[2016] UKFTT 0214 (TC)

TC04990

Appeal number: TC/2014/01581
TC/2015/00405

EXCISE DUTY – revocation of appellant's status as registered dealer in controlled oils - restoration of vehicles – whether HMRC's decisions unreasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEHZAD FUELS (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
REBECCA NEWNS

Sitting in public at The Royal Courts of Justice on 18 – 20 February 2016

Oliver Powell, instructed by Imran Khan and Partners, for the Appellant

Matthew Donmall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant company (the "Company") carries on a business that involves the wholesale purchase of fuel and its sale in smaller quantities to end users or retailers. In this consolidated appeal, the Company appeals against two decisions of HMRC:

(1) HMRC's review decision dated 19 December 2014 to refuse to restore four road fuel tankers (the "Vehicles") that HMRC seized from the Company on 5 March 2013. That review decision was in fact a "re-review" as this Tribunal's decision[1] (the "First FTT Decision") following a hearing on 4 and 5 August 2014 (the "First FTT Hearing") was that HMRC should perform a further review of their decision to refuse to restore the Vehicles and gave directions as to how that further review should be performed. We will refer to this aspect of the appeal as the "Restoration Appeal".

(2) HMRC's decision, upheld following a review on 18 February 2014, to revoke its approval of the Company as a registered dealer in controlled oil ("RDCO") under s100G of the Customs & Excise Management Act 1979 ("CEMA"). We will refer to this aspect of the appeal as the "Revocation Appeal".

Background

The difference between "red diesel" and "white diesel"

2. This appeal is concerned in large part with the distinction between "white diesel" and "red diesel". Interested readers are referred to the First FTT Decision for a more detailed explanation of this distinction. However, very broadly, "white diesel" is the diesel that is used in road vehicles and is subject to full excise duty. "Red diesel" is in all material respects an identical product to white diesel, but is subject to much lower rates of excise duty.

3. The intention is that red diesel is to be used in agricultural vehicles and similar vehicles which are not driven on the road. There are statutory prohibitions on using red diesel in road vehicles for the obvious reason that, if drivers did this, HMRC would be deprived of excise duty on white diesel. In order to enable red diesel and white diesel to be distinguished, chemical "markers" and a red dye are added to red diesel. The dye means that red diesel is very different in appearance from white diesel. The chemical markers for red diesel can also be detected by means of chemical analysis and therefore there are more sophisticated methods than mere visual analysis of determining whether a product is, or contains, red diesel.

4. Given the difference in excise duty rates between red diesel and white diesel, some fraud takes place. The most basic version of the fraud simply involves fuelling a

[1] Reported at *Behzad Fuels UK Ltd v HMRC* [2014] UKFTT 850 (TC)

road vehicle with red diesel and hoping that this unauthorised use of red diesel is never identified. However, there are more sophisticated versions of the fraud which involve seeking to remove either the red dye or the chemical "markers" from red diesel to enable it to be passed off as white diesel. This process is known as "laundering".

Biodiesel

5. Biodiesel is diesel that is produced by first converting biomass or vegetable oils (such as recovered vegetable oils) into fatty acid methyl esters ("FAME"). The FAME so produced is then blended into normal (mineral) diesel in order to produce biodiesel. The British Standard for diesel road fuel stipulates a maximum FAME content for biodiesel which is currently 10%.

6. FAME can degrade if stored for a long time. Red diesel is largely sold to farmers who in many cases stockpile large quantities which they purchase when they consider the price to be favourable. It follows that since red diesel is often stored for lengthy periods, manufacturers do not typically make it with FAME.

7. Biodiesel is subject to a lower rate of excise duty than ordinary white diesel. However, biodiesel can be used in road vehicles and, for that reason, there is no need for statutory markers to be added to biodiesel.

Wet line procedures

8. Given the scope for fraud involving red diesel and white diesel, HMRC are given powers to seize fuel that consists of a mixture of red diesel and white diesel and vehicles containing such fuel. It is, therefore, important that red diesel and white diesel are stored separately so that white diesel does not inadvertently become contaminated with red diesel. Particular care is needed where red diesel and white diesel are both to be dispensed using the same hose. In these cases, wholesalers will typically follow "wet line procedures" (for example blowing compressed air through the hose to clear as much red diesel from the hose as possible before using that hose to dispense white diesel) in order to minimise the amount of contamination.

The First FTT Decision

9. The Company accepted both at the First FTT Hearing and now, that fuel found in the white diesel storage tank at its premises and in the running tanks of the Vehicles contained markers for red diesel. However, it maintains that this was merely because white diesel had been contaminated by red diesel by poor wet line procedures. It denied that any of the fuel in question was laundered in the sense outlined at [4]. One of the reasons relied upon by HMRC in their refusal to restore the Vehicles at the time of the First FTT Hearing was the conclusion of Officer Bines (the reviewing officer) that the fuel in question was laundered. Therefore, during the First FTT Hearing, the Company relied on the expert evidence of Dr Horace Stinton to seek to establish that the fuel was not laundered. HMRC relied on the expert evidence of Mark Rafferty which indicated that the fuel was laundered.

10. The Tribunal did not express a conclusion one way or the other in the First FTT Decision. At paragraph [50] of its decision the Tribunal stated (when considering whether HMRC's decision not to restore seized fuel was reasonable):

> However, given that Dr Stinton accepted that laundering was a possibility for the contamination of the white diesel we consider that there was evidence on which Ms Bines could reach such a conclusion.

11. At paragraph [53] of the First FTT Decision, when considering HMRC's decision to refuse to restore the Vehicles, the Tribunal said:

> As Mr Powell submits, there is no evidence that vehicles BX05 RYT or V407 ECY were being used for laundering or transporting contaminated fuels.

12. Mr Powell submitted that this was a positive finding that the company's vehicles were not being used for laundering. However, we do not agree. Paragraph 53 of the First FTT Decision immediately follows paragraph 52 which summarised submissions that Counsel for HMRC made. We consider that, the first sentence of paragraph 53, the Tribunal was similarly summarising submissions that had been made to it by Mr Powell (acting for the Company) rather than making findings of fact. That conclusion is borne out by the fact that paragraph 53 is not in the section headed "Findings of fact". Moreover, if the Tribunal were making a finding of fact, it would be highly relevant to HMRC's subsequent review and yet, the Tribunal made no direction, in paragraph 55 of the First FTT Decision, requiring HMRC to take it into account when performing their re-review.

