



TC04566

Appeal number: TC/2014/00997

Excise Duty - Hydrocarbon Oil Duty – forfeiture of truck with red diesel in tank – whether decision to restore subject to payment of amount representing civil penalties was unreasonable- whether penalties under section 13 HODA would have been exigible – whether someone other than owner in possession

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LESLIE THOMAS WEATHERILL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE HELLIER

Sitting in public in Exeter on 17 March 2015

The Appellant in person

Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Weatherill's truck was seized by HMRC's officers on 17 July 2003 on the
5 basis that they had found that it carried red diesel. Mr Weatherill appeals against a
decision of HMRC to restore his truck to him only on payment of £500.

2. I must explain that the outset that the role of this tribunal in an appeal of this
nature is unusual and is limited. There are three aspects to this. First, in relation to the
question of whether or not a vehicle should be returned, or on what terms it should be
10 restored, the tribunal is not given authority by Parliament to make a decision that it
should or should not be restored or as to the terms of restoration. The decision as to
whether or on what terms to restore a vehicle is left in the hands of HMRC. Instead, I
am required to consider whether any decision they made was reasonable. If it was not
reasonable I can set the decision aside and require HMRC to make a new decision; I
15 can give instructions in relation to the remaking decision, but I cannot take over the
decision-making role. If I set aside a decision and the HMRC make a new decision
then the taxpayer may again appeal against that decision and the same process
follows.

3. The second limitation on the tribunal's role follows from the fact that
20 Parliament has decreed that it is for the magistrates court to decide on whether or not
goods are legally forfeited. The Customs and Excise Management Act 1979 sets out
the procedure. If the subject disputes the seizure of his goods he can require HMRC to
bring proceedings in the magistrates court to determine the question (unhappily these
are called "condemnation" proceedings). If the magistrates court decides that the
25 goods are properly forfeit then this tribunal cannot overturn that decision or take a
different view. Further the tribunal must proceed on the basis that any finding of fact
which was actually made, or which was necessary for the magistrates court to reach
its decision is to be treated as proved.

4. Third, I am required to determine whether or not HMRC's decision was
30 "unreasonable"; normally such an exercise is performed by looking at the evidence
before the decision maker and considering whether she took into account all relevant
matters, included none that were irrelevant, made no mistake of law, and came to a
decision to which a reasonable officer could have come. But this is a fact finding
tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003]
35 EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide
the primary facts and then decide whether, in the light of the tribunal's findings, the
decision on restoration was in that sense reasonable. Thus the tribunal may find that a
decision is "unreasonable" even if the officer had been, by reference to what was
before him, perfectly reasonable in all senses.

40 **The relevant law.**

5. The Hydrocarbon Oil Duties Act 1979 ("HODA") sets out a regime for the
taxation of hydrocarbon oils. A rate of duty is prescribed. Section 11 provides for a
rebate on that duty where heavy oil is delivered "for home use". But limitations are

placed on the use of fuel to which such a rebate has been applied: section 12 (2) provides that:

"(2) No heavy oil on whose delivery for home use rebate has been allowed ...

(a) be used as fuel for a new road vehicle; or

5 (b) be taken into a road vehicle as fuel"

unless an amount equal to the rebate has been paid to HMRC.

The words "for home use" are not defined in the Act, but in *Thomas Corneill v HMRC* [2007] EWHC 715 (Ch), Mann J said at [8] "home use" in [section 6] means (it is
10 common ground) use in the UK market". In the context of the provisions of HODA that appears to me to be their meaning. I do not consider that they mean "for domestic use".

6. Section 13(6) HODA provides that any heavy oil taken into a road vehicle in contravention of section 12(2) is liable to forfeiture.

15 7. Thus, if fuel found in Mr Weatherill's truck was heavy oil on which a rebate had been allowed and no equivalent amount had been paid to HMRC, the fuel was liable to forfeiture.

8. Section 24 HODA provides that the presence of a prescribed marker in heavy oil is conclusive evidence that a rebate on the oil has been allowed. This marker is a
20 red or orange colouring: hence the term "red diesel".

9. Section 141 Customs and Excise Management Act 1979 ("CEMA") provides that where anything has become liable to forfeiture any vehicle used for the carriage of that thing is also liable to forfeiture. Thus if the diesel oil in Mr Weatherill's truck was marked with the orange marker and had been taken into the truck in
25 contravention of section 12(2), then the truck was also liable to forfeiture. By section 139 CEMA anything liable to forfeiture may be seized by an officer of HMRC.

10. Statute provides a mechanism for challenging a seizure of goods. Schedule 3 to CEMA provides for an appeal against seizure of goods:

30 "3. Any person claiming that anything 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 date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.

35 "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 any such notice given, any requirement of paragraph 4 above is

not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.

5 “6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture, the court shall condemn it as forfeited.”

