TC04790

Appeal number: TC/2014/02762

Excise Duty - taking in and use of rebated fuel in road vehicles - whether insufficient evidence to rebut assessed use of rebated fuel for periods of assessment - whether quantum reasonable and fairly assessed - yes - s13 Hydrocarbon Oil Duties Act 1979 - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

KINGSBOROUGH HAULAGE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: ANN CHRISTIAN

Sitting in public at City Exchange, 11 Albion Street, Leeds on 16 July 2015

Mr Michael Hobson and Mr Ronald Osbourne, for the Appellant

Mrs Jenny Newstead Taylor, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Kingsborough Haulage Limited ('the Appellant'), against a decision dated 12 March 2014, to raise an assessment in the sum of £120,184, revised to £113,404 on 24 July 2014, under s 13 of the Hydrocarbon Oil Duties Act 1979 ('HODA'), for repayment of rebated excise duty allowed on heavy oil, used in vehicles owned by the Appellant in contravention of s 12(2) HODA.

2. The assessment relates to the period between 1 April 2010 and 2 October 2013 ('the assessment period').

The background

3. It is illegal to use heavy oils (for example, kerosene or gas oil, usually marked and dyed, also called 'red diesel') as fuel in a road vehicle unless the user obtains a licence from HMRC to pay the difference between the full rate of duty on the fuel and the rebated rate actually paid on the fuel used. Only vehicles which are specifically excluded from the legal definition of 'road vehicle' may use red diesel as road fuel. These are known as 'excepted vehicles'. A vehicle that is not used on the public road and has no licence under the Vehicle Excise and Registration Act 1994 is an excepted vehicle. Vehicles used for construction, agriculture, forestry and horticulture can be excepted vehicles, as can, by way of example, tractors, gritters, and road rolling machines.

4. Kerosene carries a nil rate of duty (fully rebated) when used as a heating fuel. Gas oil carries a lower (rebated) rate of duty.

5. There is no major difference between gas oil and diesel, which is the reason why red dye is added to gas oil by HMRC, to prevent or dissuade customers from using it in diesel cars. Technically the only difference between gas oil and diesel is the sulphur content. Gas oil can contain up to 0.1% natural sulphur content while diesel can only contain 0.001% natural sulphur. As such, gas oil has a lower production specification and costs less than diesel to produce. Once fuel duty is factored in there is a significant difference in price between gas oil and diesel.

6. Chemical markers are added to fuels to indicate the difference between rebated, un-taxed fuels and taxed fuels. A dye is usually used with the marker so that rebated oil can be easily identified. The current gas oil dye is red in colour. In the UK, dyed gas oil, known as 'red diesel' is intended for use for agricultural and non-road applications and is significantly cheaper than taxed commercial diesel fuel. The dyes used are solvent dyes such as Solvent Red 24 and Solvent Yellow 124. Solvent Yellow 124 has been added since 2002 because it is difficult to remove in an economical way, whereas earlier dyes were more easily removed. The custom marker quinizarin is also added to rebated fuels.

7. Different countries add different dyes to fuels – the UK uses Solvent Red and quinizarin in red diesel and coumarin in rebated kerosene. The European Union uses Solvent Yellow in many rebated fuels.

8. The Appellant, incorporated in December 2005, trades as Hobsons and Sons Haulage, carrying out business as a haulage contractor and vehicle service provider from 5 Intake Road, Bolsover Business Park, Bolsover, Derbyshire, S44 6BB ('the premises'). It does not operate any excepted vehicles.

9. On 23 May 2013, Officers Marshall, Speed and Bryan from HMRC's Road Fuel Testing Unit visited the premises and found that samples of diesel, taken from three vehicles, tested positive for red diesel. The fuel was red in colour and chemical analysis confirmed the presence of UK marked rebated gas oil (red diesel).

10. The vehicles testing positive were:

- a Mercedes flatbed pick-up, registration plate A3 HOB that was taxed until 30 June 2013 and registered to Mr Michael Hobson, ('Mr Hobson') a director of the Appellant Company;
- a Vauxhall Astra A4 HOB that was taxed until 31 July 2013 and registered to Mr Dean Hobson, son of Michael Hobson.;
- a Scania HGV H3 HOB which was off the road ('Sorned') and was registered to Mr Hobson.

11. Each of the positive samples for A3 HOB and A4 HOB were split into three tins, each set of three being labelled respectively with nos 206730 and 206731. One of each set was given to Mr Hobson. The two taxed vehicles were seized under s 139 of the Customs and Excise Management Act 1979 ('CEMA') and s 13 HODA.