13. Ultimately, the Tribunal concluded in the First FTT Decision that HMRC's decision to refuse to restore the seized fuel was reasonable, but directed a further review of HMRC's decision to refuse to restore the Vehicles.

The HMRC decisions at issue in this appeal

14. Officer Matthew Sayers made the decision to revoke the Company's RDCO approval on 5 November 2013, before the First FTT Hearing. That conclusion was upheld following a review of Officer Sayers's decision that was completed by Officer Liz Elliott on 18 February 2014. Since Officer Elliott's review conclusion stated simply that Officer Sayers's decision was upheld, all the material reasoning was contained in Officer Sayers's letter.

15. The Company made the Revocation Appeal on 19 March 2014 but it was evidently agreed that the Revocation Appeal should not be considered until the Tribunal had considered the Restoration Appeal at the First FTT Hearing. We will deal with Officer Sayers's decision in more detail later in this decision. In summary, he concluded that fuel found in the running tanks of the Vehicles and in the Company's bulk storage tanks was laundered and this formed a key component of his conclusion that the Company's RDCO status should be revoked.

16. Following the First FTT Decision, HMRC reconsidered, but confirmed, their refusal to restore the Vehicles. Officer Brown reviewed that decision in a letter dated

19 December 2014. There was some dispute as to the precise reasons why Officer Brown upheld the refusal to restore the Vehicles and we will deal with that dispute later. However, it is clear from Officer Brown's review letter that she was not basing her conclusion primarily on a determination that there was laundered fuel in the Vehicles and that a significant component of her reasoning was her conclusion that, prior to her review, there had been two separate occasions on which "contaminated fuel" had been found in the running tanks of vehicles belonging to the Company.

17. In February 2015, the Revocation Appeal was consolidated with the Restoration Appeal.

Preliminary matters relating to procedure and evidence

The Company's application to put forward expert evidence

18. The Tribunal's case management directions for this appeal (as consolidated) made no provision for expert evidence. However, it was common ground between the parties that for a period they proceeded on the basis that expert evidence would be given in the consolidated appeal. For example, in July 2015, the Company served a supplemental report of its expert, Dr Stinton, on HMRC. In August 2015, HMRC informed the Company that they would be relying on expert evidence in the form of Mr Rafferty's expert report prepared for the First FTT Hearing and would be calling Mr Rafferty to give live evidence.

19. Shortly prior to the hearing, the Company applied for formal permission from the Tribunal to rely on expert evidence of Dr Stinton. HMRC objected to that application on the basis that, in their submission, the Tribunal had, in the First FTT Decision, already decided that it was reasonable for HMRC to conclude that fuel found in the Company's white diesel storage tank was contaminated as a result of laundering. Therefore, Mr Donmall argued that, if the Tribunal turned its mind again to the question of laundering it would place itself in a difficult position. However, Mr Donmall said that HMRC were not fighting shy of engaging with the expert evidence and, if the Tribunal was minded to admit expert evidence, they would seek to rely on the expert report that Mr Rafferty had prepared for the First FTT Hearing and would call Mr Rafferty for cross-examination on that report as he was available to attend this hearing if necessary.

20. In answer to a question from the Tribunal, Mr Donmall confirmed that HMRC were not seeking to argue that the decision in *HMRC v Jones and Jones* [2011] EWCA Civ 824 meant that it was a "deemed fact" before the Tribunal that the fuel in question was laundered. He confirmed that HMRC had seized that fuel merely because it was "contaminated" with red diesel (a fact which is not disputed). Accordingly, a finding that the fuel was laundered did not underpin HMRC's decision to seize that fuel and he accepted that the Company was not precluded by the decision in *Jones* from arguing that the fuel was not laundered.

21. Mr Powell's response to Mr Donmall's objections outlined at [19] was that the Tribunal had made no explicit finding that the fuel either was, or was not, laundered.

In those circumstances, he argued that the Company should be permitted to seek to establish, by means of expert evidence, that the fuel was not laundered, as that was a relevant issue in this appeal.

22. Having heard the arguments from Mr Donmall and Mr Powell, we decided to direct that both Dr Stinton and Mr Rafferty could put forward expert evidence. We reached that decision for the following reasons:

(1) In the First FTT Decision, the Tribunal decided only that it was reasonable for HMRC to conclude that the fuel found in the Company's white diesel storage tank was laundered. That is not the same as a finding that the fuel was laundered. Nor would the Tribunal be reaching an inconsistent decision in this appeal if it concluded that the fuel was not actually laundered as it would simply be concluding that HMRC's suspicion that the fuel was laundered, while reasonable, was wrong.

(2) In Officer Sayers's letter of 5 November 2013 revoking the Company's RDCO status, Officer Sayers stated positively that HMRC officers "had detected mixing and laundering of fuel". He also stated expressly that the Company was involved in that laundering[2]. Therefore, it is at least arguable that HMRC were justifying their decision on RDCO status, not just by reference to a reasonable suspicion that the fuel was laundered, but by the assertion that it was actually laundered. If that were the basis of HMRC's decision, the Company should be given the opportunity to show that it was wrong by establishing, with expert evidence, that the fuel was not actually laundered.

(3) The Tribunal reached the conclusion described at [22(1)] in the part of the First FTT Decision dealing with HMRC's refusal to restore fuel that had been seized. While it might be reasonable for HMRC to refuse to restore fuel on the basis of a reasonable suspicion that it was laundered, it was at least arguable that a higher threshold should be met before it would be reasonable to revoke the Company's RDCO status which would result in the Company ceasing to be able to carry on its business.

(4) Since HMRC's expert could attend the hearing and had already prepared an expert report for the First FTT Hearing, HMRC would not be prejudiced by the admission of the Company's expert evidence as it could rely on expert evidence of its own.

Evidence

23. For the Company we had evidence from the following witnesses of fact:

(1) Jayakrishna Krishna Menon, the Vice Chairman of Behzad Corporation (the parent company of the Company) and a director of the Company;

[2] In his oral evidence Officer Sayers subsequently withdrew his reliance on the allegation that the Company was actually involved in the laundering.

(2) Suresh Vattekkattu Kumaran, the Finance Manager of the Company; and

(3) Eldho James, the transport manager of the Company who has also previously been employed in the role of assistant accountant at the Company.

24. All of the above witnesses prepared witness statements and were cross-examined. We found them all to be honest and reliable witnesses.

25. As we have noted, Dr Stinton gave expert evidence on behalf of the Company and was cross-examined. His evidence was clear, dispassionate and useful – exactly the qualities that the Tribunal looks for in expert evidence.

