



**TC04967**

**Appeal number:TC/2014/02638**

*EXCISE DUTY – misuse of rebated fuel – assessment – penalty – whether deliberate misuse – quantum of assessment and penalty – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**D CONNELL COURIERS  
(a firm)**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JONATHAN CANNAN  
MR PETER WHITEHEAD**

**Sitting in public in Manchester on 15, 16 July 2015 and 24 September 2015**

**Mr Josh Shields of counsel instructed by Cartmell Shepherd Solicitors for the Appellant on 15 and 16 July 2015 and Mr Darren Connell and Mrs Emma Connell partners in the Appellant on 24 September 2015**

**Mr Paul Joseph of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents**

## DECISION

### *Background*

1. The Appellant is a partnership between Mr Darren Connell and his wife Mrs Emma Connell. It operates a courier service in North West England and south west Scotland. On 24 August 2012 HMRC's Road Fuel Testing Unit ("RFTU") made an unannounced visit to the Appellant's premises and tested fuel in the running tanks of certain of the Appellant's vehicles. Two of the vehicles tested positive for rebated gas oil, commonly known as "red diesel".

2. The Respondents subsequently carried out a fuel audit on the Appellant's business and vehicles connected with that business. On 27 June 2013 an assessment was issued to the Appellant in relation to red diesel allegedly misused by the Appellant. The amount of excise duty assessed was £71,850 ("the Assessment") covering the period 1 June 2010 to 24 August 2012.

3. On 24 March 2014 the Respondents assessed the Appellant to a penalty under Schedule 41 Finance Act 2008 in the sum of £61,072 ("the Penalty") covering the same period as the Assessment.

4. By a Notice of Appeal dated 9 May 2014 the Appellant appealed both the Assessment and the Penalty. The grounds of appeal challenged various assumptions and estimates used by the assessing officer. In broad terms, the grounds of appeal can be summarised as follows:

(1) The assessing officer failed to take into account that there was a legitimate explanation for the presence of red diesel in the two vehicles.

(2) The assessing officer failed to take into account widespread legitimate use of red diesel by Mr Connell for agricultural purposes.

(3) The assessing officer over-estimated the number of road vehicles using red diesel.

5. The Appellant was represented by Mr Josh Shields of counsel and messrs Cartmell Shepherd Solicitors on 15 and 16 July 2015. On those two days we heard opening submissions, various applications and the evidence of both parties. We heard closing submissions on 24 September 2015, by which stage Mr Shields and Cartmell Shepherd were no longer instructed. On that date Mr and Mrs Connell were self-represented and they told us that they could no longer afford professional representation. The Respondents were represented throughout the proceedings by Mr Paul Joseph of counsel.

6. There was no real issue in relation to the law. It is well known that it is unlawful to use red diesel in the running tank of a road vehicle, save in respect of certain excepted vehicles including agricultural vehicles. Where such fuel is used unlawfully the Respondents can assess an amount of excise duty equivalent to the amount of the rebate pursuant to section 13(1A) Hydrocarbon Oil Duties Act 1979. They can also

assess a penalty pursuant to Schedule 41 Finance Act 2008 up to a maximum of 100% of the potential lost revenue depending on the level of culpability.

7. The Penalty in the present case was assessed on the basis that the Appellant's behaviour was deliberate and concealed. Credit was given for prompted disclosure by the Appellant such that the penalty was calculated at 85% of the potential lost revenue.

8. The Respondents accept that an assessment under section 13(1A) must be made to best judgment. The evidence necessary to support an assessment or to challenge an assessment will depend on the facts of the particular case. As Mann J stated at [31] in *Thomas Corneill v HM Revenue & Customs* [2007] EWHC 715 (Ch):

“ 31. ... There has to be a sufficient evidential linkage between rebated oil and use in a vehicle to give rise to an inference that oil in a provable quantity has been placed into a vehicle. Sometimes a great degree of particularity will be available, sometimes it will not. I can see no legislative purpose in defining some sharp cut-off line in a degree of particularity which is required. What is required is appropriate proof and evidence of the facts.”

9. Thomas Corneill was a case where the only direct evidence of the use of red diesel in road vehicles was the one lorry which was actually tested. No other red diesel was found in tanks on the premises or in other road vehicles tested at the premises. However there was sufficient indirect evidence in relation to supplies of red diesel and an absence of any evidence of supplies of legitimate duty paid diesel commonly known as “white diesel”. It is clear that the evidence as to use of red diesel must be considered in the context of the particular case and the facts found by reference to the balance of probabilities.

10. The principal issue in relation to the Penalty is whether and to what extent the Appellant deliberately put red diesel into the running tanks of road vehicles and whether it made arrangements to conceal that it had done so. We were not addressed specifically in relation to the burden of proof on an appeal against a penalty under Schedule 41, but we take it that the burden is on the Respondents to satisfy us that the Appellant acted deliberately and made arrangements to conceal its actions. Thereafter the burden is on the Appellant to satisfy us that the quantum of the Penalty is excessive for any reason. The principal issue we must determine in relation to the Assessment is the correct quantum. The burden is on the Appellant to satisfy us that it is excessive.

#### *Background Facts*

11. In this section of our decision we make findings in relation to background facts which were not disputed and also set out the basis on which the Assessment and the Penalty were calculated by Mr Ewan Villiers, the assessing officer.

12. Mr and Mrs Connell trade in partnership as D Connell Couriers. The business commenced in 2008 and it has always been based at 8 Sark Tower, Canonbie, Dumfriesshire (“Sark Tower”). Sark Tower also includes a farm known as Sark

Tower Farm. The Appellant keeps vehicles at Sark Tower, at premises in Carlisle which we understand belonged to the nationwide courier UK Mail and at premises in Gretna which we understand belonged to the nationwide courier Fed Ex.

5 13. Mrs Connell also runs a laundry and cleaning business called Esk Laundry. This is a partnership between Mr and Mrs Connell and Mrs Connell's mother which purchased the laundry business in 2008.

10 14. The Appellant's business is run by Mr Connell. It makes collections and deliveries of parcels as a sub-contractor for other large courier businesses. For that purpose it owns and operates a number of vans, employs van drivers and itself uses some self-employed sub-contractors. The precise number of vans, employees and sub-contractors is one of the principal issues in the appeal.

15 15. Mr Connell's father is Mr William Warbeck ("Mr Warbeck") who owns two farms. Sark Tower Farm mentioned above and Berclees Farm at Chapelknowe, Dumfriesshire. The two farms are run by Mr Warbeck, Mr Connell and Mr Connell's brother Mr Paul Warbeck ("Paul").

20 16. Sark Tower Farm comprises 260 acres of land and farm buildings including two farmhouses, one occupied by Mr Warbeck and the other occupied by Paul. There are also farm buildings, including a garage from which Mr Connell carried on the Appellant's business. The land is mainly arable, growing crops to feed beef cattle and sheep grazed on the land. Most of the work on Sark Tower Farm is done by Mr Warbeck and Paul.

25 17. Berclees Farm is a hill farm comprising some 500 acres of land. It is about 10 miles away from Sark Tower Farm. There is no farm house but there are a number of farm buildings. Mr Warbeck keeps a number of suckler cows there and Mr Connell keeps sheep there.

30 18. On 24 August 2012 the RFTU made an unannounced visit to Sark Tower and three of the Appellant's vehicles were tested. Two vehicles tested positive for red diesel, a Mercedes Sprinter van (P666 DCC) and a Ford Transit van (CK12 HHZ). The third vehicle was a Mercedes Sprinter van (P444 DCC) which tested negative for red diesel. A bulk storage tank at the Appellant's premises belonging to Mr Connell also tested positive for red diesel. The two vehicles, the bulk storage tank and the fuel in the tank were seized. The two vehicles were later restored to the Appellant on payment of a restoration fee.

35 19. Mr Bryan Dawson, a mechanic employed by the Appellant, was present at Sark Tower at the time of the RFTU visit. He invited the officers present to check vehicles belonging to Appellant at other locations but they declined. In the course of his evidence Mr Villiers himself expressed concern that those vehicles had not been tested, but we do not know why the RFTU officers declined the opportunity to test them.

20. On 3 September 2012 Mr Connell was interviewed accompanied by his solicitor. There was a transcript of the interview although we were only directed to limited aspects of what was said during the interview.