12. Two other vehicles at the premises, a Land Rover SVO9 CGK and a Ford Transit K3 HOB, tested negative.

13. Officer Lee Marshall interviewed Mr Hobson under caution. The following is Officer Marshall's summary of the interview as extracted from his notes :

i. Mr Hobson confirmed that he was a director of Kingsborough Haulage Limited. The main business activity of the company is road haulage.

ii. The company owned three heavy goods vehicles and one van. In respect of the vehicles testing positive, the company owned vehicle A3 HOB and Mr Hobson's son Dean Hobson owned vehicle A4 HOB.

iii. The company did not have a diesel storage tank. No diesel fuel was stored on site.

iv. Mr Hobson did not know when vehicle A3 HOB was last fuelled.

v. When asked to explain why there was red diesel in the vehicles, Mr Hobson stated he had no idea about his son's vehicle but his vehicle A3 HOB had been in the yard so long "one of the lads put red diesel in it to get it going".

vi. Mr Hobson stated he had purchased the red diesel from travellers who came to the yard; he had intended to use the fuel in his forklift and steam cleaner.

vii. Mr Hobson stated he knew it was an offence to use red diesel in a road vehicle and that he knew the difference between red and white diesel.

viii. The notebook entry was signed and agreed by Mr Hobson.

14. Following the interview Mr Hobson paid restoration fees for the two seized vehicles, which totalled £1,089.

15. The case was referred to Officer Turner of HMRC's Compliance unit, for a Post Detection Audit. On 9 September 2013, Officer Turner wrote to Mr Hobson informing him that it was necessary for a fuel audit to be carried out on the business, to determine to what extent rebated fuel may have been used in the seized and other vehicles owned by the Appellant. He enclosed HMRC Factsheets FS1d, FS9, FS12 and FS16 and requested books and records pursuant to Regulation 48 Hydrocarbon Oil Regulations 1973, in order to carry out a full reconciliation of legitimate fuel purchases against usage of vehicles owned and operated by the Appellant.

16. Officer Turner advised the Appellant that an offence had been committed under s 12(2) HODA, which rendered Mr Hobson liable to proceedings under s 13 of that Act and constituted an Excise Wrongdoing under Schedule 41 of the Finance Act 2008.

17. On 3 October 2013 at 07.15 am the premises were revisited by Officers Speed and Bryan. They identified themselves to Mr Hobson, and explained the reason for their visit: Officers Speed and Bryan observed a Scania HGV tractor unit registration R2 HOB with trailer attached manoeuvring to leave the premises. Officer Bryan told the driver not to drive the vehicle away as they needed to obtain a sample of fuel from it, and that if he were to drive the vehicle away this could result in a penalty being issued. The driver informed Officer Bryan that he was just going to park the vehicle outside the gate which the Officer agreed to. A few minutes later Mr Hobson approached and spoke to the driver of R2 HOB whilst he was still in the vehicle, following which the vehicle was driven away from the premises on to the public highway and out of sight.

18. Four vehicles:

- a blue Volvo tractor unit YNO7 BWK;
- a silver Ford Transit Connect van MH06 SON;
- a black Scania Tractor Unit M3 HOB;
- a HGV tractor unit R2 HOB,

and a 2800 litre capacity Derv (road diesel) stock tank located inside a unit at the premises, which had been installed at the end of May 2013, all tested positive for rebated fuel markers.

19. At Officer Bryan's request, over four hours later, vehicle R2 HOB was returned to the premises in order that it could be tested and sampled. It tested positive, but with only trace results of chemical markers.

20. The samples for the vehicles testing positive and the storage tank were split into three tins and labelled. One of each sample was given to Mr Hobson.

21. Mr Hobson was again interviewed under caution. Officer Speed summarises his notes of the interview with Mr Hobson as follows:

i. The Appellant Company owned vehicles YNO7 BWK, R2 HOB, M3 HOB, MH06 SON, and the 2800 litre capacity diesel tank.

ii. The vehicles were mainly used by company drivers to make local UK journeys.

iii. Vehicles MH06 SON, M3 HOB, YNO7 BWK and R2 HOB had been fuelled from the diesel stock tank on site.

iv. Some of the vehicles fuelled at filling stations when they are out on the road.

v. Apollo Fuels supplied fuel to the Appellant (some invoices were produced).

vi. Mr Hobson claimed that Apollo Fuels must have been responsible for the contamination of fuel in the vehicles and the diesel stock tank. The seized vehicles had been fuelled from the storage tank. He said that neither he nor his drivers had knowingly fuelled the vehicles with rebated fuel.

vii. Gasoil/ red diesel was also used at the premises in machinery and for heating.

viii. Following the detections, a road fuel audit was carried out on all road vehicles owned and used by the Appellant in the period 1 April 2010 to 2 October 2013.

22. Following the interview 555 litres of contaminated diesel was seized and removed from the premises. Vehicles YNO7 BWK and R2 HOB were seized and restored on payment of restoration fees totalling £1,670. Vehicles M3 HOB and MH06 SON were seized and restored free of charge.