26. For HMRC, we had evidence from the following witnesses of fact:

(1) Officer Sayers who, as we have noted, made the original decision to revoke the Company's RDCO status; and

(2) Officer Brown who, as noted, performed the review of the decision to refuse to restore the Vehicles.

27. Both of HMRC's witnesses prepared witness statements and were cross-examined. We found them both to be honest and reliable witnesses.

28. Mr Mark Rafferty gave expert evidence on behalf of HMRC and was cross-examined. His evidence was, like Dr Stinton's, clear, dispassionate and useful.

FINDINGS OF FACT

29. As well as the background findings at [2] to [8] (which we did not understand to be in dispute), we have made the findings of fact set out at [30] to [82].

The Company's business

30. The Company is a wholly owned subsidiary of Behzad Corporation, a business conglomerate based in Doha with an annual turnover of approximately £50 million.

31. The Company was incorporated in 2008, obtained RDCO status on 24 June 2008 and started trading in 2009. The establishment of the Company was part of Behzad Corporation's global expansion plans designed to capitalise on the group's expertise and experience in the fuel sector. Initially the Company's business involved the sale of both red diesel and white diesel. However, from 2011 onwards the Company has focused on the sale of red diesel and kerosene.

32. In essence the Company purchases fuel in bulk from fuel producers or suppliers and resells and delivers that fuel in smaller quantities to end users or retailers. Prior to the seizures of the Vehicles it had a fleet of five road fuel tankers and, on average, undertook about 20 deliveries per day.

The seizures of vehicles in 2009

33. On 12 June 2009, which fell on a Friday, the Company made a delivery of fuel to a garage near Liverpool. The Company's transport manager at the time was Mr Prashant Chandran. For some reason, in breach of the Company's usual policy, Mr Chandran had not required the customer to pay for this fuel in advance. Anticipating problems, Mr James, who at the time was employed by the Company as an accountant, was asked to accompany Mr Chandran on the delivery.

34. The fuel was duly supplied. However, the customer alleged that the fuel the Company supplied was not "road worthy" and asked the Company to take it back. The Company contacted HMRC, informed them of the allegation that their customer was making, and asked them to carry out tests. Accordingly, on the same day, HMRC officers attended the Company's vehicle and tested both fuel in its container pots and in its running tank. No problems were identified with the fuel in the container pots. However, HMRC officers found that the fuel in the running tank was contaminated with red diesel.

35. HMRC seized the vehicle. However, they immediately entered into a "Restoration Agreement" which Mr James signed on behalf of the Company. Under the Restoration Agreement, HMRC agreed to restore the vehicle to the Company for a fee of £500. One of the terms of that agreement was as follows:

> I acknowledge that this vehicle contains rebated fuel and that it must have all traces of fuel removed from its running system in 24 hours from the time of release.

It also contained a warning in the following terms:

> Warning
>
> You are advised that on any future occasion that this vehicle or any other vehicle driven or owned by you is detected misusing rebated fuels, HM Revenue & Customs may enforce tougher sanctions including non-restoration of the vehicle.

36. At around 6.30pm on 12 June 2009 the vehicle started its journey of some 400km (or 250 miles) back to the Company's business premises in Rainham. It arrived just before midnight on 12 June 2009. From the vehicle's tachograph, we have concluded that from 12 June 2009 to 17 June 2009 it did not move and was stationary in the Company's yard.

37. On 16 June 2009, officers of HMRC visited the Company's yard in Rainham and conducted tests on fuel found in the running tank of the same vehicle that was seized, and restored, on 12 June 2009 and found traces of red diesel in its running tank. The vehicle was again seized, but a Restoration Agreement entered into under which the Company agreed to pay a fee of £500 and HMRC agreed to restore the vehicle. That Restoration Agreement included the following paragraph:

> THIS IS THE SECOND OCCASION that you have been detected with a vehicle fuelled on rebated fuel. You are therefore advised that on any future occasion if this vehicle or any other vehicle driven by Behzad

> Fuels is detected misusing rebated fuels, HM Revenue and Customs will seize the vehicle and will not return it to you, as well as assessing you to the rebate you have fraudulently taken.

38. On 16 June 2009, the Company wrote to HMRC to ask for the £500 that they had paid to be rebated stating that the vehicle's running tank had been emptied "to the extent physically possible" and refilled with white diesel and that the positive test for red diesel was the result of residual contaminating particles being present. The Company also made the point that the testing on 12 June 2009 had taken place following the Company's own request for HMRC to conduct tests. However, HMRC refused the Company's request and the Company did not require HMRC to institute condemnation proceedings.

The seizures in 2013 – whether laundered fuel was present

39. In this section, we will give reasons for our overall conclusion that the fuel found in the white diesel storage tank, and in the running tanks of the Vehicles, on 4 March 2013 was "laundered". In a subsequent section, we will consider the separate, but related, question of whether the Company was itself involved in the "laundering".

Findings of fact in the First FTT Decision

40. Paragraphs 24 to 42 of the First FTT Decision set out factual matters relating to the seizure of the fuel and the Vehicles following a visit by HMRC officers to the Company's business premises on 4 March 2013. In the interests of brevity, we will not repeat all facts that the FTT found in those paragraphs, but we have nevertheless treated them as established facts for the purposes of this decision. We would, however, draw particular attention to the following findings:

> (1) In Paragraphs 15 and 21 of the First FTT Decision, the Tribunal accepted without challenge evidence given by Mr Makkatu, a former employee of the Company, to the effect that without authorisation from, or knowledge of, the Company or Behzad Corporation, shortly after the Company began trading, he conducted experiments on the purification of biodiesel that involved the use of bleaching agent.
>
> (2) In addition, paragraph 25 of the First FTT Decision contains a finding that two 25kg bags labelled "bleaching earth" or "bleaching agent" were found on the Company's premises during HMRC's visit.

The statutory markers

41. Both Dr Stinton and Mr Rafferty were agreed that there were three relevant "markers" that are added to red diesel namely quinizarin, solvent red 24 and solvent yellow 124. The law stipulates minimum concentrations in which these individual markers must be added, but does not specify precise concentrations. However, while the precise concentration of any individual marker is not specified, the ratio between the concentrations of the markers is specified. In red diesel, the concentrations of quinizarin, solvent yellow 124 and solvent red 24 are in the ratio of 1.75 to 6 to 4.