5 21. Mr Connell's purchases of red diesel were set out in statutory returns made by his suppliers to HMRC and showed the following pattern:

<b>Period</b>	<b>Average Red Diesel Purchases</b>
March 2004 – December 2006	1,000 litres every 2 months
January 2007 – December 2009	1,000 – 2,000 litres every year
January 2010 – May 2010	2,800 litres per month
June 2010 – July 2012	8,800 litres per month
September 2012 – March 2013	2,400 litres per month

22. Mr Warbeck also purchased approximately 1,000 litres of red diesel per month over the years 2007 to 2012. There was no suggestion that this was used for anything other than legitimate agricultural purposes.

10 23. During the course of Mr Villiers' audit the Appellant produced fuel receipts for white diesel purchased by it for road vehicles covering the periods 25 May 2011 to 31 August 2011 and 1 November 2011 to 29 March 2013. These showed the following pattern for the periods excluding August 2012, the month of the detection:

<b>Period</b>	<b>Average White Diesel Purchases</b>
May 2011 – July 2012	1,757 litres per month
September 2012 – March 2013	9,373 litres per month

15 24. In the 24 days of August 2012 up to and including the date of the RFTU visit the Appellant purchased 2,282 litres of white diesel. In the 7 days following the visit the Appellant purchased 2,223 litres of white diesel.

20 25. In the period January 2010 to March 2013 the average of total fuel oil purchases by Mr Connell and the Appellant was approximately 11,500 litres per month. It is not clear to us where Mr Villiers got figures for the purchase of white diesel in the period January 2010 to May 2011. It may be that he extrapolated from the fuel receipts he did have. In any event, the figures were not challenged by the Appellant.

25 26. Mr Villiers was satisfied from the evidence available to him including the pattern of purchases that there had been a large scale misuse of red diesel by the Appellant in the period June 2010 to August 2012. In order to calculate the amount of duty he considered to have been evaded he looked at two periods. Firstly the period 1 June 2010 to 22 May 2011 and secondly the period 23 May 2011 to 24 August 2012.

27. For the first period he calculated the average red diesel purchases in the period January 2010 to May 2010 to be 2,805 litres per month. He accepted that this was all legitimately used by the Appellant and he assumed that the legitimate use continued at that level. He deducted this level of purchases from the actual purchases of red diesel  
5 from 1 June 2010 onwards to give what he considered to be red diesel unlawfully used in road vehicles. This gave 71,075 litres which he estimated had been used unlawfully in the period 1 June 2010 to 22 May 2011, giving rise to a duty shortfall of £32,937.

28. For the second period Mr Villiers used a different method. He estimated the  
10 duty shortfall by reference to 39 specific road vehicles which he considered had been fuelled with red diesel. There were 30 commercial vehicles, mainly vans, 6 car derived vans and 3 cars. He accepted that 1 vehicle was not used in the relevant period. He made various assumptions which we consider below and estimated that those vehicles would have required 110,704 litres of diesel in the period. He gave  
15 credit for white diesel purchased in the period amounting to 27,574 litres and inferred that the balance of 83,130 litres represented red diesel on which the duty shortfall was £38,913.

29. As a cross check for the second period Mr Villiers identified the total red diesel  
20 purchased in that period as 130,843. He gave credit for legitimate use of red diesel at the rate of 2,805 per month and inferred that 88,768 litres had been unlawfully used. This compared to the 83,130 litres using details of specific vehicles and he based the Assessment on the lower figure.

30. The Appellant did not challenge the mathematics of these calculations but it did  
25 challenge the assumptions made by Mr Villiers which we consider below. The total duty assessed by Mr Villiers was £71,850.

31. Mr Villiers concluded that the appellant had deliberately used red diesel in road  
vehicles and had sought to conceal that fact during the course of the enquiry. He considered that the disclosure given by the Appellant during the enquiry in terms of  
30 explanations and access to records had been prompted by the RFTU unannounced visit on 24 August 2012. The maximum penalty was therefore 100% of the duty and the minimum penalty was 50% of the duty. He gave a reduction of 30% of the difference to reflect disclosure which led to a penalty equivalent to 85% of the excise duty, that is £61,072.

32. We have set out above the basis of Mr Villiers' assessment. In the next section  
35 of this decision we set out the substance of the evidence we heard from the Appellant's witnesses in relation to the disputed issues. We had witness statements and heard oral evidence from Mr Connell, Mr Warbeck, Paul and Mr Bryan Dawson for the Appellant. We also had witness statements and heard oral evidence from Mr Villiers for the Respondents. In a separate section we discuss the evidence and the  
40 issues, make our findings of fact and set out reasons for our decision.

*Evidence in relation to Disputed Facts*

33. In summary, Mr Connell's evidence in chief taken from his witness statement was as follows:

5 (1) White diesel for the business vehicles was stored in a tank at Sark Tower which had an electric pump. He described this as "Business Fuel" which was supplied by Allan Stobart Lubricants and Fuels. There was another tank at Sark Tower which was used to store red diesel and which had a gravity pump to fill agricultural machines and vehicles.

10 (2) Employees of the business were allowed to use their company vans for personal use but were not allowed to use Business Fuel when doing so.

(3) Agricultural vehicles and machines were used for farm and agricultural contracting work carried out by Mr Connell.

15 (4) Mr Connell put a blue dye in the Business Fuel to help him determine whether any employees were stealing Business Fuel. The effect was to dye not only the fuel but also the inside of the engine of vehicles using that fuel.

20 (5) The Appellant stopped keeping Business Fuel at Sark Tower in May 2011 because of difficulties in monitoring fuel use by employees and also because it was cheaper to switch to fuel cards supplied by Allan Stobart. The fuel cards could be used at any Morrisons fuel station and a fuel station at Houghton known as Robert Littles.

25 (6) From May 2011 onwards both tanks at Sark Tower were used to store red diesel. Since that time Mr Warbeck and Paul considered the original red diesel tank to be theirs although all three would on occasion pay for it to be filled. What was originally the white diesel tank was considered as belonging to Mr Connell. There was no formal agreement between them as to the use of and sharing of red diesel. There was an informal agreement that Mr Warbeck and Paul would generally use red diesel from their tank when using a vehicle. Most of the fuel was purchased by Mr Connell.

30 (7) Mr Connell keeps sheep and uses approximately 100 acres of Berclees Farm for grazing. Since 2009 he has also had some cattle. Apart from this there was little farming done at Berclees Farm.

35 (8) Mr Connell, Mr Warbeck and Paul have used various agricultural vehicles and machinery in running the two farms. This includes five agricultural tractors, various other tractors, a bailer, two quad bikes and two large excavators. The excavators were used to renovate the farms and by Mr Connell in his agricultural contracting business.

40 (9) Mr Connell would undertake agricultural work on the two farms on behalf of Mr Warbeck. He produced invoices from June 2010 and July 2011 outlining the jobs undertaken and the fuel used. He did not expect payment but had wanted to demonstrate to Mr Warbeck the work that he had done. Mr Connell helps on the farms and provides the majority of the diesel because he is grateful

that he is allowed to farm some of the land and to use Sark Tower Farm for the Appellant's business.

5 (10) Over the years much of the land at Berclees Farm had become run down and was covered in wild rushes and gorse bushes, also known as whins. In May 2010 Mr Connell took it upon himself to restore the 100 acres of land that he farmed there. He undertook a great deal of work to do this. He used red diesel to burn rushes and gorse and to run vehicles and machinery whilst carrying out the work. He excavated fire breaks, improved the drainage and constructed farm buildings. Once completed he intended to graze his sheep and cattle on that land.

10 (11) The process of restoring the land began in May 2010. He produced photographs showing the land before and after. He estimated that he had used 3,600 litres of red diesel burning rushes over a 3 month period. Red diesel from Sark Tower Farm was transported to Berclees Farm in 250 litre drums.

15 (12) Mr Connell's work at Sark Tower Farm included bailing and silage using tractors which can each use in the region of 350 litres of red diesel per day. In winter feeder wagons for the livestock would be used daily and would use approximately 180 litres of fuel per day. The livestock sheds would be heated in winter using red diesel.

20 (13) Mr Connell had also worked as a general agricultural contractor since 2000. He employed a Mr Paul McClean in that business until 2011. This would involve using farm machinery and red diesel. He identified specific jobs in 2010 and 2011 involving bailing, slurry spreading, fertilising, ploughing and drainage work. He exhibited some but not all the invoices for this work, and those invoices identified the amount of fuel used on the jobs.