23. On 9 October 2013, Officer Turner, having received no response to his letter of 9 September 2013, (see paragraph 15 above) issued a pre-assessment letter informing Mr Hobson of a potential duty liability of £151,527, representing an amount equal to the rebate on oil misused as road fuel. He said that he intended to assess for this on 30 October 2013 unless Mr Hobson produced evidence to show that the assessment was not correct. Officer Turner's calculations were based on the vehicles owned by the

Appellant company/Mr Hobson, as evidenced by DVLA checks, on estimated average annual mileages using Automobile Association and Department of Transport figures, and average fuel consumption figures from a HMRC consumption chart. His proposed methodology was to calculate:

i. The total mileage of vehicles owned by the Appellant during the assessment period using odometer readings apportioned for the period of ownership of the vehicles and the period of assessment;

ii. The miles per gallon of each vehicle estimated objectively on the basis of independent data;

iii. The total fuel used during the period of assessment and apply the relevant duty.

24. On 30 October 2013, Mr Hobson emailed Officer Turner to say that due to illness, he had not been able to collate all the information requested by Officer Turner in September and it was arranged for Officer Turner to inspect the Appellant's records the following week at the premises. The visit had to be postponed twice, but eventually was re-arranged for 22 November 2013.

25. HMRC arranged for a formal analysis of the fuel found in the four vehicles which tested positive and the 2,800 l diesel tank on 3 October 2013. The results were as follows:

VEHICLE	QUINIZARIN	SOLVENT RED	SOLVENT YELLOW	MARKED
YN07 BWK	0.07	0.11	0.29	4%
MH06 SON	0.02	trace	0.08	1%
M3 HOB	0.02	trace	0.08	1%
R2 HOB	0.00	0.00	trace	0%
2800 L TANK	0.02	trace	0.09	1%

The results confirmed that the samples contained UK rebated gas oil.

26. On 22 November 2013, Officer Turner attended the premises and inspected the Appellant's records. Mr Hobson said that he only had three trucks and in 2012 he was down to two. Mr Hobson had prepared a schedule showing kilometre readings for vehicles R2 HOB, H3 HOB, YNO7 BWK and AH53 AHA. The figures had been taken from a six week service schedule. According to Mr Hobson H3 HOB came off the road on 10 December 2012 for painting and repairs and did not go back on the road until 15 October 2013. Officer Turner asked for evidence of all fuel purchases for the audit period including copy receipts where available.

27. Officer Turner had obtained details from DVLA of all vehicles which had been registered to and owned by the company. There were twenty-eight in total. He asked Mr Hobson to give an account for each vehicle. Based on the information provided Officer Turner excluded fifteen vehicles because they were either petrol fuelled or had been sold, scrapped or owned for only a very brief period. Thirteen vehicles were therefore to be included in the assessment. Officer Turner's summary is as below:

> 'A3HOB - a recovery truck used about once a week doing a maximum of 150 miles per week and occasional recoveries. Mr Hobson said his son uses it for transporting vehicles for off-roading near Mansfield. He said it was fuelled by his son and his friends.
> H3 HOB - details produced.
> K3 HOB - used by a driver who lived about 6 miles from the premises. Mr Hobson said it does about 60-70 miles per week.
> MHO6 SON - is still owned and does about 70 miles per week.
> M3 HOB - is registered as AY53 AHA for which he produced records.
> N3 HOB - sold 3 years ago and had done regular work up to that point.
> R2 HOB - details produced.
> SVO9 CGK - was one of his son's vehicles who had owned it 3- 4 months. It is taxed and on the road.
> YNO7 BWK - details produced.
> YPO4 SXL - has been owned for 3-4 months and makes two trips to Nottingham a week.
> YTO8 YSO - sold three years previously. He said he had done 18,000 over three years.
> YT59 PPU - had replaced YTO8 YSO. He estimated he had done about 14,000 miles in it over 18 months and had then sold it eight months previously.
> AU52UWX – a Fiesta which replaced YPO4SXL that was stolen.'

28. On 17 February 2014, following the provision of further information, Officer Turner was able to undertake a Post Detection Audit. In doing so Officer Turner examined records from the Tachodisc Goods Vehicle Inspectorate, the Road Haulage Association Maintenance records, VC60 forms and MOT details.to give comparative mileage readings for the HGV's.

29. Officer Turner discussed the mpg figures for the vehicles. Mr Hobson said the trucks do 7-9 mpg. The average for a Land Rover was 30 mpg. The Fiesta does 60 mpg and the Astra. Van does 30 mpg.

30. Mr Hobson stated that he could account for some of the vehicles mileage (for which he did not have fuel receipts) because he had received 12,000 litres of biodiesel from Ron Osbourne of Fuel Systems UK Ltd free of charge about two years previously. All the fuel had been used.