42. The process of laundering involves the removal of these statutory markers. One method that can be used is "laundering by adsorption" which involves the addition of an adsorbent material that acts as a "chemical filter" and removes these markers. Fuller's earth (or bleaching earth) is one commonly used adsorbent material. This process can vary in its efficacy and can result in part only of the statutory markers being removed. In addition, this process can result in different markers being extracted in different proportions resulting in those markers being present in ratios that differ from those specified at [41].

43. If white diesel and red diesel are mixed together an analysis of the resulting mixture will show that the statutory markers are present. That of itself will demonstrate that the sample is not pure white diesel (since pure white diesel contains no statutory markers). However, the mere mixing of red diesel and white diesel will not alter the ratio of the concentrations that the various statutory markers bear to each other.

44. If chemical analysis shows that the ratio between the concentrations of the various statutory markers is different from that set out at [41], that suggests that the sample contains laundered fuel as it suggests that the addition of an adsorbent material has disturbed the ratio between the various markers.

The chemical analysis of samples of fuel taken from the Company's premises and Vehicles

45. LGC Limited, a firm of forensic chemists, ("LGC") performed chemical analysis on samples of fuel taken from the running tanks of each of the four Vehicles and a sample of fuel taken from the Company's white diesel storage tank. The salient features of that chemical analysis were as follows:

(1) Each of those samples contained the statutory markers found in red diesel, which confirmed that they contained red diesel.

(2) The sample from the running tank of one of the Vehicles contained 0.14mg of quinizarin per litre of fuel. That was around 8% of the quinizarin that would be expected if the sample consisted entirely of (unlaundered) red diesel.

(3) The other samples from the running tanks of the vehicles and the white diesel storage tanks contained around 0.08mg of quinizarin per litre of fuel. That was around 4% of the quinizarin that would be expected if those samples consisted entirely of (unlaundered) red diesel.

(4) The ratio of quinizarin to solvent yellow 124 in each of the samples was between four and six times the expected ratio of 1.75 to 6.

(5) The sample taken from the running tank of one vehicle contained 2% FAME by volume. All other samples contained 4% FAME by volume.

46. Mr Rafferty's conclusion was that the only reasonable explanation for the difference in ratios referred to at [45(4)] was that each of the samples contained

laundered red diesel and not merely white diesel that had become contaminated with red diesel.

47. Dr Stinton agreed that laundering was one possibility. However, he suggested that there might be a second. He noted that the FAME found in biodiesel can produce a precipitate which can block vehicle fuel filters. He said that studies showed that FAME can have a chemical effect on mineral diesel when it is blended with that diesel to make biodiesel. He acknowledged that he was not aware of any study dealing with the effect that FAME might have on the statutory markers found in red diesel (largely because, as noted at [6], FAME is not generally present in red diesel). However, his evidence was that it must be considered possible that, if biodiesel and red diesel were mixed, the precipitate formed by FAME could act in the same way as an adsorbent and disturb the ratio between the statutory markers found in red diesel.

48. Dr Stinton's evidence at [47] was potentially of significance given Mr Makkatu's experiments involving the purification of biodiesel. Moreover, all of the samples referred to at [45] tested positive for FAME. Therefore, while the Company would still need to explain how FAME came to be mixed with red diesel, Dr Stinton's alternative explanation could suggest that the reason why the statutory markers were not present in the correct ratios was because red diesel had merely become contaminated with biodiesel containing FAME and a reaction between the FAME and the statutory markers in the red diesel disturbed the ratio between those markers. In short, therefore, this alternative explanation if correct might suggest that the fuel in question was not laundered, but merely contaminated.

Our conclusion on whether the fuel was laundered

49. For reasons set out at [50] to [52] we concluded that all of the samples referred to at [45] contained laundered fuel.

50. Both experts were agreed that the fact that the ratio of quinizarin to solvent yellow 124 was considerably in excess of 1.75 to 6 was at least indicative that the fuel in the samples was laundered. It was only if we accepted Dr Stinton's alternative hypothesis, outlined at [47], that the presence of FAME had the effect of altering the ratio of quinizarin to solvent yellow 124, that there would be an explanation that would displace the indication that the fuel was laundered. Dr Stinton fairly admitted both in his expert report and in cross-examination that the hypothesis as to the effect of FAME on the statutory markers in red diesel was hypothesis only and was not backed up by research, although there was evidence of FAME taking out other components of mineral diesel and causing problems when mixed with mineral diesel. He also accepted in cross-examination that, taking the chemical analysis in isolation, he would conclude on a balance of probabilities, that the samples contained laundered fuel.

51. Dr Stinton explained the qualification that he made about taking the chemical analysis in isolation by saying that the chemical analysis was not the only evidence relevant to laundering. Some evidence could also be derived from financial and other information. For example, if an analysis of the Company's financial data showed that it was purchasing much more red diesel than it sold, and was selling much more white

diesel than it purchased, that could be evidence that it was laundering red diesel into white diesel. Similarly, if the data showed that it was purchasing exactly the same amount of red diesel as it sold, that might point against the conclusion that the fuel was laundered.

52. We accepted the general point that the chemical analysis is not the only relevant evidence, but we considered that it was clearly evidence of significant weight. The financial evidence that Dr Stinton mentioned was certainly relevant but perhaps might be more relevant to the question of whether the Company was actually itself laundering the fuel and less relevant to the question of whether the fuel at the Company's premises was laundered. In any event, no submissions were made by reference to the Company's financial records. If the Company had wished to assert that these records suggested a different conclusion from that of the chemical analysis it had the onus of proving the necessary facts. The Company did not do this. Therefore, based on the evidence of the chemical analysis alone we have concluded, as both Dr Stinton and Mr Rafferty concluded, that on a balance of probabilities the fuel was laundered.

Whether white diesel was merely inadvertently "mixed" with small quantities of red diesel

53. Since we have reached a positive conclusion that the fuel samples referred to at [45] contained laundered fuel, we will not deal in any great detail with the Company's arguments that the presence of the statutory markers for red diesel in the fuel samples could be explained by white diesel becoming inadvertently contaminated with red diesel by poor wet line procedures.

54. One argument that the Company advanced related to the fact, referred to at [45], that the samples of fuel contained only 4% to 8% of the quantity of statutory markers for red diesel that would be found in a sample of pure red diesel. It was suggested that this demonstrated that the samples seized consisted of a mixture consisting of 96% white diesel (or 92% for one sample) and 4% red diesel (or 8% for one sample). It was submitted mixing white diesel with red diesel in such low concentrations would not make economic sense in terms of the amount of excise duty that could be evaded and accordingly an innocent explanation should be preferred, namely that poor wet line procedures resulted in red diesel and white diesel being inadvertently mixed.