25 (14) By 2010 the Appellant operated 4 runs for UK Mail with ad hoc work for Fed Ex. Most of the vehicles used for these runs were on hire to the Appellant. A run involves a morning delivery route and an afternoon collection route, 5 days a week, with occasional Saturdays.

30 (15) The Appellant obtained its first contract with Fed Ex in 2010 for one delivery run which was undertaken by Mr Tony Gilbertson. In fact the associated documentation shows that the first contract started in September 2009. This covered a 50 mile radius from the centre of Carlisle. In 2011 the Appellant secured a further contract with Fed Ex for an additional 3 delivery runs undertaken by Mr Wilkie, Mr Brown and Mr Murray. In July 2012 the Appellant secured a further contract for an additional 2 delivery runs undertaken by Mr Hartners and Mr Stainton. This resulted in a large increase in work and associated diesel usage. At the same time, because of the increased workload, Mr Connell was not able to undertake as much work on the farms which resulted in decreased usage of red diesel.

35 (16) Fuel in vehicles used in the business is regularly tested both by Fed Ex and UK Mail at their own depots and at the Appellant's premises.

40 (17) Tony Gilbertson had been driving the Mercedes Sprinter van (P666 DCC) which was tested positive by the RFTU. The vehicle had broken down because

of a faulty fuel pump. Mr Gilbertson then started to use the Ford Transit van (CK12 HHZ) which also tested positive and which was purchased only a week or so before the RFTU visit.

5 (18) When Mr Connell and Mr Dawson came to look at the Mercedes Sprinter van prior to the RFTU visit it was apparent that the inside of the fuel pump was dyed blue. Mr Connell therefore thought it more than likely that Mr Gilbertson had been using the Business Fuel which in the past had been dyed blue by Mr Connell. Mr Connell did not explain why, but this caused him to suspect that Mr Gilbertson had been stealing red diesel. Mr Connell also stated that he and Mr  
10 Dawson found red diesel in the van's fuel system.

(19) To test his theory, Mr Connell added blue dye to the red diesel tank shortly after the Mercedes Sprinter van had broken down. He subsequently checked the Ford Transit van being used by Mr Gilbertson and found blue dyed red diesel. He immediately dismissed Mr Gilbertson for stealing red diesel,  
15 shortly before the RFTU visit.

(20) At the time of Mr Connell's witness statement, which was signed on 4 February 2015, Mr Gilbertson was said to be awaiting trial for theft of a Ford Transit van which was on temporary hire to Mr Connell from Hertz. Mr Connell said that he was also involved in civil proceedings although it was not clear  
20 what those proceedings were or who the parties were.

(21) When Mr Gilbertson was sacked, his delivery runs were taken over by Mr Michael Waugh. Mr Waugh had been with Mr Gilbertson when Mr Gilbertson had been taking red diesel from the tanks at Sark Tower Farm. This led Mr Waugh to believe that he could do the same and he had filled up the Ford  
25 Transit van using the red diesel at Sark Tower Farm in the week before the unannounced visit.

(22) The RFTU officers did not test a Fiat van which was at the premises on the day of the visit. We assume this refers to a Fiat Scudo (WN59 PYL) which at the time had not been on the road for a considerable period.

30 (23) The Assessment fails to take into account that many vehicles which were assumed by Mr Villiers to have been fuelled on red diesel were either hired out to other individuals, were unroadworthy or were not used to the extent Mr Villiers has estimated. Vehicles which are hired out are not fuelled using the Appellant's fuel tanks or fuel cards unless the individual who had hired the  
35 vehicle was assisting the Appellant to fulfil its delivery contracts. Mr Connell exhibited what purport to be hire agreements with the individuals concerned.

(24) All vans used in the business have been tuned by a company called Viezu Technology to improve fuel efficiency. The estimates of miles per gallon used by Mr Villiers in the Assessment were therefore understated.

40 (25) Red diesel was never used in the Appellant's business, apart from the isolated incidents involving Mr Gilbertson and Mr Waugh

34. The Appellant's case is essentially that the only two vehicles in which red diesel were found were those which had been in the control of Mr Gilbertson and Mr Waugh. Only one other vehicle was tested and it was found to be negative. The

5 pattern of purchases of legitimate diesel and red diesel are explicable by reference to Mr Connell's use of red diesel for agricultural purposes. Further, many vehicles which formed part of the Assessment were not used by the Appellant in its business and should not have formed part of the Assessment, or at least not to the extent assumed by Mr Villiers.

35. We can also at this stage summarise the evidence in chief of Mr Warbeck, Paul and Mr Dawson.

10 36. Mr Warbeck's evidence was that he did not have any involvement in the administration or day to day running of the Appellant's business. He confirmed that he, Paul and Mr Connell did the bulk of the work on the farms. Mr Connell tended to work on the farms when the Appellant's business was quieter, and more particularly in the summer rather than the winter. He stated that a large amount of red diesel would be used on a daily basis. He stated that there was in fact a third 600 litre red diesel tank at Sark Tower Farm which belonged to him. He also owned a 5,000 litre  
15 red diesel tank and Mr Connell owned a 600 litre tank. He referred to Mr Connell at some stage switching one of the tanks from holding white diesel to red diesel.

37. Mr Warbeck recalled a time when Mr Connell was burning rushes and gorse at Birclees Farm and that it was done between June to August, starting either in 2010 or 2011.

20 38. Mr Warbeck stated that he had seen the Appellant's vans coming to Sark Tower Farm for servicing and maintenance and to be washed. He had never seen the Appellant's vans going near the oil tanks.

25 39. Paul's evidence was that red diesel was used a great deal on both farms. He also stated that Mr Connell tended to work on the farms when the Appellant's business was quieter. He recalled over a number of summers that Mr Connell was using red diesel to clear rushes from Birclees Farm. He thought it was between 2010 and 2012. He stated that Mr Connell used his own red diesel from his own tank for this purpose. He had never seen any of the Appellant's van drivers filling up using red diesel from the tanks at Sark Tower Farm.

30 40. Mr Dawson's evidence was that he had worked for the Appellant for roughly two years at Sark Tower Farm at the time he made his witness statement in February 2015. It seemed that his evidence was that he started working shortly before the RFTU visit because when he first began working for the Appellant he recalled working on a Mercedes Sprinter van which had broken down. He noticed red diesel in the fuel pump and immediately told Mr Connell. He also used red diesel when he was  
35 fixing it to check it was working correctly. He did not recall which van driver the van belonged to. He stated that he had never seen any van drivers filling up at Sark Tower Farm.

40 41. Mr Dawson was present on the morning of the RFTU visit. He invited the visiting officers to check vehicles at other locations where they were kept but the officers declined.

42. We have summarised above the evidence in chief of all the witnesses, based on their witness statements. We now consider various matters which arose during the course of their oral evidence.

43. Mr Connell's oral evidence in chief included reference to the following matters:

5 (1) He further described the work he had done at Birclees Farm. The rush burning took place over a period of about a year, on and off. Red diesel was used because it would just smoulder and not create a large fire. The other work took 2 or 3 years from 2009. On a dry week he said that he would be doing 10 to 12 hours a day, 7 days a week. He stated that he could get through 1,000  
10 litres of red diesel in a 2 day period. He painted a picture of intensive use of red diesel throughout the year at the two farms. He also described in more detail the agricultural contracting work he did on behalf of other farmers.

15 (2) The delivery vans were leased from a company called Network Leasing by Mr Warbeck. The reason for this was that Mr Connell could not get finance but his father could. However Mr Connell paid the leasing company each month by direct debit. After 4 years the vehicles were theirs, and Network Leasing permitted them to hire them out during that period.

20 (3) The vans would be hired out to independent drivers who worked for UK Mail and Fed Ex. The Appellant would service and maintain the vehicles but the drivers would have to fuel them. They were not used by the Appellant in its business in the period 2010 to 2012.

25 (4) Vans which had been hired out might on occasion show on the fuel cards used by the Appellant. This was because if the Appellant had been working on the van, they would run it for a week or two to make sure it was in good working order.

(5) A bank statement of the Appellant adduced during the course of the hearing shows receipts for van rental in December 2012. These were hire payments from individuals who had hired vans from the Appellant and were doing their own runs for Fed Ex or UK Mail.

30 (6) A sample of Mr Warbeck's bank statements shows receipts for van rentals in October and November 2011, May and June 2012 and August 2012.

