles Dunn (Mr Dunn), an officer of HMRC and part of the Appeals & Review Unit with responsibility for reviewing decisions made by Excise assurance staff, was asked to carry out a review in relation to the assessment of £57,124. Mr Shaw had written on 31 January 2011 advising that he had paid £250 for the return of the tractor and that he thought the additional penalty of £250 for failing to produce information was sufficient punishment for what he considered to be a minor offence.

36. In spite of promises to provide information, and several extension of time limits for that to be done, Mr Shaw did not provide any further information. As a result, Mr Dunn based his assessment on the information provided by Gunn JCB Ltd referred to above. On 25 March 2011 Mr Dunn reduced the assessment to £26,647. He advised Mr Shaw that his agricultural tractor was entitled to use red diesel on public roads *solely* for purposes relating to agriculture, horticulture and forestry. As a result Mr Shaw could travel on public highways so long as he was performing a task which was solely for agriculture.

37. A tractor used on a public road for non-agricultural purposes, is not an “agricultural vehicle” and therefore falls foul of the taxation class and the use of red diesel. Haulage of the kind that he was carrying on at the time of detection was not accepted as falling within the definition of agriculture, horticulture or forestry. As a result, because the vehicle had been used on several occasions for purposes of haulage and not agriculture the tractor was no longer allowed to use red diesel when it was being driven on the public highway.

38. Mr Shaw had advised that the tractor had been stored at HMRC’s compound from 15 May 2007 to 7 July 2008 a total of 419 days. Mr Tidmarsh recalculated the number of hours used by the tractor and the period covered using the reading provided by Gunn JCB and then excluded the days in HMRC’s compound. This then gave him the average number of hours used per day, which he then used for the number of days to be assessed. Mr Dunn concluded that the vehicle was not being used on the public roads for solely agricultural purposes and that it was not, therefore, an excepted vehicle. He used Mr Shaw’s evidence to the effect that the tractor had a 188 horsepower engine using 12 litres of fuel per hour when carrying out light duties. (See: Tayforth Machinery Ring 2010 handbook). He reduced the assessment to £26,647.

39. His calculation was as follows based on the assumption that the hour meter had passed through 9999:

	Date of detection	27/01/2010	
	Hours reading on	21/03/2011	3636 hours
5	<u>Hours reading on</u>	<u>23/04/2007</u>	<u>4477 hours</u>
	(Clock reset at 9999. 9999- 4477 = 5522 + 3636 = 9158)		
	Total hours operated 23/04/07 to 27/01/10		9159 hours
	Number of days between 23/04/07 to 21/03/11		1429 Days
	<u>Less days vehicle in compound</u>		<u>419 days</u>
10	Number of days vehicle in use		1010 days
	Average hours per day (9159 hours/1010 days)		9.06 hours per day

Total number of days to assess (08/07/08 (date of release) to 27/01/10 569 days

Litres per hour 12 litres

15 Hours operated between 08/07/08 -27/01/10 (569 days x 9.06) 5,155.14 hours

12 litres per hour x 5155.14 hours 61,861.68

The full duty and rebated duty changed 4 times during the period and resulted in a reduced assessment of £26,647

20 40. In February 2013 Mr Dunn re-visited his calculation and used the hours reading of 2228 taken by the officer on 27 January 2010 and the reading of 3636 to calculate a new average hours worked per day. This resulted in a further reduction in the assessment to £9,883. In either case, Mr Dunn has assumed that the original meter passed through 9999.

#### **Submissions.**

25 41. Mr Charles submitted that there were two grounds for the Appeal being:

- Whether, during the period of assessment , the tractor should be classified as an 'excepted vehicle'; and
- Whether the basis on which the reduced assessment was calculated is/was unreasonably manifestly wrong.

30 42. Mr Shaw contends that the tractor is/was an 'excepted vehicle' and fell within the class of vehicle defined by paragraph 1 and 2 of Schedule 1 of HODA. For the tractor to be an 'excepted vehicle' it must be being used *solely* for agriculture. If at some time during the period of assessment (08/07/09 to 27/1/10) it had been used in Mr Shaw's demolition contracting business then it would lose that status and would not  
35 therefore be able to use red diesel. The officers have confirmed that the diesel was 'very red' and Mr Shaw has not sought to deny that. In his defence, he has argued that the tractor was being used for agricultural purposes and that he was, therefore, entitled to fuel it with red diesel.