55. For reasons set out below, even ignoring the conclusions that we have reached on laundering, we are not satisfied on a balance of probabilities that the samples consisted primarily of white diesel that had been inadvertently mixed with small amounts of red diesel.

56. The first point to note is that, just because a sample contains 4% of the statutory markers that would be found in a sample of pure red diesel, it does not follow that the sample consists only of 4% red diesel. It might just as well consist of 92% white diesel that has been mixed with 8% red diesel that has been subjected to a laundering process that has removed 50% of its statutory markers. To put the point in a more extreme way, the sample could consist entirely of red diesel that has been subjected to

a laundering process that has successfully removed 96% of its statutory markers. Therefore, the argument at [54] proceeded from a false premise.

57. The FAME content of the samples was a limiting factor as to the amount of red diesel that could be present in the samples. Therefore, it would not actually be possible for the samples to consist entirely of red diesel from which 96% of the statutory markers had been removed by a laundering process. That is because the samples consisted of between 2% and 4% FAME whereas red diesel is unlikely to contain any FAME at all. Dr Stinton's evidence was that, at least when he prepared his report, the amount of FAME that could be included in biodiesel was around 7% of total volume, although he thought the figure might have been 5% at the time of the seizures. However, no firm evidence was advanced as to the amount of permissible FAME at the time of the seizures. Even if that figure was 5% as Dr Stinton suggested, it was still possible for the samples containing 4% FAME to consist as to 80% of biodiesel (containing 5% FAME) and as to 20% of red diesel (containing no FAME). That would amount to significant contamination of white diesel with red diesel, too much to be explained by poor wet line procedures.

58. Overall we considered that there were simply too many unknowns for us to be able to conclude, on a balance of probabilities, even ignoring the conclusion we reached on the fuel being "laundered", that the fuel in the white diesel storage tank had been inadvertently contaminated with red diesel.

Whether the Company was involved in the laundering of fuel

59. At [49], we have concluded that laundered fuel was present in the Company's white diesel storage tank, and in the running tanks of the Vehicles, at the time of the seizure in 2013. This section considers the separate question of whether the Company was itself involved in the laundering of that fuel.

60. Given that the Company is seeking to establish that HMRC's decisions were unreasonable, to the extent that it wishes to rely on the fact that it was not involved in the laundering of the fuel, it has the burden of establishing that fact. We do not consider that the Company has discharged that burden. However, that should not be interpreted as a positive finding that the Company was involved in the laundering of fuel. Nor should it be interpreted as a finding that the Company's witnesses of fact were dishonest or gave misleading evidence. As we have said, we found those witnesses to be both reliable and honest. We explain our reasons in more detail below.

The competing evidence

61. We will not recite in detail all the evidence that we heard on this issue, but will summarise certain aspects of that evidence.

62. There was some evidence that suggested the Company could be involved in laundering[3]:

(1) During HMRC's visit in 2013, they took a sludge-like sample from one of the container pots on one of the Vehicles which was referred to at the hearing as "the sludge". Mr Rafferty's evidence was that the sludge was bleaching earth (an agent known to be used in the laundering of fuel) and contained markers for red diesel. Dr Stinton did not dispute that the sludge contained markers for red diesel, but considered that it could simply be rust from the inside of the container pot of the relevant Vehicle rather than bleaching earth.

(2) The FTT found as a fact in the First FTT Decision that two 25kg bags marked "bleaching agent" or "bleaching earth" were found during HMRC's visit in 2013 and seized.

63. There was equally evidence that suggested that the Company was not involved with the laundering:

(1) Dr Stinton's evidence, which we accepted, was that if the Company was laundering fuel in large quantities at its yard it would in all likelihood be using toxic chemicals to do so. That would have an impact on the environment at the yard. However, when he visited the Company's yard in August 2013, he not only saw no evidence of the presence of the necessary chemicals, he also considered the vegetation and wildlife at the yard to be healthy.

(2) Dr Stinton's evidence was that the large scale laundering of fuel would not be a discreet operation. The Company's yard is situated next to a 24-hour truck stop and even at night time, drivers were often at that stop sleeping in their cabs. (Mr Rafferty disagreed with this, however, stating that he had experience of large-scale laundering operations being conducted in the middle of industrial estates).

(3) HMRC officers had visited the Company's premises in 2011 and it was common ground that no evidence of laundering, or laundered fuel, was found during that visit.

(4) We found that the Company had shown itself to be honest in its dealings with HMRC. It had specifically requested HMRC to perform tests on its fuel in 2009. Mr Menon, a senior executive of Behzad Corporation voluntarily flew from Doha to attend, with Mr Kumaran, an interview under caution on 7 March 2013, shortly following the seizure. During that interview both Mr Kumaran and Mr Menon were asked if any of the Company's vehicles had been seized before and both replied that they had

[3] Initially, it was argued that the fact that a sample of soil taken from near the Company's white diesel storage tank contained markers for red diesel was evidence that the Company was involved in laundering. However, it was eventually accepted that this could simply have come from the run-off when the Company's lorries were washed near the white diesel storage tank and therefore we have not considered it to be evidence consistent with the Company engaging in the laundering of fuel.

not. They gave that answer because they simply did not remember, at the time of the interview, the previous seizures in 2009. They realised shortly after the interview that they had inadvertently given an incorrect answer to the question and, on 11 March 2013, the Company wrote to HMRC to correct their answer and to remind HMRC of the seizures in 2009.

Our conclusion based on the evidence

64. If the sludge was bleaching earth, that would suggest (though would not conclusively prove), that the Company was involved in laundering. Both Dr Stinton and Mr Rafferty were agreed that, when fuel is laundered by adsorption, steps must be taken to filter out the adsorbent material as otherwise it would damage the engine of any vehicle that used it. Therefore, if the Company had been supplied with laundered red diesel by a third party, one might expect it to be free of any bleaching earth that had been used to launder it. Accordingly, if bleaching earth were present in a storage pot of one of the Vehicles that might suggest that the Company was using that storage pot in the course of laundering fuel and had not yet completed the final stage of filtering that fuel. (Of course it might also suggest that the Company had been supplied with laundered fuel from a launderer who simply did not bother to filter it after laundering. However, we considered that to be less likely as a fuel launderer who did not filter the fuel would damage his customers' engines and might not be expected to stay in business for long.)