(7) One of the vans hired out in this way was hired to Esk Laundry.

35 (8) All the runs done by the Appellant were done by the Appellant's employees, save for Mr Gilbertson who was self-employed. When the Appellant was very busy at Christmas it might also use self-employed drivers although that would be a rare occurrence.

40 (9) The Appellant adduced Employer Payment Records (P32) for the tax years 2010-11 and 2011-12. These were completed by the Appellant and showed 11 and 10 employees respectively over the course of the two years. In 2010-11 Mr McLean was included on the P32. He was a farm employee and was not involved in the Appellant's courier business. Hence Mr Connell said that there were 10 employees employed as drivers and apart from Mr Gilbertson

who was self employed these were the only drivers used by the Appellant in those tax years. He relied on this to support his case that he would have a maximum of 11 drivers on the road at any one time.

5 44. Mr Warbeck's oral evidence was that he was not really aware of the work done by Mr Connell at Berclees Farm. He thought the burning of rushes and gorse was in the same year and took a matter of weeks rather than days. He had been shocked that the vehicles were found to be running on red diesel and speculated that whoever had done it "must have got the wrong tank".

10 45. Paul's oral evidence was that Mr Connell had been renovating the land at Birclees Farm over 2 or 3 summers in 2010 to 2012, but that the main work was done in 2011. He described periods of intensive work rotovating, rolling and digging drainage ditches. He could not help with the quantity of red diesel that might have been used in this work other than to say that it was "quite a lot". He confirmed that he had not seen anyone filling up from the tanks at Sark Tower Farm, including Mr  
15 Gilbertson or Mr Waugh. Even in the period when Mr Connell said that he kept white diesel at Sark Tower Farm for use by the van drivers Paul could not recall anyone using the tanks.

20 46. Mr Dawson explained in his oral evidence that he had left school in 2009. At that time he started working part time for the Appellant as a mechanic. Prior to that he had helped out as a boy because his father worked at Sark Tower Farm. He said that he started working full time for the Appellant in 2013.

25 47. Mr Dawson also explained the Viezu technology, although he couldn't say when the Appellant first started to use it. The service involves altering the software in the engine management system so as to fine tune the fuel injector so that it delivers just the right amount of diesel to the engine.

48. Mr Dawson said that he had never seen any van driver fuelling using the tanks at Sark Tower Farm.

#### *Discussion and Findings of Fact*

30 49. We have set out above the basis on which the Assessment and the Penalty were raised and the substance of the Appellant's case that there was no misuse of red diesel. The issues involved in this appeal are essentially issues of fact. We now deal with our discussion of the factual issues and our findings of fact.

35 50. Mr Connell dealt in his witness statement with each of the 40 vehicles which Mr Villiers considered for the purposes of the Assessment in the period 23 May 2011 to 24 August 2012. We set out our findings in relation to those specific vehicles in Annex 1 to this decision. Those findings are based on the oral and documentary evidence before us, including records from the DVLA, MOT test certificates and the Appellant's fuel card records. As noted in Annex 1, the Appellant contends that a number of those vehicles were hired out to third parties who had their own courier  
40 businesses.

51. Vehicle P333 DCC was a Mercedes Sprinter van. We are satisfied from the documents that Appellant became the registered owner of this vehicle in or about May 2011. At that time the registration plate for the vehicle was SH57 ZRL. We were referred to what purported to be a hire agreement completed in manuscript and signed by a Mr Jason Smith in March 2010. It showed Mr Smith's name and address, the registration number of the vehicle being hired was stated as P333 DCC, the start date was March 2010 and the end date was March 2012. The hire rate was said to be £740 per month.

52. In his evidence Mr Connell was quite clear that this document had been signed by Mr Smith in March 2010. However it was pointed out, and we find as a fact, that the personalised registration number P333 DCC was not purchased by Mr Connell until March 2012 and it was not moved to the vehicle allegedly under hire until 30 April 2012. The registration number of the vehicle in March 2010 was SH57 ZRL and the vehicle was not registered to Mr Connell until May 2011. Mr Connell was pressed for an explanation of the registration plate discrepancy in cross examination but he could not offer any explanation.

53. We accept Mr Villier's evidence that he was unable to trace in HMRC's records anyone called Jason Smith at the address given on the hire form.

54. Vehicle P999 DCC was a Mercedes Sprinter van allegedly hired out to a Mr Rob Wilson. Mr Wilson apparently signed the hire agreement which showed that registration, a start date of 2 October 2010 and an end date of 5 November 2014. However the personalised plate was not put on the vehicle until 15 August 2012. When questioned about this vehicle Mr Connell stated that he had filled out some of the details on the hire agreement "for the purposes of the Tribunal", at or about the time he had produced his witness statement, which was February 2015. The same applied to the other hire agreements, including the agreement previously mentioned for P333 DCC. He maintained that the signatures were those of the hirers which he had also obtained at the time of his witness statement.

55. We accept Mr Villiers evidence that he could not trace the address on the hire form for Mr Wilson which was described as 188 London Road Carlisle.

56. It was clear from Mr Connell's evidence that he must have known very well why the Hire Agreement for P333 DCC showed a registration plate later than the date the document was apparently signed. We are drawn inevitably to the conclusion that he chose to feign ignorance during cross examination rather than admit that had fabricated at least part of the evidence he was relying on.

57. Vehicle AV10 FCV was a Mercedes Sprinter van allegedly hired out to Mr Brian Foster. We accept Mr Villiers evidence that there was no trace in HMRC's records of Mr Foster at the address on the hire form, nor was he able to trace the address itself.

58. Vehicle AV10 FDA was a Mercedes Sprinter van allegedly hired out to a Mr Paul Graham. We accept Mr Villiers evidence that there was no trace in HMRC's records of Mr Graham at the address given on the hire form.
59. Vehicle AV10 FDC was a Mercedes Sprinter van allegedly hired out to Mr Dan Charleton although the name written on the hire form was "Chalton". There was an incomplete address in Carlisle but we accept Mr Villiers evidence that there was no trace of Mr Charleton in the Carlisle area.
60. Vehicle AV10 GLK was a Mercedes Sprinter van allegedly on hire to Mr Nigel Brown. We accept Mr Villiers evidence that there was no trace of Mr Brown or indeed the address given on the hire form.
61. Vehicle CK12 HJZ was a Ford Transit van allegedly hired out to an individual called Gareth whose surname Mr Connell could not recall. No hire agreement or other details of the alleged hire were produced.
62. P888 DCC was a Mercedes Sprinter van also allegedly hired out to the same individual called Gareth. Again, no hire agreement or other details of the alleged hire were produced.
63. WG59 WYM was a Ford Fiesta van allegedly hired out to a Mr Martin Burney. No hire agreement or other details of the alleged hire were produced. Mr Connell said in evidence that the vehicle was hired out to Mr Burney for 4 years between 2010 and 2014 but he had never paid the hire charges. Quite why the vehicle was left on hire in those circumstances was never explained by Mr Connell. He did say that Mr Burney was presently serving a prison sentence.
64. Despite Mr Connell's claim that this vehicle was on hire, a letter dated 5 May 2013 from Mrs Connell to Mr Villiers describing vehicles owned by the Appellant did not identify it as a vehicle on hire. Nor did a letter from the Appellant's accountant dated 26 July 2013 which described this vehicle as broken down and off the road. There was no mention that it was a vehicle that had been hired out until Mr Connell claimed as much in his witness statement dated 5 February 2015. Even then no details of the hire were produced.
65. The Appellant was aware that Mr Villiers was questioning the existence of the hire agreements, the identity of the hirers and the addresses given for some of the hirers. However the Appellant produced no evidence to substantiate these matters.
66. We cannot take at face value the hire agreements which Mr Connell produced in support of the Appellant's case that certain vans were not used in the Appellant's business. We acknowledge that there is some evidence in the form of receipts into the Appellant's bank account and Mr Warbeck's bank account that certain vehicles were hired out. However the amounts received did not tally with the amounts in the hire agreements produced by Mr Connell. More importantly, there is no direct evidence other than what Mr Connell has told us as to the terms of the hire, what use the vehicles were put to and whether vehicles were fuelled by the individuals themselves or with diesel supplied by the Appellant. Even on Mr Connell's case the vehicles

would be used in the Appellant's business on occasions, albeit he described that as rare.