10 11. This if the subject does not require condemnation proceedings to be taken in the magistrates court, he effectively concedes the legality of the seizure.

15 12. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this tribunal (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: “Deeming something to be the case carries with it any fact that forms part of that conclusion”).

20 13. The nature of the extension of the deeming to facts other than the simple legality of the seizure will depend on the facts of the case, and in particular on those said to justify the seizure. In this case there are two possible reasons for which the truck was said to be forfeit. The first is that there was a contravention of section 12(2)(a) – the “use” of rebated fuel in a road vehicle; and the second the contravention of section 12(2)(b) – the taking of rebated fuel into a road vehicle. The effect of the statutory deeming must be that one of these reasons is to be treated as fact, but there is no necessity to treat both as fact. What is clear however is that both
25 depend on the rebated fuel being in the vehicle and thus at the least I must work on the basis that that was the case. But it will be seen that that presumption is not at odds with the evidence or Mr Weatherill’s arguments.

30 14. What is clear, however, is that the statutory deeming does not extend to the question of who was responsible for the use or taking in. This is relevant to the question of penalties to which I shall come later in this decision. The presence of the rebated fuel is all that is required for the seizure to have been legal. Thus it will remain a question of fact for me whether any particular person was liable for the presence or use of the rebated fuel.

35 15. Section 152 CEMA gives the Commissioners power to "restore, subject to such conditions (if any) as they think proper, anything forfeited all seized under" the Acts. This is an alternative, or in addition to, the right to seek condemnation proceedings.

16. Section 14 of the Finance Act 1984 provides that the subject may require the Commissioners to review a decision made in relation to forfeiture.

40 17. Sub sections 16 (2) and (8) of the Finance Act 1994 give a right of appeal to the tribunal in respect of such a review decision. Section 16 (4) provides:

"In relation to any [such decision], the powers of an appeal tribunal on an appeal under this section shall be confined to power, where the tribunal are satisfied that the Commissioners or any other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say --

- (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
- (b) to require the Commissioners to conduct, in accordance with the decision direction of the tribunal, a further review of the original decision; and...

18. In *HMRC v Mark Mills* [2007] EWHC 2241 (Ch) Mann J considered whether the failure to take account of a relevant consideration or the taking account of an irrelevant one gave rise to a decision which was not reasonable for the purposes of the Finance Act 1994. At paragraph 42 he said:

"As a matter of language such errors do not, by themselves, come within the concept of the reviewing officer making a decision that could not reasonably have been arrived at, which is the statutory concept behind section 16 (4) of the 1994 Act. The Tribunal relied on dicta in a tribunal decision in *Jason Thomas Bowd v Commissioners of Customs & Excise ...* as bringing reliance on the relevant matters and disregarding relevant matters within the concept. Mr. [counsel for HMRC] did not dispute that approach, so I find that the tribunal were correct to adopt it. ..."

The correspondence.

19. Mr Weatherill wrote to HMRC 12 days after the seizure asking that HMRC reconsider their decision and release the truck to him. HMRC replied in a letter of 1 August 2013 asking Mr Weatherill indicate whether he wished to challenge the legality of the seizure in the Magistrates court or to request a "review ... of any decision made by an HMRC officer in connection" with the truck. Mr Weatherill replied on 7 August 2013 that "the second course of action would be more suitable for myself re appealing against the seizure of my truck."

20. On 28 August 2013 HMRC wrote to Mr Weatherill offering to restore the truck on the condition that he made a payment of £800. On 18 November 2013 Mr Weatherill wrote HMRC seeking a review of the seizure of the truck. On 20 January 2014 Louise Bines of HMRC's Appeals and Reviews team replied reviewing the decision of 28 August 2013 and deciding to offer a restoration of the truck for a payment of £500. On 15 February 2014 Mr Weatherill gave notice of appeal.

21. Although there may be some duplication or confusion in the correspondence over which letters were decisions on restoration and which letters were review decisions, it seems fairly clear to me that an application for restoration was made and that Miss Bines in her letter of 20 January 2014 made a decision on review of either the offer made by the officers at the time it seizure or of the letter of 28 August 2013.

22. Mr Weatherill did not seek to pursue a challenge of the seizure in the Magistrates Court, but sought the second course of an application to HMRC in the consideration of which HMRC could exercise the discretion to restore the van or restore it on conditions.

5 **The evidence and my findings of fact.**

23. I heard oral evidence from Mr Weatherall and from Miss Bines who also provided a witness statement. In addition I had a bundle of documents which included copies of the notebooks of the officers involved in the seizure. Miss Balmer gave evidence about HMRC's restoration policy. In what follows, where I recount statements made to me, I do so to record the evidence I received. I set out my conclusions on such evidence separately where relevant.

24. Mr Weatherill did not challenge the account of the seizure given in the officers' notebooks (save in relation to matters which are irrelevant to those I had to decide).