65. Mr Rafferty was clear in his evidence that the sludge was bleaching earth saying that he couldn't think of anything else it could be. Moreover, Mr Rafferty was supervising the team at LGC that performed the chemical analysis on all samples, including the sludge. That team therefore saw the sludge first hand and Rattanjit Gill, a chemist under Mr Rafferty's supervision, wrote a letter on 18 March 2013 setting out his view that the powder was "consistent with bleaching earth/fullers earth material that has been used to remove or 'launder' the markers from UK rebated Gas Oil."

66. Dr Stinton questioned Mr Rafferty's conclusion. He had not himself seen the sludge but noted that it was described as a "slurry" when sampled but later evidently became a "fine red/brown powder". He said that there was no record of any chemical analysis of this solid part of the sludge, and noted that Rattanjit Gill had said only that it was "consistent with" bleaching earth. He suggested that it was not clear where the sample had been taken from, whether from the inside of the pot of the Vehicle or not. For all of those reasons, he concluded that it was "unsafe and unscientific" to conclude that the solid part was bleaching earth. In view of what he considered to be a lack of evidence, he did not want to speculate on what the substance actually was but concluded that it might be nothing more than rust from the interior of the pot on the relevant vehicle which had absorbed some of the statutory markers from red diesel being transported in that pot.

67. We prefer Mr Rafferty's conclusion that the solid part of the sludge was bleaching earth. Mr Rafferty's team at LGC expressed the conclusion that it was bleaching earth and, since that team performs thousands of tests each year on laundered fuel, could be

expected to know bleaching earth when they saw it. Moreover, Dr Stinton had not actually seen the sludge and was not able to say positively that the sample was not bleaching earth: his opinion was simply that a lack of scientific rigour suggested that the substance might not be bleaching earth. Dr Stinton's opinion was, entirely appropriately given the evidence that he had in front of him, a nuanced opinion. We did not consider it was enough to displace Mr Rafferty's confident evidence. Finally, we did not consider that Dr Stinton was correct to say that there was doubt over the provenance of the sludge. The sample was taken by Officer Flaherty during the visit on 4 March 2013 and Officer Flaherty's notebook contained the following entry:

> Swabbed Pot No 1 with clean blue role [sic] which had red sludge on it when extracted. Placed blue role with red sludge to Rantanjit from LGC sealed with AB0439112.

The fact that Officer Flaherty referred to the blue roll being "extracted" indicates that the sample was taken from the inside of the container pot of one of the Vehicles.

68. We also considered that the presence of bags marked "bleaching earth" or "bleaching agent" at the site was potentially significant. Mr Powell suggested that there was no evidence that these bags actually contained bleaching earth and no chemical analysis of the bags' contents had been performed. However, if Mr Powell wished to establish that the bags' contents did not correspond with their description, he would bear the burden of proving this and no evidence was advanced to support such a conclusion. Bleaching earth is used to launder red diesel. Moreover, while the FTT found as an (unchallenged) fact that Mr Makkatu used bleaching agent in his own experiments involving biodiesel, it made no finding of fact which precludes a finding that the Company was also using bleaching earth to launder red diesel.

69. We did not consider that the evidence at [63(1)], [63(2)] and [63(3)] pointed strongly in either direction. If the Company were engaged in laundering, it might simply have chosen a more discreet spot than its own business premises to undertake that laundering. Equally, if the Company were laundering fuel, it might reasonably be expected to hide any laundering agents before Dr Stinton's visit which took place several months after the seizure. The fact that no evidence of laundering was found in 2011 does not preclude the possibility that the Company was laundering fuel in 2013.

70. Therefore, if matters stopped there, we would have concluded on a balance of probabilities (based on the evidence of the sludge and the presence of fuller's earth at the Company's premises) that the Company was laundering fuel particularly given the absence of any other explanation as to how laundered fuel came to be present in the Company's white diesel storage tank. However, the Company's evident honesty in its dealings with HMRC referred to at [63(4)], and the fact that we considered the Company's witnesses to be honest and reliable has caused us to stop short of making a positive finding that the Company was involved with laundering. We have not made a positive finding that the Company was not involved with laundering partly because of the points made at [64] to [69] and because we consider that it was possible for the Company to be involved in laundering without Mr Menon, Mr Kumaran or Mr James being aware of this. Mr Menon is based in Doha and said in his evidence that he did not know about the experiments that Mr Makkatu was performing with biodiesel

which demonstrated that Mr Menon could not know about everything that was going on at the Company. Both Mr Kumaran and Mr James were based in the UK but said that, while they were aware that Mr Makkatu was performing experiments on biodiesel, neither of them knew that those experiments involved bleaching earth. Therefore, even people based in the UK were not aware of precisely what was going on at the Company's premises. Overall, therefore, the Company has not discharged the burden of proving that none of its agents or employees were involved in the laundering of fuel.

Officer Sayers's decision on revocation of the Company's RDCO status

71. Officer Sayers made his decision to revoke the Company's RDCO status in a letter of 5 November 2013. The material part of that letter read as follows:

> - On the 04/03/13 HMRC officers detected mixing and laundering of fuel. Fuel uplifted shows that you were mixing ultra low sulphur diesel with laundered gas oil and extending gas oil with kerosene.
> - At Behzad Fuels HMRC Officers seized 16,600 litres of laundered fuel from the bulk tank and 6000 litres of Gas Oil.
> - HMRC also seized 4 HGV road fuel tankers, 2 full, 1 empty and 1 being used for laundering. The marked rebated oil was being passed from pod to pod along the tanker as it moved through the laundering process. Waste bleaching earth was sampled from around the sides of the pods as well as 2 full bags of bleaching earth were also uplifted from inside a locked container and hidden in an old washing machine.
> - Purchase and sales invoices were scheduled and there are discrepancies with the different type of fuel purchased and sold.
>
> As a consequence in order to protect the Revenue your approval as a Registered Dealer in Controlled Oils is revoked with immediate effect by virtue of the Customs and Excise Management Act 1979, section 100G(5).

72. Officer Sayers made that decision before the First FTT Decision was released. In his witness statement for this appeal, he stated that he would make the same decision in the light of the facts that the FTT found in the First FTT Decision based only on his belief that the fuel seized from the white diesel storage tank, and the fuel found in the running tanks of the Vehicles, was laundered. In cross-examination, he elaborated on that point. He accepted that the Vehicles had not been used for laundering fuel. He accepted that there was no evidence that the bags of bleaching earth that were seized were "hidden". He also accepted that he had not himself seen any evidence of "discrepancies" between the fuel purchased and the fuel sold and conceded that it was unreasonable of him to rely on this as a factor in his original letter.