5 67. At one stage in his oral evidence Mr Connell maintained Mr Gilbertson was the only self-employed driver. He subsequently accepted that there was another self employed driver, Mr Dubeck.

10 68. Mr Connell stated in his witness statement that Business Fuel was supplied by Allan Stobart until May 2011 when the Appellant switched to using fuel cards also supplied by Allan Stobart. Allan Stobart informed Mr Villiers by email dated 5 March 2015 that they had never made bulk deliveries of white diesel to the Appellant. In cross examination Mr Connell stated that the bulk deliveries of Business Fuel had come from Robert Little's garage but only on a couple of occasions and they had not gone into the bulk tank. Instead they had been kept in a bowser.

15 69. There was no documentary evidence to support Mr Connell's evidence in this regard. His witness statement and his oral evidence were entirely inconsistent, not only as to the identity of the supplier but also as to the extent of white diesel being supplied in bulk and how it was stored. Mr Connell has produced no documentary evidence at all for bulk purchases of white diesel prior to May 2011. We do not consider that the evidence of Mr Warbeck, Paul or Mr Dawson corroborated Mr Connell's evidence. We find that there were no bulk purchases of white diesel at all. Mr Connell's evidence in his witness statement in relation to bulk supplies of white diesel was untrue and he must have known it to be so at the time he made his witness statement.

25 70. Mr Dawson's evidence that he found red diesel in the fuel pump of the Mercedes Sprinter Van was not challenged and we accept it. However it tells us nothing about how the red diesel got there. We must decide whether it was an isolated incident or common place because the vehicles were generally fuelled on red diesel. Prior to the RFTU visit Mr Dawson had only worked for the Appellant part time.

30 71. Mr Dawson's evidence was that he had never seen any van driver fuelling from the tanks at Sark Tower Farm was not reliable. He was working part time during the period of the Assessment. Further, his evidence that he did not notice van drivers filling up on white diesel prior to May 2011 does not corroborate Mr Connell's evidence as to the position. We are not satisfied that Mr Dawson would have known if the Appellant's vehicles were being fuelled with red diesel.

35 72. We accept Mr Warbeck's evidence that there were three oil tanks at Sark Tower Farm, only one of which belonged to Mr Connell. Mr Warbeck's evidence as to the use of the tanks was not reliable. In some respects his evidence was confused. For example when asked why he was shocked that the vans had tested positive for red diesel he suggested that the drivers must have got the wrong tank. Even on Mr Connell's case there had been no white diesel tank at Sark Tower Farm since May 40 2011 and his later evidence was that it was not stored in the bulk tanks.

73. Mr Connell's evidence was generally unsatisfactory and unconvincing. We have found significant aspects of his evidence to be untrue. More generally he was argumentative, vague and displayed a lack of candour. We are unable to accept his oral evidence save where it is corroborated by other reliable evidence.

5 74. Mr Connell's evidence as to the key issue, whether the Appellant's vehicles were fuelled with red diesel or white diesel could easily have been corroborated by independent evidence from one or more of the drivers. It is telling that there is no evidence from any of the drivers. Further there is no evidence whatsoever to show any purchases of white diesel between June 2010 and May 2011 when fuel cards were  
10 first used.

75. Mr Connell's evidence was that he was using red diesel for his agricultural contracting business in the period of the Assessment. Mr Connell certainly did have an agricultural contracting business and he included it as a source of income on his self assessment tax returns. In his return for 2009-10 he declared that his business as  
15 an agricultural contractor had ceased on 6 April 2009. However we saw invoices for such work in September and November 2009. Mr Connell explained that when the courier business was established his accountant had advised him to effectively merge the two businesses and income from agricultural contracting was included in the Appellant's turnover. There was no documentation to support this evidence but we are  
20 prepared to accept it for present purposes. However it was impossible to tell the extent of agricultural contracting work from the scant business records produced by Mr Connell. The records which were produced were incomprehensible. Mr Connell also accepted that his record keeping for the Appellant was "terrible".

76. Mr Warbeck stated in his oral evidence that he was not really aware what work  
25 Mr Connell was doing at Birclees Farm in 2011 and 2012. He did recall Mr Connell burning gorse and whins over the course of a few weeks during one year and also doing some drainage work. He did not paint the same picture of intensive work as Paul and Mr Connell in their evidence, however it may be that he was simply unaware of the extent of the work. He did confirm that over the winter animals would be kept  
30 in a shed at Sark Tower Farm and that the shed was heated using red diesel.

77. Paul painted a picture of substantial work being done by Mr Connell on Birclees Farm but unsurprisingly he was unable to give any estimate of how much red diesel would have been used.

78. Mr Connell and Mr Warbeck made some purchases of kerosene in the period of  
35 the Assessment. It was suggested by the Respondents that this was used to burn the rushes and gorse at Birclees Farm. Mr Connell maintained that it was used as heating oil at Sark Tower Farm and 3 other houses owned by the family. We cannot say on the evidence available to us what the kerosene was used for.

79. We are satisfied that Mr Connell did a substantial amount of work at Birclees  
40 Farm. Further, red diesel would be used for various agricultural purposes at the two farms. We cannot say what amount of red diesel was used for agricultural purposes and the Appellant has not satisfied us that it explains the pattern in the usage of red

diesel in the period of the Assessment. It was not disputed that in the period of the Assessment the Appellant had purchased 234,821 litres of red diesel. Mr Connell came nowhere near explaining how that amount of red diesel might have been used for agricultural purposes. His evidence was limited to vague assertions that the  
5 burning of rushes and gorse and heavy use of agricultural machinery would use a great deal of red diesel.

80. It was common ground that there was a large increase in red diesel purchases starting in June 2010 and ending immediately after the unannounced visit on 24 August 2012. There was also a corresponding increase in purchases of white diesel  
10 immediately after the RFTU visit. Mr Connell's explanation for this was that after August 2012 he had stopped doing the agricultural groundworks and the Appellant had got two additional runs for Fed Ex. We are prepared to accept that in July 2012 the Appellant obtained two additional runs for Fed Ex. However that would not account for the increase in white diesel usage from 1,757 litres per month prior to July  
15 2012 to 9,373 litres per month thereafter.

81. We must decide whether the Appellant deliberately put red diesel in the running tanks of its vehicles. In the light of all our findings of fact we are satisfied that it did. The burden is then on the Appellant to satisfy us that the quantum of the Assessment is excessive. In relation to the hire vehicles we are not satisfied that Mr Villiers was  
20 wrong to include them in the Assessment. The only evidence we have as to the fuelling arrangements for these vehicles is the uncorroborated evidence of Mr Connell which we do not accept. Further, including the hire vehicles in the Assessment for the period 23 May 2011 to 24 August 2012 does not produce a result which is out of kilter with an alternative calculation based on overall purchases of red and white  
25 diesel.

82. In the light of all the evidence the most likely explanation for the pattern identified by Mr Villiers is that prior to 24 August 2012 the Appellant had been using red diesel in road vehicles. We are not satisfied that the two vans which tested positive for red diesel were isolated instances. The allegation that Mr Gilbertson had  
30 been stealing red diesel, was being prosecuted for the theft of a van from the Appellant and his involvement in some form or civil proceedings was not substantiated. Even if true, we would not be satisfied that the presence of red diesel in his van was the full extent of the misuse. It is clear that following the RFTU visit the Appellant ceased to use red diesel in its vehicles and started using white diesel.

83. We make that finding conscious that the Mercedes Sprinter van P444 DCC tested negative for red diesel. We had no evidence as to the circumstances in which a vehicle which had been using red diesel might subsequently test negative for red diesel. It seems to us more likely that it was an isolated instance of one of the Appellant's vehicles being fuelled consistently on white diesel. The use of white  
40 diesel was taken into account by Mr Villiers in making the Assessment.

84. On 19 April 2013 Mr Villiers wrote to the Appellant indicating that he was doing an audit of fuel usage following the detection on 24 August 2012. He made a detailed request for various records in relation to all vehicles owned by the Appellant

since 1 April 2009. Mrs Connell replied on 5 May 2013 providing some details for 28 vehicles. 6 of those vehicles owned during the period of the Assessment were described as being on hire. Mr Connell has subsequently claimed that 9 of those vehicles were one hire. The vehicles for which Mrs Connell provided details included  
5 7 vehicles which Mr Villiers had not previously identified as belonging to Mr and Mrs Connell. In total Mr Villiers identified 40 vehicles owned during the period 1 April 2009 to 24 August 2012. On 13 June 2013 he set out his detailed findings in relation to those vehicles, the patterns of fuel purchases and usage by the Appellant and his estimate of what later became the Assessment.