25. Mr Weatherill owns some 60 acres of farmland at Doddiscombeleigh. There he keeps about 18 horses and from time to time kennels a number (up to 15) dogs. Mr Weatherill describes himself as a retired builder and in part of the land there is a yard in which he keeps building materials. He also keeps an E registration digger on the land.

26. A stream passes through the land but the manganese content of the water appears to be such that it is only really suitable for the horses to drink from in emergencies. As a result presently Mr Weatherill has to ensure that water is taken up to the field. He normally does this twice a week using a half tonne container carried in the back of a vehicle, which used to be the truck. His practice has been to fill this with mains water at his house, some 3 miles away, and take it to the field, but on occasion he obtains it from Beryl who runs Luscombe Nursery a little below his land. The journey to Luscombe Nursery requires a drive of about 100 yards on a public road.

27. Mr Weatherall has a right of access to his land from the council road about a mile away via a track which passes over land belonging to another. The present owner of the other land is a Mr Ansell. Over the years of Mr Weatherill's ownership of the land there have been disputes about this right. More recently they have been with Mr Ansell

28. Mr Weatherill described Mr Ansell as an ex-RAF man with an unhealthy interest in guns. He said that Mr Ansell had set up a shooting range on his land and that he had concerns about the shooting lines, which appeared to go across the access track, and the limited height of the target bulwarks. Mr Weatherill also became concerned that one of his horses and one of his dogs had been shot and that both his dogs and horses had been let out of the fields. In her letter Miss Bines says that she spoke to a Mr Herrington of World Horse Welfare who confirmed some of the incidents.

29. When Mr Ansell first acquired the adjoining land relations between him and Mr Weatherill appeared to have been fairly cordial because Mr Weatherill was allowed to

take water from a mains supply in Mr Ansell's fields, but the relationship had deteriorated. In his letter of 18 November Mr Weatherill described the arguments between them as becoming heated. There had been arguments about over the obstruction of the track. They had been arguments about a water bill. Mr Weatherill
5 now had to source his water from elsewhere. From this evidence I accept that Mr Weatherill's relations with Mr Ansell were acrimonious.

30. Mr Weatherill told me that he bought red diesel in 5 gallon cans from the Star Cross garage nearby. He used it for the digger and for a generator kept on his land. When using it for the generator he would decant it into a small can before using that
10 can to put it into the generator. I accept this evidence.

31. In addition to the digger, Mr Weatherill kept a number of other vehicles in varying states of repair: a Renault, of Vauxhall, a Ford, and two Land Rover discoveries. I concluded that some of these at least were kept on his field. It may be that their presence there, with the dogs, the horses and the building materials did not
15 enamour him to all his neighbours. In a letter of 29 July Mr Weatherill records that one of his neighbours had said that "they would go for me on all sides" to get rid of him.

32. Mr Weatherill said that the truck was normally kept in the field and that the key was left in the ignition. It was left in the ignition because it was difficult to start the
20 truck if it was taken out. This key is also operated the fuel cap. The truck was unlocked with a separate key.

33. Mr Weatherill told me that a number of years ago a Mr Morris (or Mo) Ide had helped him break in some horses, and about 4 1/2 years ago he had agreed to permit Mr Ide to occupy an acre of his land (on which there were a good number of trees) in
25 return for the truck (which had previously belonged to Mr Ide). Mr Ide, he said, had returned to Devon fairly recently from the vicinity of Brighton where he had some sort of interest in property (Mr Weatherill would not say that all Mr Ide's dealings were above suspicion). Since returning Mr Ide had, he said, been selling logs.

34. Mr Weatherill had several brothers who live in the area. He said that the cars were used by them too: there was some sharing of the vehicles. One of his brothers was called Raymond. About 10 weeks before the seizure Mr Weatherill's brother Raymond had had use of the truck. Then, about 8 weeks prior to the seizure Mr Weatherill said he had told Mr Ide that he could use the truck but on condition that he
30 took two tankfulls of water up to his horses in the field each week. This activity would consume fuel and Mr Weatherill, rather than agreeing to pay Mr Ide for the fuel, said that he provided him with a can of white diesel every week or so.

35. It struck me that a gallon of white diesel a week was a generous deal. The return journey from the field to Mr Weatherill's house would be about 6 miles. In a week that would be 12 miles, say 20 miles allowing for the place from which Mr Ides might
40 start. If the truck did more than 20 miles a gallon, Mr Ide obtained the benefit of the truck and the balance of the diesel in return for the twice weekly trip to water the horses.

36. Miss Bines letter notes that the truck bore a sticker "logs for sale" when it was seized, and that the officers' first contact had been with Mo, or Morris, who was working in a nearby field.

5 37. I conclude that it is likely that Mr Weatherill had agreed that Mr Ide could have the use of the truck and Mr Ide had the right to use it and control its use at the time the officers tested the diesel in its tank.