31. Mr Hobson produced fuel card invoices and fuel receipts for diesel purchases. Officer Turner said that he had been unable to understand some invoices which were indecipherable and suggested that Mr Hobson provide him with copy bank statements. The direct debits would show payments made to the fuel card companies and where there was no fuel statement the information from the nearest ones held could be used to give the approximate price per litre. Officer Turner pointed out that full fuel receipt

records had not been provided and that he had to conclude that this indicated that misuse had occurred. Mr Hobson did not accept this but did admit, "if someone offers you cheap diesel you are not going to turn it down".

32. Officer Turner concluded that due to:

i. The finding of rebated fuel in the road vehicles;

ii. The open admission by Mr Hobson under caution that company employees had knowingly put rebated fuel in the tested vehicles;

iii. The significant discrepancy between the amount of fuel used during the assessment period and the amount for which the Appellant was able to provide evidence of valid fuel purchases, the amount unaccounted for was attributable to rebated fuel.

33. On 28 January 2014, Officer Turner telephoned Mr Osborne and asked if he had supplied Mr Hobson with any biodiesel. He confirmed he had. Mr Osborne said he did not know how much and added that he did not sell it to him because he had not got his refining process right. Because of this he had given it free of charge. He said there was about 10,000 to 15,000 litres. Officer Turner asked if there were any records to confirm this. He said unfortunately he had no records of what he had supplied.

34. On 14th February 2014 Officer Turner received the Appellant Company's bank statements. He checked the purchase invoices and identified them on the bank statements including entries relating to payments to fuel card companies. He calculated the quantity of fuel purchased by taking the price per litre from the nearest like for like purchase, where the invoice was provided. In order to arrive at the assessment, Officer Turner had ascertained the mileage of each of the vehicles and then by applying a mpg figure assessed the amount of fuel that must have been used. He compared the total fuel which he calculated as having been used with the total legitimate fuel purchased (where receipts had been produced) in order to determine the shortfall and after applying the amount of applicable rebate for each period of assessment (there being different periods of assessment corresponding to separate rebate changes), calculated the amount of excise duty payable.

Period	From	To	Difference £	L used	L purchased	Shortfall L	Duty £
1	01.04.10	30.09.10	0.4620	32,163.289	0.00	32,163.28	14,859
2	01.10.10	31.12.10	0.4701	12,645.763	0.00	12,645.76	5,944
3	01.01.11	22.03.11	0.4762	7926.107	0.00	7926.10	3,774
4	23.03.11	17.04.13	0.4681	229,611.104	25,364.16	204,246	95,607
						Total Duty Due	120,184

35. On 12 March 2014 the Appellant was issued with an assessment in the reduced sum of £120,184. Following the identification of legitimate fuel purchases from Apollo Fuels not previously taken into account the assessment was further reduced to £113,581 on 13 March 2014. It was reduced again to £113,404 on 24 July 2014 because vehicle A3 HOB had tested negative in the second test and therefore there was no evidence that it been fuelled with red diesel for the period after 23 May 2013.

36. On 23 April 2014, Mr Hobson lodged a Notice of Appeal against the assessment (as revised) with the Tribunal. The stated grounds of appeal, in brief were:

i. Vehicle A3 HOB, which tested positive on 23 May 2013, although taxed, was off the road. Its truck body and gearbox had been removed. It was clearly not being used.

ii. The vehicles which tested positive on 3 October 2013 had been fuelled with fuel supplied by Apollo fuels delivered only two days prior to the detection (and must have been contaminated).

iii. The post detection fuel audit result was incorrect.

37. On 13 May 2014, Officer Turner issued a Wrongdoing Penalty under the Finance Act 2008 Schedule 41. The Penalty is not the subject of this appeal and is suspended pending determination of this appeal.

Relevant legislation

38. The relevant legislation is set out below:

HODA 1979

Section 6 - *Excise duty on hydrocarbon oil:*

(1) Subject to subsections (2)...and (3) below there shall be charged on hydrocarbon oil -

a. imported into the United Kingdom; or

b. produced in the United Kingdom and delivered for home use from a refinery or from other premises used for the production of hydrocarbon oil, or from any bonded storage for hydrocarbon oil not being , hydrocarbon oil chargeable with duty under paragraph (a) above

a duty of excise at the rate specified in subsection 1A below.