10 85. There was then a telephone call between Mr Villiers and Mr Connell on 20 June 2013 in which Mr Connell stated that he was seeking legal advice. He was told by Mr Villiers that he should immediately notify him of the name of his legal adviser and if no records were supplied by 27 June 2013 then an assessment would be raised.

15 86. Mr Connell responded in an undated letter faxed to Mr Villiers on 26 June 2013. He indicated he was seeking advice, but in the meantime he stated that not all the vehicles identified were used daily in the business. He stated that 12 vans were used on a daily basis and 9 vans were hired out. In the absence of any further records or information Mr Villiers made and notified the Assessment on 27 June 2013.

20 87. As we have noted the Assessment was calculated using two methods for two separate periods. The burden is on the Appellant to satisfy us that the Assessment is excessive. In the first period from 1 June 2010 to 22 May 2011 Mr Villiers looked at the pattern of fuel purchases and estimated that 2,805 litres of red diesel per month were used legitimately. He deducted that from the actual purchases of red diesel and estimated the duty shortfall at £32,937. On the basis of the evidence we have heard  
25 and for the reasons given above we are not satisfied that was excessive.

30 88. In the second period from 23 May 2011 to 24 August 2012 Mr Villiers estimated the mileage of vehicles owned by Mr and Mrs Connell. We have set out in Annex 1 our findings in relation to each of the vehicles considered by Mr Villiers. In closing submissions, Mr Joseph provided some additional calculations of the duty evaded taking into account amendments to the mileages and periods of use for some of the vehicles which formed the basis for this part of the Assessment. Those amendments would have caused the Assessment to be increased slightly, but the Respondents did not ask us to increase the Assessment or the penalty. The Respondents' calculations must now be considered in the light of our findings in  
35 relation to the vehicles set out in Annex 1. We have found that in some respects the mileage and periods of use of the vehicles in the Assessment does require amendment. The effect of these adjustments is set out in Annex 2 which shows that the diesel required to run the Appellant's vehicles in the second period was 113,954 litres. The total white diesel purchased in that period was 27,574 litres leaving a shortfall of  
40 86,380 litres. The Assessment for this period was actually based on a smaller shortfall of 83,130 litres.

89. The Appellant also challenged the basis of the assessment in so far as it relies on estimated consumption figures for vehicles owned by Mr and Mrs Connell. We accept

the estimates of miles per gallon used by Mr Villiers which he obtained from various publicly available sources. Those estimates are set out in Annex 2. We do not accept that these are underestimates because they fail to take into account the Viezu tuning. Mr Dawson could not say when the Viezu technology was in use. The Appellant has produced no documentary evidence to support his assertion that all the vehicles used by the Appellant utilised the Viezu technology. We are not satisfied which, if any, of the vehicles owned and operated by the Appellant had been tuned in this way during the period 23 May 2011 to 24 August 2012.

90. Mr Connell contended that four employees were permitted to use vans to go from home to Carlisle and back again on a daily basis. He said that these vans were not used for the courier routes and the employees fuelled the vehicles themselves. The four employees lived in Galashiels, Dumfries, Berwick and Whitehaven and these journeys involved round trips of up to 180 miles. In the light of Mr Connell's evidence generally we are not prepared to accept his uncorroborated evidence in this regard. There was no corroboration. Whilst he named the individual drivers, none of them gave evidence.

91. Most of the analysis and calculations relevant for the purposes of this appeal relate to the use of red diesel by specific vehicles used by the Appellant. In our view Mr Villiers would have been justified in applying the same methodology to the period 23 May 2011 to 24 August 2012 as he had done in the earlier period going back to 1 June 2010. A comparative calculation of the second period using similar evidence and assumptions as had been used in the first period showed a slightly greater level of misuse amounting to 88,768 litres. We consider that HMRC could, consistently with best judgement, have used the same basis for both periods of the Assessment. In the event, the calculation by reference to oil supplies supports the calculation by reference to vehicles. Overall therefore we are not satisfied that the Assessment as a whole is excessive.

92. On the final day of the hearing we heard oral closing submissions. The oral submissions of Mrs Connell were based on a draft which Cartmel Shepherd provided to the Appellant following the first two days of the hearing. To that extent therefore the oral submissions of the Appellant were based on advice by its lawyers. We also had the gist of Mr Shields cross-examination. We have dealt with many of the points raised in our consideration of the evidence above. For the sake of completeness we should also consider the following matters raised on behalf of the Appellant.

93. We do not know why only 3 vehicles were tested by the RFTU. There may or may not have been a good reason. Obviously the more vehicles tested the better evidential base from which to determine the extent to which red diesel was misused. The position is not helped by the fact that the records kept by the Appellant were wholly inadequate. However we must reach our conclusions on the basis of the evidence which is before us and by reference to the balance of probabilities. We do not accept a suggestion by Mr Shields during cross examination that we should err on the side of caution in considering an assessment against a poor record keeper.

94. Mrs Connell submitted that direct evidence of red diesel in the running tanks of 2 vehicles was not a sufficient basis to assess so many vehicles. Mr Shields also suggested in cross examination that it was unreasonable for Mr Villiers to treat every mile as using red diesel unless there was direct evidence that it used white diesel. We do not accept those submissions. We have looked at the evidence as a whole and reached our conclusions based on that evidence and with due regard to the burden of proof. Firstly, for the reasons given above we consider that the Respondents have established on the balance of probabilities that the Appellant was deliberately misusing red diesel. We are also satisfied that the Assessment was made to best judgment. The Appellant had not satisfied us that the Assessment is excessive.

95. Mr Shields suggested that very few traders would be able to explain every mile driven by reference to records of purchases of white diesel. Whether or not that is right, we are concerned with this trader, specific evidence of misuse by this trader and the specific evidence as to the extent of that misuse.

96. Mr Shields suggested that Mr Villiers should have first identified the fleet of vehicles operated by the Appellant in its courier business and that in relation to a large number of those vehicles there was no evidence that they were operated as part of the Appellant's fleet. We do not accept that submission. The task of Mr Villiers was to identify the extent to which red diesel had been misused by the Appellant in road vehicles. The two vehicles in which red diesel was found were owned and operated by Mr and Mrs Connell as part of the Appellant's business. Mr Villiers was entitled to seek to identify all vehicles owned and operated by Mr and Mrs Connell which were associated in some way with the business. Whether they were used as courier vans, cars provided for the use of Mr and Mrs Connell, or vans owned by them and hired out to third parties acting as self-employed couriers.

97. Mr Shields suggested to Mr Villiers that if we were to conclude that there were only 10 courier runs then the Assessment should be based on only 10 vehicles. In fact Mr Connell's case was that there were only 8 runs until July 2012, 4 for UK Mail and 4 for Fed Ex. Be that as it may, we do not consider that Mr Shields suggestion was correct for the following reasons:

(1) It ignores the need to keep and maintain spare vans. There was direct evidence that some of the spare vans maintained by the Appellant did over 20,000 miles per annum;

(2) Mr Connell stated in interview that the Appellant also carried out runs for TNT and City Link.

98. Mr Shields suggested that the Appellant only had 10 employed drivers and 2 sub-contractors and could not have operated a larger fleet. For the reasons given above we do not consider that we can exclude the vans which were allegedly on hire to various individuals. Nor can we accept Mr Connell's uncorroborated evidence that there were only 2 sub-contractors.

99. Mr Shields criticised an assumption made by Mr Villiers that where there was no evidence for the mileage of specific vans, the mileage could be estimated at 20,000

miles per annum based on a Department of Transport survey. In one sense that assumption is arbitrary. However it seems to us that it was favourable to the Appellant, because the alternative would be to look at the average mileage for those of the Appellant's vehicles where mileage could be identified. We are satisfied that is substantially higher than 20,000 miles per annum. The one exception to this, where there is merit in Mr Shields' criticism, is the Iveco Breakdown Truck. That vehicle plainly had a specific purpose and for want of any more reliable evidence we must accept Mr Connell's estimate of approximately 500 miles per year.

100. Mrs Connell submitted that in the period June 2010 to 22 May 2011 HMRC were saying that 200 litres per day or 65% of red diesel purchased was misused. In the period 23 May 2011 to 24 August 2012 HMRC were saying that 85% of red diesel purchased was misused. We accept that these figures suggest large scale misuse of red diesel, but that is the finding we have made based in the evidence before us.