43. The Tribunal needed to consider all the evidence. There is no doubt that Mr Shaw carried on a demolition business, as evidenced by the work carried out on the Denton site. The letter head he used demonstrated that he was involved with demolition. Mr Shaw confirmed that, whilst it was not part of his contract, he had agreed to sell off the rubble on the Rothesay Road site. When questioned on 27 January 2010, Mr Shaw appeared confused as to the loading of the rubble at the farm and his suggestion that the trailer was empty when he reached Rothesay Road. His witness statement indicated that he had collected the rubble from a 'demolition site' (i.e. not from his farm) and taken in to the site at Western Coyney Road due to the fact that his farm land was wet. He also said that he had placed adverts indicating that the rubble was for sale, contrary to his assertion that the rubble was from his farm.

44. Mr Charles submitted that Mr Shaw attempted to justify the use of the tractor as a means of assisting his father. His evidence needs to be considered with a healthy degree of cynicism. HMRC cannot verify all the times that he has used the tractor for the purposes of his business. He has indicated, when giving evidence, that he could not remember some matters given the passage of time. He had been asked to provide details of his accounts; of the farm; and photographs to substantiate his version of events. He had failed to do so. The Tribunal is to weigh up the evidence and where there is a conflict that of HMRC is to be preferred.

45. Mr Charles submits that the quantum of the assessment as first raised has fallen dramatically. There are two reasons for that:

1. Mr Shaw had not, initially, provided any information and when he did so HMRC were able to take those matters into account which resulted in the reduction of the assessment.
2. After receiving all the information HMRC have decided to analyse the information on a basis most favourable to Mr Shaw.

The burden of proof is on Mr Shaw to show why he considers that the assessment is incorrect. Mr Shaw has produced no alternative figures except to say that HMRC's are incorrect.

46. The two key variables are the number of hours per day (on average) for which the tractor was used and the assumed fuel consumption per hour. The only points of reference for the hours the tractor was used each day are the meter readings taken on 23/4/07; 27/1/10; and 21/3/11. From the various spread sheets used for the purposes of the assessments it is clear that the tractor appeared to have been used most intensively between 23/4/07 – 27/1/10 and least intensively between 27/1/10 - 21/3/11. In order to give Mr Shaw the benefit of the doubt HMRC has taken the daily usage between 27/1/10 to 21/3/11. This produced a use of 3.36 hours each day.

47. In relation to the fuel consumption per hour HMRC initially worked on 17.8 litres. When the evidence became available 12 litres per hour was used giving Mr Shaw the benefit of the lower consumption rate. In the circumstances, it is submitted that the quantum of the reduced assessment of £9,883 is reasonable given that the information available has been analysed using the means of calculation most favourable to Mr Shaw and the appeal should be dismissed.

48. Mr Charles submitted that he would like the Tribunal to decide that the assessment is correct and to dismiss the appeal on that basis. If not, he submitted that when the tractor was seized, Mr Shaw had been given Notice 12A, which explained that he should apply to the Magistrates' Court if he wished to allege that the seizure was illegal because he was using the tractor for agricultural purposes. Schedule 3 of Customs and Excise Management Act 1979 provides that unless Mr Shaw applied to the Magistrates' Court, within one month from 27 January 2010, to claim that the tractor was being used for agricultural purposes, he could not pursue that argument before this Tribunal, because the tractor was 'deemed to be' forfeit and this appeal had to be dismissed.

49. Mr Shaw submitted that the assessments had been raised on wild assumptions. The initial hours suggested of 13 per day were "outrageous". Since then the assessments have been reduced based on nothing except incorrect assumptions. No account appears to have been taken that the computerised management system had been changed and the hour reading returned to zero. The hours had not, therefore passed through 9999 and in any event the hour meter consisted of 6 digits as demonstrated by the photographs he had produced to the meeting and the evidence from Mr Copeland.

50. He submitted that his records had been with his accountant and he had not been able and still had not retrieved them all. His accountant had been made bankrupt and there was no prospect of him being able to retrieve his records. He indicated that he was familiar with the use of red diesel as he used rebated fuel in his mechanical machinery. He readily agreed that he was involved in demolition, but that the tractor had been used to carry loads from the sites to the farm for the purposes of constructing a road. It was not economically viable for him to use the tractor to clear rubbish from the sites. As far as the Magistrates' Court was concerned he had not pursued the matter when he received the notice because he had immediately paid £250 and he believed that that was the end of the matter.