Section 11 - *Rebate on heavy oil*

1) Subject to sections 12, 13, 13AA and 13AB below, where heavy oil charged with the excise duty on hydrocarbon oil is delivered for home use, there shall be allowed on the oil at the time of delivery a rebate of duty at a rate—

(a) in the case of fuel oil, of £0.0274 a litre less than the rate at which the duty is for the time being chargeable;

2) In this section—

"fuel oil" means heavy oil which contains in solution an amount of asphaltenes of not less than 0.5% or which contains less than 0.5% but not less than 0.1% of asphaltenes and has a closed flash point not exceeding 150°C;

Section 12 - *Rebate not allowed on fuel for road vehicles*

(1) If, on the delivery of heavy oil for home use, it is intended to use the oil as fuel for a road vehicle, a declaration shall be made to that effect in the entry for home use and thereupon no rebate under section 11 above shall be allowed in respect of that oil.

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

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

(b) be taken into a road vehicle as fuel

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

(3) For the purposes of this section and section 13 below—

(a) heavy oil shall be deemed to be used as fuel for a road vehicle if, but only if, it is' used as fuel for the engine provided for propelling the vehicle or for an engine which draws its fuel from the same supply as that engine; and

(b) heavy oil shall be deemed to be taken into a road vehicle as fuel if, but only if, it is taken into it as part of that supply.

Section 13- *Penalties for misuse of rebated heavy oil.*

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

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

(b) notify him or his representative accordingly.

(7) For the purposes of this section, a person is liable for heavy oil being taken into a road vehicle in contravention of section 12(2) above if he is at the time the person having the 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.

Section 24 - *Control of use of duty-free and rebated oil*

(3) For the purposes of the Customs and Excise Acts 1979, the presence in any hydrocarbon oil of a marker which, in regulations made under this section, is prescribed in relation to—

(b) rebated heavy oil or rebated light oil,

shall be conclusive evidence that that oil has been so delivered...

(4B) Where—

(b) any oil is delivered without payment of duty, and

(c) a person contravenes or fails to comply with any requirement which, by virtue of any regulations made under this section, is a condition of allowing the oil to be delivered without payment of duty,

the Commissioners may assess an amount equal to the excise duty on like oil at the rate in force at the time of the contravention or failure to comply as being excise duty due from that person, and notify him or his representative accordingly.

Evidence

39. The hearing bundle contained:

(i) A chronological copy exchange of correspondence between the Appellant and HMRC relating to the assessment, together with a schedule, spreadsheets and an explanation of the methodology used in arriving at the total estimated rebated fuel used.
(ii) A record of the transcripts of interviews under caution with Mr Hobson on 23 May 2013 and 3 October 2013.
(iii) Detection reports by HMRC's Road Fuel Testing Unit, dated 23 May 2013 and 3 October 2013.
(iv) The results of an analysis of the samples by LGC Forensics for HMRC.
(v) The results of an analysis by Intertek for the Appellant.
(vi) A schedule of fuel receipts provided by the Appellant.
(vii) Copies of Appellant's bank statements.
(viii) Witness statements by Officer Lee Marshall, Officer Martin Speed, Officer Joseph Bryan and Officer Turner for HMRC.

40. Mr. Hobson gave evidence on behalf of the Appellant company. He produced a letter from Mr Tony Law an employee of Apollo Fuels Limited, a company which supplies the Appellant with fuel, which said:

"I work as a tanker driver for Apollo Fuels Limited, Templebar Works, Sheffield Road, Sheffield, and on 3 October 2013, delivered to Kingsborough Haulage Limited of 5 Intake Road, Bolsover Business Park, Bolsover, Chesterfield, 500 L of gas oil and 2000 L of road diesel.

> The 500 L of gas oil was pumped into the outside heating fuel tank after which I cleaned my lines and then pumped the 2000 L of road diesel into the bonded Derv tank located inside the workshop doors."

The letter was not signed by Mr Law and was not on letter headed notepaper.

41. Mr Hobson agreed that both his independent chemical analysis and that of HMRC confirmed red diesel contamination. He said that the wet line method of fuel supply recommended by the Federation of Road Suppliers was not always guaranteed to prevent cross contamination. It inevitably depended upon the expertise, diligence and integrity of the driver.

42. He agreed that at the first detection he had not challenged the positive results of the two vehicles seized and had readily paid the restoration fees for their return.

43. Mr Hobson agreed that he had admitted purchasing 'second-hand fuel' from travellers but said he had only done so during the recession when trading conditions were extremely poor and only once a week. He knew he was taking a risk.

44. Although Mr Hobson said he challenged Officer Turner's audit, he was not able to challenge Officer Turner's methodology or provide any evidence to show why the assessment was not correct. He confirmed that he had been trading for over twelve years and was the main proprietor of the business. He was VAT registered and agreed that for that purpose he would have to maintain proper records including fuel receipts. He also agreed that after the first detection he had received letters from HMRC reminding him that it was an offence to use red diesel in commercial vehicles and that he had to maintain up-to-date and comprehensive records in the event of there being an inspection.