101. Mrs Connell made the point that Mr Connell's evidence in chief that the vans used for Fed Ex and UK Mail were regularly tested for red diesel by those companies was not challenged. It is certainly the case that Mr Connell wasn't challenged in cross examination about a short paragraph to that effect in his witness statement. However, for the reasons given above we do not accept Mr Connell's evidence unless it is corroborated. There was no other evidence to support Mr Connell's evidence that Fed Ex and UK Mail regularly tested the Appellant's vans for red diesel. We do not accept Mr Connell's evidence in this regard.

102. Mrs Connell submitted that if the Assessment is reduced then the Penalty should be reduced. Clearly that would follow, but for the reasons given above we are not satisfied that the Assessment should be reduced.

103. Mrs Connell also submitted that the percentage reduction in the penalty for disclosure was too low. She accepted that the Appellant's record keeping was poor but disputed that they had obstructed the investigation as Mr Villiers had alleged. They had since changed accountants and improved their record keeping.

104. We can only reduce the penalty in line with the provisions of Schedule 41 Finance Act 2008. We are satisfied that the misuse of red diesel by the Appellant was deliberate. We are also satisfied that throughout the enquiry and in these proceedings Mr Connell has sought to deny and conceal that misuse. He was prompted to supply some information and assistance to HMRC in quantifying the unpaid duty following the RFTU visit. The maximum penalty that can be imposed in those circumstances is 100% of the potential lost duty and the minimum penalty is 50%. We are not satisfied that nature of the Appellant's assistance justifies a reduction of more than the 15% which was given by HMRC. We therefore confirm the Penalty in the sum of £61,072.

### *Conclusion*

105. For all the reasons given above the appeal is dismissed.

106. 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.

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10 MARCH 2016**

## ANNEX 1

### Findings of Fact in relation to Vehicles used in the Assessment

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No	Registration	Vehicle Description	Findings of Fact
1	AV10 FCV	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 36,154 miles in the period 23 May 2011 to 24 August 2012.
2	AV10 FDA	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 36,317 miles in the period 23 May 2011 to 24 August 2012.
3	AV10 FDC	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 33,694 miles in the period 23 May 2011 to 24 August 2012.
4	AV10 GLK	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 27,906 miles in the period 23 May 2011 to 24 August 2012.
5	AV59 ANP	Mercedes Sprinter Van	Purchased by Mr Connell on 22 September 2009 and used by the Appellant in its business on average 33,785 miles per year. We are not satisfied that it did any less than 42,578 miles in the period 23 May 2011 to 24 August 2012.
6	AV59 ARU	Mercedes Sprinter Van	Purchased by Mr Connell on 22 September 2009 and used by the Appellant in its business on average 29,689 miles per year. We are not satisfied that it did any less than 37,416 miles in the period 23 May 2011 to 24 August 2012.
7	BV12 UGY	Volkswagen Transporter	Purchased new in May 2012 and registered to Emma Connell t/a Connell Couriers. There is no direct evidence of mileage but fuel was purchased using the Appellant's fuel card. It is likely that it was used in the Appellant's business. We are not satisfied that it did any less than 6,356 miles in the period May 2012 to 24 August 2012.
8	CK12 HHZ	Ford Transit Van	This vehicle tested positive for red diesel. It was purchased new by the Appellant on 24 May 2012 and used in its business. We are not satisfied that it had done any less than 14,873 miles in the period to 24 August 2012.
9	CK12 HJZ	Ford Transit Van	Allegedly on hire – The vehicle was purchased on 24 May 2012. We are not satisfied

			that it did any less than 5,041 miles in the period to 24 August 2012.
10	E12 DCC	Mercedes Sprinter Van	Described by Mr Connell as a spare business van which was 10 years old at the date of the visit. We find that it was used as a spare van when other vans had broken down and for odd jobs. It was therefore used in the Appellant's business. We are not satisfied that it was also used by employees to go to and from home or that any fuel was provided other than by the Appellant. The mileages recorded on MOT certificates are unreliable after 31 October 2011. The Assessment is based on an average mileage of 18,000 miles per year. Following the evidence the Respondents reduced their estimate to 14,353 per year. We are not satisfied that it did any less than 18,089 miles in the period 23 May 2011 to 24 August 2012.
11	FP56 FEJ	Citroen Berlingo	Mr Connell's evidence was that he purchased this vehicle in 2010 with a view to fixing it up and selling it on. The Respondents have accepted alternative evidence that it was purchased on 14 November 2011. We are prepared to accept the later date. We are satisfied that it was used in the Appellant's business but we do not accept Mr Connell's evidence that it did next to no mileage whilst in his possession. We are not satisfied that it did any less than 10,319 miles in the period to 24 August 2012.
12	KM56 ZNP	Mercedes Sprinter Van	We do not accept Mr Connell's evidence that this van was purchased for parts with a blown engine. It was purchased in or about June 2010 and we are satisfied from the MOT documentation that on average it did 52,688 miles per year. We are not satisfied that it did any less than 42,439 miles in the period 23 May 2011 to 11 March 2012 when its MOT expired.
13	P333 DCC	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 30,452 miles in the period 23 May 2011 to 24 August 2012.
14	P444 DCC	Mercedes Sprinter Van	This vehicle tested negative for red diesel. We do not accept Mr Connell's uncorroborated evidence that this was a low mileage vehicle used mainly for personal miles by him. For the reasons given in the decision we are satisfied that this vehicle was generally fuelled on red diesel. We are not satisfied that this vehicle did any less than 45,616 miles in the period 23 May 2011 to 24 August 2012.
15	P555 DCC	Ford Transit Van	This vehicle was not assessed on the basis that it was not used in the relevant period of

			the Assessment.
16	P666 DCC	Mercedes Sprinter Van	This vehicle tested positive for red diesel. The Appellant accepts that it was used in the Appellant's business. We are satisfied from the MOT documentation that it covered on average 23,502 business miles per year. We are not satisfied that it did any less than 29,619 miles in the period 23 May 2011 to 24 August 2012.
17	P777 DCC	Mercedes Sprinter Van	Mr Connell purchased this vehicle in May 2010 and it was used in the Appellant's business. We are not satisfied that it did any less than 62,200 miles in the period 23 May 2011 to 24 August 2012.
18	P888 DCC	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 58,563 miles in the period 23 May 2011 to 24 August 2012.
19	P999 DCC	Mercedes Sprinter Van	Allegedly on hire – We are not satisfied that it did any less than 36,486 miles in the period 23 May 2011 to 24 August 2012.
20	PX52 JYW	Fiat Scudo	Mr Connell contends that this was a van shared by employees for their journey to and from their homes in Galashiels to work and that it was fuelled by the employees. We are not satisfied that is the case. In 2011 it was fuelled using the Appellant's fuel card. We are satisfied that this vehicle was used by the Appellant for periods 23 May 2011 to 27 August 2011 and 6 June 2012 to 24 August 2012 (177 days) during which it did no less than 40,848 miles.
21	PX57 EUU	LDV Maxus	Mr Connell stated in evidence that this van was bought in late 2011 to fix up and sell on and that it did no mileage when in his possession. We do not accept that it did no mileage. We find that it was purchased in June 2012 and used in the business for 66 days until 24 August 2012. We are not satisfied that it did any less than 5,996 miles during that period.
22	PY09 GXE	Citroen Relay	We find that this vehicle was purchased on 11 August 2012. We are not satisfied that it did any less than 819 miles in the period to 24 August 2012.
23	R960 DWS	Iveco Breakdown Truck	This is a recovery truck and Mr Connell's evidence was that it did no more than 500 miles per year. The Assessment is on the basis of 20,000 miles per annum throughout the period of the Assessment. For the reasons given in the decision we accept Mr Connell's estimate and we are satisfied that it did no less than 630 miles in the period 23 May 2011