73. We concluded, therefore, that by the time of the hearing, Officer Sayers genuinely held the view that revocation of the Company's RDCO was appropriate on the basis

only that laundered fuel was found in the white diesel storage tank and in the running tanks of the Vehicles. Later in this decision, we will consider whether that conclusion was reasonable.

Officer Brown's review decision

74. Officer Brown set out her review decision in a letter dated 19 December 2014. In her letter she quoted the directions set out in the First FTT Decision requiring HMRC to take into account four factors in particular when re-reviewing their decision. She also set out her view that:

> …the Tribunal has directed that there is no evidence of the vehicles being used for laundering or transporting contaminated fuels.

As noted at [12], we consider that Officer Brown was mistaken in her conclusion that the Tribunal made a positive direction to this effect in the First FTT Decision.

75. Her conclusion was that the Vehicles should not be restored (whether for a fee or otherwise) broadly because the latest seizure was the third occasion on which contaminated fuel had been found in the running tanks of vehicles owned and operated by the Company and that the warning notice referred to at [37] had warned specifically that a "strict non-restoration policy" would be applied on the occasion of a third seizure.

76. In her witness statement, Officer Brown also confirmed that the fact that 18,000 litres of laundered fuel had been seized from the white diesel storage tank was a further factor that supported her decision. In cross-examination she accepted as a "fair summary" Mr Powell's proposition that there were four components underpinning her decision:

> (1) that this was the Company's third offence,
>
> (2) that four vehicles (rather than just one) were involved,
>
> (3) that there were a number of factors suggesting that laundered fuel was on the site (and it did not matter whether it was the Company or someone else who had done the laundering),
>
> (4) that it was proportionate not to restore.

77. Officer Brown was cross-examined as to how she went about performing her review and the amount of discretion that she considered she had. The position that emerged from that cross-examination was somewhat unclear. In her witness statement, Officer Brown stated that "in all the circumstances of the case and in consideration of HMRC's policy" she decided not to restore the Vehicles and that considerations of proportionality did not require her to restore the Vehicles for a fee. That suggests that HMRC's policy was a consideration, but not her only consideration. However, when asked in cross-examination whether she was fettered by HMRC's policy her response was to the effect that she did not consider questions such as that and just "stuck to the policy". In response to a later question as to whether she was aware that she had a discretion when performing her review, she confirmed

that she was aware, but took relevant facts into consideration in refusing to exercise a discretion to restore the Vehicles. She was also asked whether one of the reasons why she, as a review officer, should consider policy, was so that she could consider departing from it. Her response was that, in this particular case, she considered that the decision that she was proposing to make was in line with policy and that is why she made it.

78. The evidence summarised at [77] was contradictory. However, we have concluded that Officer Brown did have in mind, when she performed her review, that she had the discretion to restore the Vehicles if she chose to. We have reached that conclusion in part because HMRC's policy, as set out in their Enforcement Handbook which was made available at the hearing makes it clear that officers should always consider questions of proportionality and human rights when making any restoration decision. Therefore, HMRC's policy was not to refuse restoration in all cases involving a third offence and consideration of questions of proportionality was built into that policy as what Mr Donmall referred to as a "safety valve". Therefore, even if Officer Brown did "stick to the policy", by doing so she would inevitably be considering whether it was proportionate to refuse to restore the Vehicles or not. Moreover, this Tribunal in the First FTT Decision specifically directed HMRC to consider the question of whether it was proportionate to restore the Vehicles for a fee. Since HMRC's policy on a third offence would typically be to refuse to restore the seized vehicle altogether, Officer Brown must have been aware that she was being asked to consider a course of action which differed from HMRC's usual policy not least since she was careful in her letter to set out the various directions that this Tribunal made as to the conduct of the further review.

79. We accepted Officer Brown's evidence that she took into account that the two previous "offences", on which she relied as justifying the decision not to restore the Vehicles, were a matter of days apart and arose from the same set of facts in 2009. She rejected Mr Powell's suggestion in cross-examination that these should just be regarded as a single offence saying that the evidence before her was that the fuel tank of the vehicle concerned was full when it was seized on 16 June 2009.

80. Officer Brown said that, at the time she made her decision, she was not aware that the Company had, on 12 June 2009 specifically asked HMRC to perform tests on fuel that it was supplying and that, but for this "self referral", HMRC would in all likelihood not have tested the fuel in the running tanks of the Company's vehicles in 2009. However, she said it would not have affected her decision on the grounds that "previous good behaviour does not negate later bad behaviour". We accepted that this was her genuine opinion. We will address the reasonableness of her decision in later sections.

81. Finally, Mr Powell criticised a part of Officer Brown's decision letter in which she said that:

> …the Tribunal found [in the First FTT Decision] that there was no evidence that this vehicle was being used for laundering or transporting contaminated fuels, which is contradictory to the evidence.

Mr Powell suggested that this passage demonstrated that Officer Brown did not take into account the FTT's directions when performing her review.

82. We do not consider that this passage does demonstrate that Officer Brown failed to follow the FTT's directions. For reasons given at [12], the Tribunal did not make any positive direction as to the absence of evidence of laundering. In any event, in the section of her letter quoted above, Officer Brown was simply noting that there was contradictory evidence before the Tribunal. She did not base her conclusion on her own assessment of that contradictory evidence and nor did she base her conclusion on a finding that the Company was itself laundering fuel (as distinct from being in possession of laundered fuel).

THE LAW

Provisions relating to the seizure of the Vehicles

83. HMRC's power to seize goods and vehicles is set out in s139 and s141 of the Customs and Excise Management Act 1979 ("CEMA").

84. Section 152 of CEMA gives HMRC a discretionary power to restore goods and vehicles that have been lawfully seized in the following terms:

> **152 Power of Commissioners to mitigate penalties, etc.**
>
> The Commissioners may, as they see fit--
>
> (a) ... compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts.

Reviews of discretionary powers

85. Section 14 of the Finance Act 1994 ("FA 1994") provides so far as material as follows:

> **14 Requirement for review of a decision under section 152(b) of the Management Act etc.**
>
> (1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say--
>
> (a) any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the customs and excise acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;
>
> (b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.
>
> (2) Any person who is--

> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to whom, or on whose application, such a decision has been made, or
>
> (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
>
> may by notice in writing to the Commissioners require them to review that decision.
>
> …
>
> (5) A person shall be entitled to give a notice under this section requiring a decision to be reviewed for a second or subsequent time only if—
>
> (a) the grounds on which he requires the further review are that the Commissioners did not, on any previous review, have the opportunity to consider certain facts or other matters; and
>
> (b) he does not, on the further review, require the Commissioners to consider any facts or matters which were considered on a previous review except in so far as they are relevant to any issue to which the facts or matters not previously considered relate.