45. Officers Speed, Marshall, Bryan and Turner all gave sworn evidence on behalf of HMRC.

46. Officer Marshall gave evidence, in particular with regard to whether in his view there could have been cross contamination at the point of delivery. He said that fuel suppliers sign up to and always use the Federation of Road Suppliers method of wet line delivery which prevents cross contamination which involves pumping 100 L of clean diesel through the line before starting the delivery. Even assuming some trace contamination, one of the vehicles YN07 BWK showed a 4% mg/l contamination which in his view was exceptionally high. Uncontaminated fuel would not show any quinizarin content

47. Officer Bryan said that when the Appellant was interviewed he had never mentioned the possibility of wet line contamination. With regard to vehicle R2 HOB which had been driven off against his instructions, in his opinion the vehicle had been gone long enough for contaminated fuel to be drained off and for clean fuel to have been added. When tested the vehicle showed slight positive results.

The Appellant's contentions

48. At the hearing Mr Hobson said that his first ground of appeal had been accepted by HMRC. HMRC now acknowledged that vehicle A3 HOB, which tested positive on 23 May 2013, although taxed, was off the road and not being used. It had tested negatively at the second detection in October. Accordingly the vehicle's mileage for period 4, as calculated by Officer Turner (9,910.45), the litres of fuel required for the vehicle to cover that distance (579.558) and the duty payable on the 'difference' [see paragraph 34 above] would be allowed by way of further reduction in the duty assessed.

49. His second ground of appeal was that the fuel in the diesel storage tank and vehicles must have been cross contaminated by Apollo Fuels who he said had made a delivery of 500 L of gas oil to the Appellant's premises only two days before the detection on 3 October 2013. The gas oil was pumped into an outside heating fuel tank by wet line delivery. Although the driver, a Mr Law, says that he cleaned his lines before pumping 2000 L of diesel fuel into the diesel tank it was possible that there were still traces of gas oil present in the line.

50. With regard to his third ground of appeal, he said that the differential in the mileage figures was excessive and incorrect. Although he had not been able to produce sufficient evidence of valid fuel purchases, it was unfair to assume that all of the company's vehicles had been using rebated fuel during the entire assessment period.

HMRC's contentions

51. At the hearing HMRC confirmed that they acknowledged Vehicle A3 HOB, which tested positive on 23 May 2013, was off the road and not being used. Accordingly the vehicle's assessment for period 4 would be allowed by way of further reduction in the duty assessed.

52. Miss Newstead Taylor for HMRC said although the Tribunal had issued directions that both parties were to provide to the Tribunal and each other a statement detailing whether or not witnesses were to be called and if so their names, whereas HMRC had provided witness statements by Officers Speed, Marshall, Bryan and Turner, who had also attended to give evidence on oath, Mr Hobson had not provided a witness statement or indicated whether he was calling any witnesses. He had at one stage said that he would be calling a Mr Parsons, but a witness statement by Mr Parsons had not been provided and in fact it was not clear who Mr Parsons was.

53. Mr Hobson had provided results of an independent laboratory analysis by Intertek, which provides a consulting and chemical analysis service. The analysis of the samples which he had been given on the second detection simply confirmed the results of the laboratory analysis undertaken on behalf of HMRC by LGC Forensics. Intertek's analysis confirmed the presence of 0.24 mg/l quinizarin in the bulk Derv diesel tank, and in respect of the vehicles which tested positive, the quinizarin content was higher (averaging approximately 0.32mg/l). Officer Marshall had confirmed in

evidence that uncontaminated fuel would not show any quinizarin content. Oddly, the Intertek analysis did not include any results for vehicle M3 HOB.

54. Ms Newstead Taylor confirmed that on the morning of the hearing, Mr Hobson had handed to HMRC the letter from a Mr Law. She said that the letter could not be accepted in evidence or at the very least its authenticity questioned because the letter was not on letter headed notepaper, was not signed, and contained inconsistencies in that Mr Law referred to making a delivery of diesel fuel and gas oil on 3 October 2013, being the date of the second detection, whereas Mr Hobson had said in his interview under caution that the delivery have been made a couple of days earlier.

55. Ms Newstead Taylor said that in respect of the first detection, Mr Hobson had admitted in interview under caution that he purchased red diesel from travellers which he put or allowed his employees to put into his vehicles. He said that one of his employees had put red diesel into one of the vehicles "to get it going". At that stage he did not have a diesel oil storage tank on site. In respect of the vehicles which tested positive there was therefore no suggestion of any cross contamination from deliveries by his supplier Apollo Fuels. He does not challenge the positive results. The Appellant has therefore presented no valid grounds of appeal in respect of the assessment and penalties which followed the first detection.

56. In respect of the second detection, again Mr Hobson is not challenging the positive test results and therefore his only grounds of appeal are firstly that the assessment is wrong and secondly that there had been cross contamination, of which there was little if no evidence.