51. Mr Shaw produced to the Tribunal an article which had appeared in an estate magazine. The case referred to the transportation of drainage pipes from a builder's merchant to the Corby Castle Estate's farm. The case was initially heard by the Carlisle Magistrates' Court. The Estate appealed to the Crown Court but before the matter was heard HMRC conceded, however it would not agree to pay any costs. The Crown Court awarded costs of approximately £85,000 and stated that "the upkeep and improvement of land by drainage was considered to be a normal and proper part of agricultural activity". Mr Shaw has not referred us to the full report. Mr Shaw indicated that he did not believe that the case was of any assistance as it related to cars. That is not wholly correct and we refer to the case in our decisions.

52. In light of the above, he considers that his appeal should be allowed and the £250 he paid for the recovery of the tractor should be refunded.

### **The Decision**

53. We have consider the facts and the law and we allow the appeal. There are three matters which the tribunal has to consider:

- Whether there was red diesel in the tractor,

- Whether, during the period of assessment, the tractor should be classified as an ‘excepted vehicle’; and
- Whether the basis on which the reduced assessment was calculated is/was unreasonably manifestly wrong.

5 54. We find ourselves in some difficulties as to whether there was red diesel in the tractor when HMRC allege it was being used to move rubble from the demolition site. When Mr Shaw was stopped on the first occasion on 9 December 2009 a sample of fuel was taken, but never tested because of the delay in examining it. The evidence that the Tribunal had that there was red diesel in the tractor was the evidence of Mr  
10 Stamps that it’s ‘colour was red’ A statement that Mr Harper upgraded to ‘very red’ at the Tribunal. The onus of proof is on HMRC to prove that the tractor was using red diesel and we do not accept that the evidence of an officer merely stating that it was red is sufficient without the subsequent evidence of a test. If that were not the case it would be open to any officer to say that any fuel was red without providing further  
15 evidence.

55. Mr Charles suggested during the hearing that the issue of whether there was red diesel in the tractor was irrelevant because Mr Shaw’s defence was that he was using the tractor for agricultural purposes and that as a result Mr Shaw had confirmed that he must have been using rebate fuel. When asked whether he was using red diesel in  
20 the tractor on the second occasion on 27 January 2010, Mr Shaw said that he did not know as his brother had filled up the tractor.

56. If we are wrong in that there is insufficient evidence that Mr Shaw was using red diesel even though Mr Shaw argued that he was using the tractor for agricultural purposes and, therefore, implicitly using red diesel, we find that he was using the  
25 vehicle for agricultural purposes. When stopped and followed on the first occasion, Mr Stamps confirmed that he saw Mr Shaw tip the rubble from the Rothersay Road site down a track in a field. Mr Shaw told us that he was creating a track for the farm. Mr Stamps did not seize the vehicle although he had had reservations as to Mr Shaw’s purpose. A sample of the fuel was taken, but Mr Shaw chose not to take the sample  
30 offered to him. As the tractor was not seized, no further action appears to have been taken with regard to that sample.

57. The only other occasion when Mr Shaw was stopped was on the 27 January 2010 when Mr Shaw took a load rubble from the Rothersay Road site to Western Coyney Road. The evidence was less than clear as to when or where all the rubble had been  
35 put in the trailer, but we are satisfied that Mr Shaw had moved the rubble from the site at Rothersay Road to the other site, as it had been too wet to put it on the farm track. Mr Shaw confirmed that he had moved some 3 or 4 loads to the farm to build the track. We are satisfied from the evidence that Mr Shaw’s principal business related to demolition and site clearance. There is not only evidence to that effect but he  
40 produced to the Tribunal several photographs of the substantial earth moving equipment which he owned. He also confirmed that he had agreed to sell the rubble.

59. If Mr Shaw was selling the rubble, then presumably his purchasers would either collect it themselves or he would make arrangements to deliver it. That delivery would arise from his demolition business. As he has stated, the tractor would not have  
45 been appropriate to move rubble to third parties as it was neither suitable nor

economically viable. We accept that the evidence giving rise to the second movement of the rubble was far from satisfactory. We have been told that the trailer was filled up at the Rothersay Road site and moved to the Western Coyney Road site. We accept that the rubble was moved so that it could subsequently be moved to the farm. There  
5 would be no commercial sense in moving the rubble from one site to the other, if it was going to be sold. The most rational answer was that the field was too wet and that Mr Shaw needed to be sure that he had a further load to build the track across the field at his father's farm.

60. The only evidence that HMRC has that the tractor was being used other than for  
10 agricultural purposes was the movement of the rubble from the Rothersay Road Site to the Western Coyney Road site. That is insufficient to disrupt Mr Shaw's contention that he had used the tractor on 5 to 6 occasions (the two specifically referred to and the 3 to 4 other occasions) for the purpose of constructing a track at his father's farm. We therefore find that the tractor was an excepted vehicle as it was being used for  
15 agricultural purposes.