38. Mr Weatherall said that about two or three days before the seizure Mr Ide rang him to report that police had been examining the truck for about 1 1/2 hours but had found nothing wrong.

10 39. On the day of the seizure it appears that truck had been left at Luscombe Nursery. It was here that HMRC's officers examined it and took samples from its tank. I find that they found orange marker dye in the samples.

15 40. Mr Weatherill says that someone must have tipped HMRC off that the truck had red diesel in it. It seems to me that this is very likely. It is unlikely to my mind that a roving team HMRC officers just happened to light on the truck in this corner of Devon.

20 41. The officers' notebooks record that they took fuel samples from the truck. They found the samples gave a positive test for the orange marker dye used in rebated fuel. It appears that they first spoke to Mo Ide who was unhelpful. Then they record a telephone call with Mr Weatherill. The notebooks record that Mr Weatherill said that the truck had run out "the other day" and that "they put diesel in it from a can used for red diesel". Mr Weatherill said that he had been phoned by Mr Ide from the Nursery.

25 42. The notebooks record that Mr Weatherill arrived about an hour later with one of his brothers; he was then interviewed and given a sample of the fuel taken from the truck. He told the officers that someone else must have put a diesel in the truck and that he suspected a setup. The notebook containing the account was signed by Mr Weatherill. In his evidence to me Mr Weatherill did not dispute this account of what he had said.

30 43. HMRC's officers record that the following statements were made during the interview:

HMRC's officer "why is their red diesel in your vehicle?"

Mr Weatherill: I think someone must have put it in there I think it's a bit of a setup

35 Officer: why did you tell me you'd run out on the phone and used the can you usually use for red?

Mr Weatherill: XXXXX out I grabbed the can and went to Sainsbury's."

44. The passage "XXXXX" indicates that in the copies of the notes made available to me the words had been cut off at the bottom of the page. It seems fairly clear that he said that the fuel in the truck had run out.

45. Mr Weatherill told me that the colour of the fuel samples indicated to him that the diesel in the tank from which it had been taken was likely to have been substantially all red diesel. He told me that there were probably no more more than 2 or 3 gallons in the tank – as “Mr Ide was broke”.

5 46. I heard no formal quantitative evidence of the concentration of the marker dye
in the samples taken from the tank of the truck. If the only source of the marker dye in
the truck's tank was a residue left in a can previously used for red diesel then it would
seem likely that the concentration of the dye in the sample taken from the tank would
be slight; but I had no evidence as to the extent of the residual red diesel in the can.
10 Mr Weatherill's observation of the strength of the dye suggests therefore that there
must have been some additional input of red diesel into the tank after any
contamination for the can. In answer to Miss Balmer's questions, Mr Weatherill said
that his initial reaction - reflected in the remarks he made on the telephone - was to
suggest that the presence of red diesel was an accident, but when he saw the
15 concentration of the dye in the sample he concluded that he must have been set up.

47. Before me Mr Weatherill did not seek to deny the account he had given on the
telephone and repeated at the interview. He accepted that the diesel in the truck's tank
could have been contaminated as result of the use of a red diesel can but the
contamination could not have resulted in the level of concentration in the sample. I
20 conclude that it is likely that he did at some stage use a can which contained some red
diesel to refuel the truck, even if the substantial majority of the red diesel in the tank
at the time of the seizure had another source.

48. The officers then offered restoration of the truck for £550. They calculated that
sum as:

25 "£250 putting in
£250 and using and
£50 duty".

I take these, 'putting in' and 'using', as referring respectively to the penalties which
under section 13(1)(a) and (b) HODA to which I shall return later in this decision.

30 49. Mr Weatherill says that Mr Ide phoned him from the scene of the seizure. That
is consistent with the account in the Officer's notebook if the phone was then given to
the Officer to continue the conversation. The Officer's notebook records that they
spoke to Mr Ide shortly after they had inspected the truck and that he had become
aggressive, but not abusive, and walked off.

35 50. Mr Ide did not come to give evidence, nor was there anything before me in
writing from him. Mr Weatherill said that they had fallen out over a photograph of a
dead puppy (I gathered that Mr Weatherill bred puppies) inside one of the kennels on
Mr Weatherill's land. At one stage during the hearing Mr Weatherill said that he had
come to wonder whether Mr Ide had been doing someone else's dirty work. He also
40 said that at the time of the seizure Mr Ide had been doing some work for Mr Ansell. I

obtained the impression that Mr Weatherill did not want to “shop” Mr Ide at the time of the seizure, but had become less sure of this course of action as time progressed.

51. The Officers’ notes record that over the next half an hour Mr Weatherill went to make phone calls about payment, that he was struggling to raise the money, and then that he said would have the money by the morning. The officers then agreed to permit Mr Weatherill to water the horses and one of them accompanied him in the truck as he collected, delivered and dispersed water to the horses before the truck was taken away by a vehicle recovery driver. The following day Mr Weatherill telephoned them to say that he had not raised the money.