			to 24 August 2012.
24	SB57 FOU	Mercedes Sprinter Van	Mr Connell accepts that this vehicle was used by the Appellant in its business. We find that it was purchased on 1 June 2011 and in the period to 24 August 2012 it did no less than 23,869 miles.
25	SF55 AFZ	LDV Maxus	We do not accept the uncorroborated evidence of Mr Connell that this vehicle was purchased when the separate partnership involving Mrs Connell's mother purchased Esk Laundry in 2008. It was registered at the Appellant's address and not the laundry address with effect from December 2010. It was off the road for a period but was used in the Appellant's business between 23 May 2011 and 1 December 2011. In that period we are not satisfied that it did any less than 10,197 miles.
26	SH03 EYX	Ford Transit Van	This vehicle was purchased in September 2009 and used in the Appellant's business. DVLA records show the vehicle still registered to Mr Connell in September 2012. He contends that it was sold in 2011. However in June 2012 the fuel card records show it as having been fuelled. In the absence of any documentary evidence establishing a sale, we are not satisfied by Mr Connell's explanation that the driver must simply have used an old registration number on a fuel card. We are not satisfied that it did any less than 48,040 miles in the period 23 May 2011 to 24 August 2012.
27	S497 BSC	Iveco Ford Truck	The Respondents are satisfied and we find as a fact that this vehicle was purchased in March 2010 but was the subject of a statutory off road notification during the relevant period of the Assessment. It was not used during that period.
28	WN59 PYL	Fiat Scudo	The Respondents accept and we find as a fact that this vehicle was not on the road during the relevant period of the Assessment.
29	YJ56 PCU	LDV Maxus	The Appellant contends that this vehicle was bought in late 2010 with a view to fixing it up and selling it and that it was not used in the Appellant's business. In fact we find based on the documentary evidence that it was purchased in November 2011. It was declared off road from 3 November 2012. In the period November 2011 to 24 August 2012 we are not satisfied that it did any less than 15,945 miles.
30	YT12 XMO	Ford Transit Van	Mr Connell accepts that this vehicle was used in the Appellant's business. He states that it was on hire from Glen Rental from December 2012 to March 2013. There is no

			documentary evidence to support that it was on hire or the period of hire. Indeed in Mrs Connell's letter dated 5 May 2013 she stated that the vehicle was still on hire to the Appellant at that time. The registration number was also on the fuel card records from May 2012 to March 2013. We are satisfied that this vehicle was used in the Appellant's business from May 2012 to March 2013. We are not satisfied that it did any less than 4,822 miles in the period May 2012 to 24 August 2012.
31	YT12 PZN	Ford Transit Van	Mr Connell accepts that this vehicle was used in the Appellant's business. He states that it was on hire from Glen Rental from December 2012 to March 2013. There is no documentary evidence to support that it was on hire or the period of hire. Indeed in Mrs Connell's letter dated 5 May 2013 she stated that the vehicle was still on hire to the Appellant at that time. The registration number was also on the fuel card records from May 2012 to March 2013. We are satisfied that this vehicle was used in the Appellant's business from May 2012 to March 2013. We are not satisfied that it did less than 4,877 miles in the period May 2012 to 24 August 2012.
32	MK08 OZN	Ford Fiesta	Mr Connell's evidence was that this was a vehicle used by Mike Dubec to go from his home to the depot and back again, and occasionally as a spare van for parcel delivery in the Appellant's business. We find that Mr Dubec was a self employed contractor used by the Appellant. The vehicle was purchased by Mr Connell on 14 March 2012 and fuelled using the Appellant's fuel card. We are not satisfied that the vehicle was mainly used by Mr Dubec for home to work travel, that it was fuelled by him or that it was only used in the Appellant's business on an occasional basis. We are not satisfied that it did any less than 8,986 miles in the period 14 March 2012 to 24 August 2012.
33	NJ55 YPP	Ford Fiesta	This vehicle was purchased in August 2008. Mr Connell's evidence was that it was purchased as a spare van and rarely used in the Appellant's business. We accept by reference to the documentary evidence that it was off road from 1 July 2011. We do not accept Mr Connell's uncorroborated evidence that it was off road from late 2009 onwards. We are not satisfied that it did any less than 476 miles in the period 23 May 2011 to 1 July 2011.
34	SH57 FYW	Vauxhall Astra	Mr Connell accepted that this vehicle was used in the Appellant's business by Mike

			Dubec. It was purchased in April 2011 and sold in April 2013. We are not satisfied that it did any less than 16,930 miles in the period 23 May 2011 to 24 August 2012.
35	WG59 WXU	Ford Fiesta	Mr Connell accepted that this vehicle was used in the Appellant's business by one of his employees. It was purchased in late 2009 and sold in 2014. We are not satisfied that it did any less than 44,681 miles in the period 23 May 2011 to 24 August 2012.
36	WG59 WYM	Ford Fiesta	Allegedly on hire – We are not satisfied that it did any less than 42,793 miles in the period 23 May 2011 to 24 August 2012.
37	YF06 CYE	Ford Fiesta	Mr Connell accepts that this vehicle was used in the Appellant's business. We find that this vehicle was purchased in November 2008 and sold in March 2013 and used in the Appellant's business throughout that period. We are not satisfied that it did any less than 18,863 miles in the period 23 May 2011 to 24 August 2012.
38	NT02 BDY	Daewoo Musso	This is a 4x4 vehicle. Mr Connell stated that it was purchased for him to get to and from the business premises in snow. It was treated in the Appellant's accounts as a business asset. We are satisfied that it was used in the Appellant's business either for delivery of parcels or otherwise. We are not satisfied that it was fuelled using legitimate diesel. We are not satisfied that it did any less than 10,963 miles in the period 23 May 2011 to 24 August 2012.
39	E13 DCC	BMW 330D Sport	Mr Connell stated that this was a private vehicle which was not used for business purposes. One BMW was used by himself and the other by Mrs Connell. It was treated in the Appellant's accounts as a business asset. We are satisfied that it was used in the Appellant's business albeit not for delivery of parcels. We are not satisfied that it was fuelled using legitimate diesel. We are not satisfied that it did any less than 3,903 miles in the period 23 May 2011 to 24 August 2012.
40	K44 DCC	BMW 335D M Sport	Mr Connell stated that this was a private vehicle which was not used for business purposes. One BMW was used by himself and the other by Mrs Connell. It was treated in the Appellant's accounts as a business asset. We are satisfied that it was used in the Appellant's business albeit not for delivery of parcels. We are not satisfied that it was fuelled using legitimate diesel. We are not satisfied that it did any less than 7,744 miles in the period 23 May 2011 to 24 August 2012.

## ANNEX 2

No	Registration	Mileage in Period	mpg	Diesel Required (l)
1	AV10 FCV	36,154	33.2	4,950
2	AV10 FDA	36,317	33.2	4,973
3	AV10 FDC	33,694	33.2	4,613
4	AV10 GLK	27,906	33.2	3,821
5	AV59 ANP	42,578	33.2	5,830
6	AV59 ARU	37,416	33.2	5,123
7	BV12 UGY	6,356	36.8	785
8	CK12 HHZ	14,873	28.3	2,382
9	CK12 HJZ	5,041	28.3	810
10	E12 DCC	18,089	33.2	2,477
11	FP56 FEJ	10,319	45.0	1,042
12	KM56 ZNP	42,439	33.2	5,811
13	P333 DCC	30,452	33.2	4,170
14	P444 DCC	45,616	33.2	6,246
15	P555 DCC	0	28.3	0
16	P666 DCC	29,619	33.2	4,055
17	P777 DCC	62,200	33.2	8,516
18	P888 DCC	58,563	33.2	8,019
19	P999 DCC	36,486	33.2	4,996
20	PX52 JYW	40,848	40.4	4,596
21	PX57 EUU	5,996	28.9	943
22	PY09 GXE	819	28.7	129
23	R960 DWS	630	25.9	111
24	SB57 FOU	23,869	33.2	3,268
25	SF55 AFZ	10,197	28.9	1,604
26	SH03 EYX	48,040	28.3	7,717
27	S497 BSC	0	14.3	0
28	WN59 PYL	0	40.4	0
29	YJ56 PCU	15,945	28.9	2,508
30	YT12 XMO	4,822	28.3	775
31	YT12 PZN	4,877	28.3	783
32	MK08 OZN	8,986	61.0	670
33	NJ55 YPP	476	61.0	35
34	SH57 FYW	16,930	57.0	1,350
35	WG59 WXU	44,681	61.0	3,330
36	WG59 WYM	42,793	61.0	3,189
37	YF06 CYE	18,863	61.0	1,406
38	NT02 BDY	10,963	30.0	1,661
39	E13 DCC	3,903	42.0	422
40	K44 DCC	7,744	42.0	838
			<b>Total:</b>	113,954