61. As a result, it is not necessary to consider the assessments, but as they have been presented in some detail we shall deal with them. Although Mr Copeland's evidence was less than succinct, we do accept that he changed the computer management system. We have not been told what affect that would have had on the existing  
20 readings on all the meters. The change took place in 2008 and we suspect that the insertion of the computer card as a replacement must have reduced all the meters to zero as the new card would not have the tractor readings on it. If that is the case the hour meter would not have gone through 9999.

25 62. Mr Stamps has told us that the meter reading he saw was 2295.5 hours. Gunn JCB Ltd said that the hours meter read 3636. They have not said whether that figure was rounded up or down nor whether there were any minutes recorded. From the photograph produced by Mr Shaw it was clear that the new meter had six digits. Mr Stamps had confirmed that there were at least 5 digits. We assume the minutes ran  
30 from 0 to 59 and that Mr Stamps had seen either 05 or 50 and had not therefore recorded the 0. That would be consistent with Mr Shaw's and Mr Copeland's evidence.

63. We have decided that the meter read to 4 hour units and 2 minute units and that it  
35 was set to zero in 2008. We were surprised that HMRC had not enquired about the status of the meter, as Mr Shaw stated 13 hours per day was unrealistic. HMRC had not realised that the vehicle had been at its compound for 419 days. As a result the assessment was amended, which resulted in a higher assessment of £57,124 because the number of days had reduced, but the multipliers had not. Mr Dunn then  
40 reconsidered the figures and decided to use the 2228 meter reading as at 27.1.2010 being the reading on the seizure and assessed Mr Shaw to £26,647.

64. Mr Dunn then decided that the other meter readings were less than satisfactory so he has chosen to use the period 27/01/2010 to 21/03/2011 to give him a usage of 3.36 hours per day and the ultimate assessment of £9883. He stated that this was to Mr

Shaw's advantage. We cannot accept that HMRC can use a period outside the actual period of use to justify the actual hours of the alleged non- agricultural use for the period 08/07/08 to 27/01/2010. In those circumstances we have decided that the assessments were all incorrect nor are we able, from the evidence, to say how the assessments should have been calculated.

65. Mr Charles has asked us to consider the 'deeming' provisions. That is that Mr Shaw had been advised that the tractor had been seized and that as he had not applied to the Magistrates' Court the tractor was 'deemed' forfeit and Mr Shaw could not then allege that the tractor was being used for 'agricultural purpose'. We have decided that the tractor had not been properly seized because there was no formal evidence as to the red diesel, therefore we have decided that the deeming provisions do not apply. We have been referred to Judge Cannan's decision in *Taylor v HMRC* [2012] UKFTT 588. Although Mr Shaw has indicated that that case referred to cars it did also deal with an off-road vehicle an 'Unimog'.

66. The Court of Appeal decision by Lord Justice Mummery in *HMRC v Jones* [2011] EWCA Civ 624 gave guidance for Tribunals and their users in relation the 'deeming' provisions:

"The tribunal must give effect to the clear deeming provisions in the 1979 Act; it is impossible to read them in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.....The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the goods..."

67. Judge Cannan accepted in *Taylor v HMRC* that:

"...The question of restoration that comes before the FTT in that context is concerned only with the goods or vehicles seized at a particular time. The tribunal cannot go behind the deemed forfeiture because it is implicit that those particular goods on the occasion of the particular importation were intended for commercial use.

.... In Judge Cannan's view the real principle which applies in case such as the present is whether it would be an abuse of process for Mr Taylor to contend that the Unimog was an excepted vehicle prior to 2 October 2010 or indeed after that date. He recognised that the abuse of process argument was rejected by the Court of Appeal in *HMRC v Jones*. However that was in the context of a restoration appeal. For the reasons he had given the context of an assessment to duty is altogether different...Judge Cannan had no hesitation in concluding that it is not an abuse of process .. for the tribunal to consider the assessment even where the 'deeming' provisions apply.

68. I agree with Judge Cannan's contention and find that even if the 'deeming' provisions apply, (which we have decided they do not) it would still have been open to Mr Shaw to dispute the assessment. As we have decided the assessment is

manifestly wrong we confirm that the appeal is allowed and that the £250 paid by Mr Shaw on the 27 /01/2010 is to be refunded to him.

5 69. 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.

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**DAVID S PORTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 1 April 2014**

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