52. Mr Weatherill said that his financial resources were limited. He had a pension of £160 per week and lived modestly. He made mortgage payments of about £290 per month. Hay for the horses cost about £60 per week. He insured and ran the vehicles but got a 70% discount on his insurance premia. One of his brothers did repairs and MOTs free. He ate modestly. Although he no longer pursued a livelihood as a builder he did help out with building projects: in return for which he might be fed or if the project was successful receive money. He said he did not make money from keeping or breaking horses: since the ban on foxhunting there was nothing to be earned from horses.

53. Mr Weatherill told me that he had recently been helping a friend Hazel manage the building of a house. During the building works she had stayed with him and she had paid his mortgage and heating bills.

54. Miss Balmer urged me to be cautious about Mr Weatherill's evidence particularly on the score of his financial circumstances. She said that he was an intelligent and charming man but wise to the world. He had received the benefit of mortgage payments made by Hazel, he had an E registration digger and about six other cars (albeit of a certain age and state of repair), he kept a fair number of horses and dogs. No evidence had been produced as to his means. (I should note that Mr Weatherill later volunteered to provide copies of bank statements and that I refused to direct that such evidence, which had not been available at the hearing, should be admitted afterwards).

55. I concluded that it was likely that the resources available to Mr Weatherill had a value exceeding £160 per week. Whilst I accept that he lived and ate modestly, I believe that from time to time he received the money or other benefits for helping out with building works (I find it difficult to believe that he did not receive some compensation when he used his digger or materials from his yard,) and that occasionally he may have sold puppies or even horses. Bearing in mind that, when asked by the officer who seized the truck for £550 to restore it, he thought he might be able to borrow that amount, I conclude that whilst a penalty of £500 would bear harshly on him it would not be wholly beyond his means or such as might be called oppressive.

56. I should formally state my conclusion that Mr Weatherill did agree to lend the truck to Mr Ide, and that at the time of the seizure Mr Ide was in charge of the truck.

Miss Bines' Letter

57. Miss Bines set out the circumstances of the seizure¹ and a fair summary of the information provided by Mr Weatherill. She set out the applicable legislation and turned to HMRC's policy on restoration. She summarised HMRC's policy thus:

5 "Every case is decided on its own merits including any mitigating or militating circumstances and exceptional hardship is always considered.

- first offence - seizure of the vehicle and restoration for the value of the civil penalties, 100% of the revenue evaded on that occasion and any storage and/or removal costs incurred by the Department or the value of the vehicle which ever is the lower ..."
- 10

I refer later to that part of the policy starting with the first bullet point as the 'prescriptive part' of the policy.

58. Miss Bines then concluded that the information suggesting malicious action by a third party did not "provide conclusive proof" that the contamination was caused by a third party, and that the most likely cause of the presence of the red diesel was that a can previously used to transport red diesel had not been thoroughly cleaned before being used for white diesel.

15

59. She says that whilst there were reasonable grounds for accepting that the contamination was accidental, having rebated fuel in the tank was "an absolute offence".

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60. On this basis she concluded that restoration should be offered for £500. In her witness statement she describes this as the sum of two civil penalties of £250 one for "fuelling" and the other for "driving".

61. In her evidence to me Miss Bines told me that she had telephoned Mr Herrington of World Horse Welfare to confirm the account given by Mr Weatherill of incidents involving the horses, and that her Internet research showed that the truck to be worth about £700.

25

62. Miss Bines also said that she did not consider that a "reasonable excuse" defence to a penalty under section 9 Finance Act 1994 was established because section 10(3)(b) prevented reliance on another person from being such an excuse.

30

The parties' arguments.

63. Mr Weatherill accepts that he could not challenge the legality of the seizure of the truck. It was plain that it contained red diesel and so was properly forfeit. But he said that the condition imposed for restoration was unreasonable:

¹ Miss Bines' account contains details which were not in the copies of the officers' notebooks, but is not inconsistent with them and which do not affect the substance of her decision.

- (1) the truck he said was worth about £300;
- (2) he had not been responsible for putting the diesel truck;
- (3) it was likely that someone else had put it in the tank in order to cause him trouble and then reported the matter to HMRC;
- 5 (4) he asked whether for example Hertz or Rent-a-car would be treated in the same way by HMRC if red diesel had been put into the tank of a van they had hired out.

64. Miss Balmer says:

- 10 (1) the truck was lawfully seized, HMRC are given the right to set conditions for restoration;
- (2) in the circumstances it was reasonable to set a fee for restoration and the fee set was reasonable.
- 15 (3) Even if, on my findings of fact, relevant findings had not been considered, or irrelevant matters taken into account, the decision would inevitably be the same if the matter was remitted for a fresh decision and so the decision should not be required to be remade.

Discussion.