57. If indeed the driver had made a delivery on 1 October 2013 and had cleaned the delivery line prior to delivery of diesel, as he said he had, there would or should have been no cross contamination. A supplier would rigorously follow the recognised and recommended method of delivery to avoid any cross contamination. Apollo had delivered fuel before and after the first detection and also after the second detection without any contamination. If it was Apollo's fault why was the Appellant still using that company to deliver its fuel? No-one from Apollo Fuels had attended to give evidence. The burden of proof is upon the Appellant to show that the assessments and penalties were incorrect. That burden had not been discharged.

58. Officer Turner's audit was undertaken on a cooperative and transparent process. Mr Hobson had not been able to produce any evidence to challenge it. The audit period is relatively recent and it was only necessary for Mr Hobson to produce valid receipts for fuel used during that period to disprove Officer Turner's assessment. There was clearly a substantial shortfall between the fuel usage and evidence of legitimate fuel purchases which could only be referable to red diesel use.

59. HMRC are entitled to rely on the presence of illegal fuel in the vehicles tested as evidence of illegal activity. HMRC are also entitled to rely on the admission that the vehicles were filled with illegal fuel by employees of the Appellant and are allowed to infer that employees may have done the same thing to other fleet vehicles.

60. Mr Hobson has provided no information as to the nature of usage of the company's vehicles, nor provided any other evidence which would have demonstrated the mileage used by the Appellant's vehicle to prove that the mileage of those vehicles was less than the figures used in the estimate. Had he done so, HMRC could have amended the assessment accordingly.

61. The data relied upon by HMRC to estimate the Appellant during the assessment period has been used in numerous prior appeals and the Tribunal has accepted the data as reasonable in the absence of actual records. The Officer used manufacturers' guidelines to estimate the mpg for the vehicles involved in the estimate. The Appellant has produced no evidence to show that the methodology was unfair.

62. In the case of *Thomas Corneill & Co Ltd v Revenue and Customs Commissioners* [2007] EWHC 715 (Ch), Mann J said:

> "[30] ….It does seem that the tribunal considered that there had to be some close degree of identity between the fuel said to be red diesel and a particular lorry. I do not consider that the tribunal was right about this; ….It does not seem to me that the terminology of s 12(1)(a) requires that one has to catch a particular vehicle with red diesel in its tank or anything like that. An assessment can be made where it can be demonstrated that oil has been "used or is taken into a road vehicle in contravention of s 12(2)". It is not possible to read into that part of the section any particular evidential requirements as to how closely one has to tie any particular fuel to any particular vehicle. All one can say about the quality of evidence that underlies such an assessment is that there has to be enough. There is a contravention if it is taken into a road vehicle…..
>
> [32] Nothing can be read into the absence of a reference to "best judgment" in s 13. It is true that the expression is used in s 12 of the 1994 Act, but its absence from s 13 of HODA is, in my view, not a bar to the exercise of some judgment in the assessment which HMRC is entitled to make under s 13. It seems to me to be inevitable in the real world, and in many cases, unless a culprit is caught red-handed, that some element of judgment or assessment is going to be necessary to make the section work. I do not see why it should be confined to the red-handed. A recalcitrant haulier may mix red and white diesel from time to time in a manner which makes it impossible to say for certain that a specified quantity was used in a given lorry or lorries at a given time which would enable HMRC to show extremely clearly that over a period of time a given quantity of red diesel was used in unspecified lorries, even if none of them are caught with red diesel in the tanks. I can see no legislative purpose in excluding that situation from the operation of s 13 and there is nothing in the wording of the section which requires it.
>
> [33] I therefore consider that Mr Barlow is wrong in his submission that no element of estimation, or no significant element of estimation, is permitted under s 13. What is required under s 13 is appropriate evidence. Inferences can be drawn from primary facts. That is a standard process in many walks of life and is appropriate to assessments under s 13. Estimation in this context is merely one way of describing a process of inference."

63. It is clear from the *Corneill* case that the assessment does not have to be restricted to those vehicles tested and that HMRC were correct to include the Appellant's fleet vehicles when determining its assessment.

Conclusion

64. Mr Hobson does not dispute that rebated fuel had been taken into and used in the company's vehicles in contravention of s 12(1) HODA 1979. Neither does he dispute that HMRC are empowered to raise an assessment against him. He asserts that there must have been cross contamination in the second detection. He disputes Officer Turner's methodology for both the first and second assessments without particularising why that methodology may have been flawed. He feels the assessments are unfair.