65. The question I have to address is whether the decision made by Miss Bines was unreasonable. It would be unreasonable if, having regard to the facts as I find them, she took into account any material irrelevant matter, failed to take into account a relevant matter, materially misdirected herself on the law or made a decision which no reasonable officer could have made.

66. I should start by saying that if it were shown that the only reason for red diesel in the tank was that someone other than Mr Weatherill had deliberately filled the truck's tank with red diesel and then reported the matter to HMRC with the intention of causing trouble for Mr Weatherill, it would seem to me that, because Miss Bines did not make a decision on that basis, and because such in circumstances no reasonable officer could have concluded that it was proper to charge a fee in relation to such events, the decision should be set aside.

67. However, whilst I believe that it is possible that the red diesel was put into the truck by someone else without Mr Weatherill's knowledge, the evidence before me was insufficient for me to reach the conclusion that this was more likely than not. He himself described it as a "possibility".

68. In his letter of 18 November Mr Weatherill notes that within one hour of his truck being seized someone reported to World Horse Welfare that his horses were without water due to non-payment of a water bill. He suggests that only Mr Ansell knew of his of the dispute over the water bill (since he had refused to supply) and that that points to his involvement in the putting of red diesel in the truck's tank. Miss Bines said that she had spoken to World Horse Welfare and confirmed the account of the incident.

69. I have said that I accept that relations with Mr Ansell were acrimonious. I accept that it is possible that the red diesel was put into the truck's tank by him or at his direction and that he or someone at his direction contacted HMRC, tipping them off as to the place where the truck was. However, I do not find the evidence I heard
5 sufficient to reach a conclusion that such events were more likely than not. Whilst the arrival of HMRC at Luscombe Nursery points fairly clear to some sort of tipoff, and to someone who may have may not have approved of Mr Weatherill, I am uncertain whether it is likely that a disgruntled neighbour would go to the length of finding the truck, finding the key, putting red diesel in the tank, and reporting it to HMRC. I am
10 therefore unable to conclude on the evidence that it was more likely than not that the red diesel had been put in the tank maliciously.

70. Furthermore other possibilities remain which I cannot say are less likely or inconsistent with the evidence: (i) that Mr Ide had put the red diesel in the tank (with or without Mr Weatherill's knowledge) and the report had been made by someone
15 with an axe to grind against Mr Ide, or (ii) that Mr Weatherill had by mistake given Mr Ide a can containing red diesel. In these matters I was hampered by not hearing evidence from Mr Ide.

71. I turn to the basis on which Miss Bines made her decision.

72. Miss Balmer told me that HMRC's policy on restoration applied in all such
20 cases. Thus she said recourse would be had to the policy if red diesel were found in a truck rented by say Hertz in the same way as it would be in the present case. I accept her evidence. If HMRC's policy for persons like Hertz was different from that which applied to individuals who lent their vehicles to others, I would not have been inclined to regard reference to such a policy as a reasonable. Her evidence was therefore
25 decisive in this respect.

73. It appears from Miss Bines' letter that the policy requires each case to be decided on its merits and any militating or mitigating circumstances to be considered. It does not seem to me that this is an unreasonable policy.

74. It is not unreasonable to have regard to policy in setting a condition for
30 restoration if that policy is reasonable and lawful. In my judgement the policy was not unreasonable where the penalties were not also levied – as was the case here. Miss Bines was therefore not unreasonable in taking into account liability for penalties in assessing whether a fee should be charged for restoration.

75. In paragraph 13 of her witness statement, Miss Bines says that she calculated
35 the restitution fee as "2 x Civil Penalties of £250, one for fuelling the vehicle and one for driving it on the road".

76. I therefore start by considering whether Miss Bines was right in considering that such penalties were due.

77. *The penalty computations.*

40 78. Section 13(1) HODA provides that where a person:

"(a) uses heavy oil ... or

(b) is liable for heavy oil being taken into a road vehicle..."

5 in contravention of section 12(2), his use, or his becoming so liable, shall attract a penalty under section 9 FA 1994. These penalties under (a) and (b) I take to be the "fuelling" or "putting in" and "driving" penalties referred to by the Officers in their notes and by Miss Bines in her letter.

79. Subsection 13(7) provides a definition of the concept of being "liable" as used in subsection (2) by providing that a person is so "liable" if he is "the person having charge of the vehicle or is its owner, except that if a person other than the owner is, or is for the time being, entitled to possession of it, that person and not the owner is liable".

80. Section 9(2)(b) FA1994 provides for a penalty of £250. Section 10 provides that if a person satisfies HMRC or the tribunal that there is a reasonable excuse for the conduct which would have given rise to the penalty, then he shall not be liable to the penalty. Section 10(3) excludes from "reasonable excuse" an insufficiency of funds, and provides:

20 "where reliance is placed by any person on another to perform any task, then neither the fact of that reliance nor the fact that any conduct to which section 9 applies was attributable to the conduct of the other person shall be a reasonable excuse."

81. In considering whether a penalty is exigible I have to bear in mind the effect of the deeming in para 3 Sch 3 CEMA. Since the truck is to be treated as lawfully seized, I must work on the basis that either section 12(2)(a) or 12(2)(b) is satisfied (or both). That means that I must assume that there was red diesel in the tank. That conclusion however was not disputed by Mr Weatherill and accords with the evidence. I see no other aspect of the statutory deeming which can affect this part of this decision.

The section 13(2)(a) penalty : "use" of heavy oil ('fuelling' or 'putting in')

82. A penalty arises as a result of section 13(1)(a) only if a person "uses" heavy oil in contravention of section 12(2). It seems to me that a mere ownership of a vehicle in which red diesel has been used as fuel is not enough to attract liability under section 13(2)(a): what is required is the use by that person of fuel in the vehicle. That use could be by driving a vehicle with red diesel in the tank or by the owner instructing another person to use such a vehicle for other purposes of the owner. But merely allowing another person to use such vehicle is not use of the fuel by the owner.

35 83. Miss Bines refers to Mr Weatherill "driving the vehicle on the road". If Mr Weatherill did drive it on the road when it had red diesel in its tank then he would have been "using" red diesel in contravention of section 12(2)(a), and that conduct would attract a £250 penalty. So I asked myself whether there was any evidence that Mr Weatherill had driven the vehicle when red diesel was in its tank without a reasonable excuse.

84. The officers' notebooks indicated that the vehicle was found at Luscombe Nursery by HMRC's officers and Miss Bines' letter indicates that the person with the vehicle (Mr Ide) was in the nearby field. Then the notebooks also showed that Mr Weatherill arrived about an hour later. That does not seem to me to be evidence that Mr Weatherill was driving the vehicle on the road with red diesel in the tank. Accordingly these facts cannot support a conclusion that a penalty was due.

85. Miss Bines also had evidence from the officers that after the seizure they accompanied Mr Weatherill in the vehicle to water the horses in the field. This would have involved driving the vehicle on the road.

86. But it seems to me that the presence and acquiescence of the officer and the horses' need for water afford a reasonable excuse for the use on that trip in those circumstances. Accordingly this trip cannot reasonably be taken as a basis for treating a penalty as due.

87. Miss Bines also had the officers' notes of the telephone call made at the time of seizure and of the interview. She took into account that Mr Weatherill had said that he had used with a red diesel can "the other day" to fill the tank. After so filling it there would have been some red diesel in the tank and if, as must seem likely, Mr Weatherill drove the vehicle after so filling it, he would have "used" red diesel in contravention of section 12(2). It would thus be reasonable to conclude that Mr Weatherill drove the vehicle and that unless he had a reasonable excuse, a penalty was due.

88. In none of Mr Weatherill's evidence to me did he indicate any wish to withdraw the statement he had made about the red diesel can, and I have found that it is therefore likely that there was some red diesel in the tank as a result whether or not more was put into the truck subsequently.

89. As a result it seems to me that Miss Bines was entitled to have regard to Mr Weatherill's statement and to conclude that as a result he had used red diesel in contravention of section 12(2). It seems to me that the accidental use of a contaminated can does not afford a reasonable excuse. I had no evidence as to the amount of red diesel left in the can. If the can had been upended for several days and only a smear of red diesel remained, I would not have regarded Mr Weatherill as careless and would have considered that he had a reasonable excuse for accidental contamination. I did not have evidence before me which permitted me to reach that conclusion.

90. I conclude that although Miss Bines does not explain why she concluded that Mr Weatherill had driven the truck, she was nevertheless was entitled to treat Mr Weatherill as liable to a penalty of £250 for using the vehicle in contravention of section 12(2)(a).

91. *Section 13(1)(b): red diesel "taken into a road vehicle".*

92. Mr Weatherill accepts that red diesel was in the truck at the time of the seizure. It must therefore have been "taken into" a road vehicle. Mr Weatherill was the owner

of the vehicle. Thus Mr Weatherill became liable to a penalty of £250 under section 13(1)(b) and section 9 unless either:

(1) it can be said that another person, in particular Mr Ide, was entitled to possession of the truck at the relevant time, or

5 (2) Mr Weatherill has a reasonable excuse.

93. I have found that Mr Weatherill did agree with Mr Ide that he could use the truck. As a result Mr Ide was entitled to use and control the use of the truck whilst Mr Weatherill's agreement continued, in other words I find that Mr Ide had possession of the truck at those times. Therefore relation to any red diesel being "taken into" the truck during the currency of that agreement Mr Weatherill would not be liable to a penalty under section 13(1)(b). That means that unless red diesel was taken into the vehicle before Mr Ide had possession of it no penalty arises. In particular no penalty can arise to Mr Weatherill under section 13(1)(b) as a result of events which resulted in the contents of the tank being, as Mr Weatherill agreed, substantially all red diesel.