65. The questions to be determined by the Tribunal are therefore, firstly, could the assessments have been properly made under s13 HODA? In respect of the first detection Mr Hobson admitted under caution that rebated fuel had been used in his company's vehicles and therefore in that regard, the assessment has been properly made. In respect of the second detection the issue is whether there could have been contamination. In relation to both detections, the question is whether the assessments have been carried out to best judgement. That is, does the evidence justify a finding that the diesel used by the Appellant in the vehicles for which it has not been able to produce valid fuel receipts was not rebated fuel. The assessment has to be based on estimates and best judgement. Although there is no reference to the use of best judgement in s 13 HODA, that is the recognised and inevitable method of assessment under s 13 where inferences have to be drawn from the primary facts.

66. With regard to the cross contamination argument put forward by the Appellant, the Appellant had not produced any evidence of previous accidental cross contamination. There is no record of any complaint by the Appellant to Apollo or any other fuel supplier of cross contamination occurring. Indeed the Appellant, it appears, still uses the same supplier. It also has to be borne in mind that Mr Hobson admitted putting rebated fuel into his vehicles on the first detection. The letter from Apollo was not on letter headed notepaper, was unsigned and gave inaccurate information. Mr Law neither attended to give evidence under oath, nor provided a witness statement. Mr Hobson has not provided a witness statement from anyone at Apollo that might have supported his assertion that accidental cross contamination can sometimes occur.

67. Fuel can be delivered using either a dry line delivery system or a wet line hose. A dry line system allows for more precise deliveries and eliminates any potential for fuel cross contamination due to the fact the fuel line is blown down at the end of each delivery. However in the wet line system, where fuel from a previous delivery of a different type of fuel can be held in the pipe when a product switch needs to be made, instead of using air to blow the pipe down, another product is needed to clear the pipe through. That is the system that was used according to the Appellant. However, undertaken correctly according to industry standards there should be no contamination. The burden of proof is on the Appellant to show that cross contamination may have happened. There is no evidence to show that there may have been some interface when line flushing was carried out.

68. With regard to the assessments, Mr Hobson has been unable to produce a full set of receipts to show clear and legitimate sources of all the diesel which his vehicles

used, or evidence that the estimated mileages were incorrect. We therefore find that HMRC were entitled to apply s 13 HODA and raise an assessment

69. It is for the Appellant to show that the assessment is wrong, either in its entirety or for a particular vehicle or period of assessment, so that if he is able to do so the assessment may be adjusted. For that purpose the Appellant has to show that the assessment is unreasonable by reason of its methodology or otherwise. If the Appellant asserts that the assessment is unreasonable it must satisfy the burden of proof upon it to demonstrate the correct amount of unpaid excise duty.

70. It is clear from *Corneill* that even if only one vehicle is shown to have tested positive for rebated fuel, s 13 HODA applies and permits HMRC to carry out an assessment even if the Appellant's other vehicles are not tested. Some common sense must of course be applied, but HMRC's calculations and assessments are not irrational or excessive. They are reasonable estimates and the calculations arrived at by accepted methodology.

71. When the Appellant's employees purchased fuel for the company's vehicles, payment must have been made either by fuel card or by an employee making payment themselves and giving the Appellant the receipt, which should have been readily available, together if necessary with other documentary evidence in the form of copy bank statements, to prove legitimate fuel purchases.

72. HMRC's calculation of mileage and fuel required is based on actual figures provided by the Appellant and reasonable estimates from accepted statistics and manufacturers' guidelines. They must therefore be regarded as reasonable in all the circumstances. HMRC's final amended assessment is based on a reconciliation of the fuel receipts Mr Hobson has provided in respect of legitimate fuel purchases and the estimate of fuel required to do the total mileage of his vehicles during the period of assessment.

73. HMRC are entitled to use estimates in order to assess the total mileage undertaken by company vehicles. In the absence of the Appellant demonstrating that it had not used rebated fuel in its vehicles during the periods of assessment, save insofar as evidenced by the fuel receipts produced, HMRC have acted reasonably in making the assessment.

74. It is reasonable and proportionate for HMRC to adopt a zero-tolerance policy as any tolerance levels in contamination would inhibit the ability of HMRC to detect fraud of laundered fuels. The presence of rebated fuel is an absolute offence. It would clearly create difficulties if it was possible for Appellants to rely on any allowed tolerance. A rigorous compliance regime is essential. In this case the levels of markers in each vehicle were different, but this simply suggests that the contaminations in the running tanks built up to different levels over time.

75. The Tribunal finds that the assessments were calculated on a fair and reasonable basis by HMRC. The assessments were not made capriciously or based on spurious estimates. The element of estimation does not serve to displace the validity of the

assessments which must be regarded as correct until the taxpayer has shown them to be wrong (see *Van Boeckel v Customs and Excise Commissioners [1981] STC 290)*.

76. The appeal is accordingly dismissed and HMRC's amended assessment in the amount of £113,404 is upheld.

77. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 14 DECEMBER 2015