94. However Mr Weatherill did say that he had used a contaminated red diesel can to obtain white diesel from Sainsbury's. That must have been when Mr Weatherill was in charge of the truck. As a result some red diesel would have entered the tank and, as Mr Weatherill as the owner and at that time "in possession" of the truck, he would have been "liable" for the purpose of section 12(2)(b) and thus liable for penalty as being in contravention of section 12(2)(b).

95. Miss Bines' letter indicates that she regarded a penalty as potentially arising because of the accidental contamination with the red diesel can. I conclude that she was entitled to do so.

96. Was there a reasonable excuse for this contravention? In my view the evidence was insufficient to conclude that there was. It is reasonable to expect that some red diesel would be left in a can which had previously used for red diesel unless it had been carefully cleaned or left upended for a while. Being careless about which can was used because one was in a hurry does not provide a reasonable excuse unless there was some good reason for the hurry. None was suggested.

97. In her witness statement Miss Bines says that she did not consider that the appellant had a reasonable excuse for any of the conduct giving rise to a penalty because he had not satisfied her that there had been vindictive contamination and "in any event his reliance on another party would not constitute grounds for reasonable excuse in terms of section 10(3)(b) FA 1994". If vindictive contamination had been shown it seems to me that Mr Weatherill would have had a reasonable excuse.

98. I do not consider that Miss Bines was correct in relation to section 10(3)(b). That subsection prevents a reasonable excuse arising where reliance has been "placed on another person *to perform a task*". Only where that is the case is contravention attributable to the conduct of another person deemed insufficient to be a reasonable excuse. In this case there was no evidence that Mr Weatherill relied upon Mr Ide, or anyone else, to perform a relevant task so section 10(3)(b) is irrelevant.

99. However for reasons I have given, I find that it was not shown that there was a reasonable excuse, and accordingly that Miss Bines was entitled to make a decision on the basis that there was no such excuse.

5 100. Accordingly I find that Miss Bines was entitled to take into consideration that two penalties of £250 would be exigible.

10 101. If the accidental contamination from the red diesel can had occurred six weeks before the seizure and if diesel had been put into the truck on several occasions since then, it is likely that very little of the original diesel was present in the sample which led to the seizure. There is a legal maxim - *de minimis non curat lex* - the law does not care about things which are too small – which may suggest that the effects of the accidental contamination might be ignored in assessing the fee payable as a result of the later seizure.

15 102. In the circumstances of this appeal I do not think that such an argument can succeed. It would require Mr Weatherill to have provided evidence of the date of the accidental contamination and of fuel use by the truck since that time, and also to succeed in an argument that a prior transgression should not be taken into account in relation to a later seizure. Without such information Miss Bines was entitled to assume that the contamination which remained was not *de minimis*.

Other Circumstances and Matters

20 103. In her letter Miss Bines says that Mr Weatherill had not provided ‘conclusive proof’ that the contamination was caused by a third party. It seems to me that this suggests a standard of proof which is not reasonable in a civil matter. Had I found on the balance of probabilities that there had been such contamination I would have set her decision aside. However as I have not so found her conclusion on this matter does not affect the reasonableness of her decision.

30 104. Miss Bines did not follow the prescriptive part of the policy. The sum she set for restoration was limited to the amount of the penalties and excluded storage and removal costs. It appears that she regarded presence of red diesel as an accidental result which together with the value of the truck, justified a lower restoration fee than required by that part of the policy.

105. That seems to me not to be an unreasonable response. Whilst some latitude might be allowed by some reasonable decision makers for the making of a mistake, Miss Bines was entitled to take into account that the legislative provisions for penalties provide for no abatement in such circumstances.

35 106. Miss Bines’ letter does not address Mr Weatherill's' financial means (although she does refer to the value of the truck). That is not surprising since there was no discussion of them in Mr Weatherill's correspondence. I, on the other hand, have had some evidence of Mr Weatherill's means. I have accepted that Mr Weatherill has only a modest income. I found that the restoration fee set by Miss Bines would bear heavily on him but would not have been oppressive. I do not consider it is wholly

unfair circumstances. I do not therefore consider there to be facts which Miss Bines failed to take into consideration which would have been material to her decision.

Conclusion

5 107. I conclude that there are no material factors (that is to say factors which could have had an effect on her decision) which Miss Bines should have taken into consideration which she did not, that she took into account no irrelevant matters, that her mistake as to the operation of section 10(3)(b) was not material to her decision and that otherwise she made no mistake as to the law, and that her decision was one at which she could reasonably arrive in the circumstances.

10 108. As a result I find that her decision was not unreasonable and I must dismiss the appeal.

Rights of Appeal

15 109. 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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CHARLES HELLIER
TRIBUNAL JUDGE

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RELEASE DATE: 5 AUGUST 2015