86. Section 15 of FA 1994 sets out the procedure to be followed on a review under s14 of FA 1994.

Provisions relating to the Company's RDCO status

87. Section 100G and s100H of CEMA, and regulations made thereunder in the Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002 permit HMRC to approve any person as an RDCO and to revoke that status.

88. HMRC have published guidance in Public Notice 192 as to how they will exercise their power to revoke RDCO status. The version of Public Notice 192 that was current when Officer Sayers made his decision stated that HMRC are likely to cancel a trader's RDCO status if:

> a. it is necessary for the protection of revenue because, for example, you have been involved in the misuse of controlled oil. In such cases we are likely to prosecute you;
>
> b. you persistently fail to meet the requirements of the scheme. However, this is likely to be the final step following a series of warning letters and civil penalties.

Rights of appeal to this Tribunal

Statutory basis of these appeals

89. Section 16 of FA 1994 sets out rights of appeal to the Tribunal and provides, relevantly, as follows:

> **16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> …
>
> (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say--
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

90. The combined effect of s16(9) of FA 1994, paragraph 2(1)(r) and paragraph 2(1)(p) of Schedule 5 of FA 1994 is that both the Revocation Appeal and the Restoration Appeal involve decisions as to "ancillary matters".

The decision in Jones

91. In *HMRC v Jones and Jones* [2011] EWCA Civ 824, the Court of Appeal considered the potential overlap between condemnation proceedings and an appeal to the Tribunal under s16 of FA 1994 against HMRC's refusal to restore seized goods. As noted at [20], HMRC did not suggest that the decision in *Jones and Jones* precluded the Company from raising any argument in this appeal.

Approach to assessing the "reasonableness" or otherwise of a decision

92. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must

address the following questions in order to assess the reasonableness or otherwise of the decisions that the various officers have made:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

93. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

Approach if a decision is unreasonable

94. Section 16(4) of FA 1994 confers a power on the Tribunal to give certain directions if HMRC make an unreasonable decision. However, it does not require the Tribunal to order a further review if HMRC reach a decision that is unreasonable in the sense outlined at [92] above. That corresponds with administrative law principles. For example, in *R v Broadcasting Complaints Commission ex p Owen* [1985] QB 1153 May LJ said:

> …the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion.

95. In the Tribunal, a similar approach has been taken in circumstances in which the Tribunal exercises a supervisory rather than an appellate jurisdiction by reference to the Court of Appeal decision in *John Dee Ltd v CCE* [1995] STC 941. In that case which concerned an appeal originating in the VAT Tribunal, the Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial information. Neil LJ (with whom the other Lords Justices agreed) held that counsel of the company contesting the security requirement in that case had been right to concede that:

> where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a tribunal can dismiss an appeal.

DISCUSSION

The Revocation Appeal

96. We will not set out in full all of the criticisms that Mr Powell made of Officer Sayers's decision as the essence of them can easily be summarised. In broad terms, his submissions were that Company had not been involved in the misuse of any controlled oils, had not committed any offence, that the Tribunal had in the First FTT Decision reached a positive conclusion that the Vehicles were not used for laundering fuel and that it was disproportionate for HMRC to proceed straight to revocation of RDCO status without giving the Company prior warning. For reasons set out below, we do not consider these criticisms are valid and we will not direct that HMRC conduct a further review of Officer Sayers's decision.

97. RDCO status confers on a taxpayer a privilege that other taxpayers do not enjoy, namely the right to deal in controlled oils such as red diesel on a large scale. Given the duty differential between red diesel and white diesel, and the potential for fraudulent misuse of red diesel, it is entirely reasonable that an RDCO should satisfy high standards in order to be awarded, and maintain, its status. HMRC are entitled to expect that an RDCO will not, whether knowingly or otherwise, supply laundered or contaminated fuel to its customers or use laundered or contaminated fuel itself.

98. We have found that the Company had large quantities of laundered fuel on its premises. That fact alone amply justifies HMRC's decision to revoke its RDCO status. The fact that the Company has not been charged with a criminal offence is not relevant: given the trust that HMRC put in RDCOs, it is reasonable to expect them to comply with much higher standards than merely refraining from committing criminal offences. Even if we had made a positive finding that the Company was not involved in the actual laundering of fuel, HMRC's decision would still have been reasonable as the presence of laundered fuel on the premises would indicate that the Company's procedures, due diligence or monitoring of staff were not of sufficient standards to justify the high level of trust that HMRC had put in it. It was, therefore, entirely reasonable of HMRC to form the view that, in order to protect the revenue, they needed to revoke the Company's RDCO status with immediate effect. Given the seriousness of the matter, it was not disproportionate to revoke that status without issuing a warning first.

99. We do not consider that Officer Sayers's decision contained any error of law. We do not consider his decision was one that no reasonable officer could have reached.

100. As noted at [72], Officer Sayers accepted that he should not have taken into account various factors. For example he accepted that he should not have taken into account his belief that the Company was itself using the Vehicles to launder fuel (although, given what we have said at [12], we do not consider he necessarily needed to accept that point). He was, however, right to accept that he should not have concluded that there were "discrepancies" in the Company's paperwork without looking at that paperwork. He has, therefore, made a decision that was "unreasonable" in the sense outlined at [92] as it took into account irrelevant considerations. However, given that the presence of a large amount of laundered fuel

on the premises of an RDCO was such a serious matter, we consider that it was inevitable that Officer Sayers would reach the conclusion he did even if he did not take into account those factors. Accordingly, despite Officer Sayers's frank admission, we will not direct that his decision be reviewed again applying the principles set out at [94] and [95].

The Restoration Appeal

101. We will not set out all of Mr Powell's criticisms of Officer Brown's decision but will give a flavour of them. He submitted that Officer Brown was wrong to conclude that the seizure of the Vehicles was the Company's third "offence" as the two seizures in 2009 should be regarded as a single incident and that only a "small trace of rebated gas oil" was found at the time of the seizure on 12 June 2009. He submitted that she failed to take into account the fact that the seizures in 2009 took place following what he described as a "self-referral" by the Company and more general evidence that the Company was an honest trader. He also submitted that there was a flaw in the process that Officer Brown followed to make her decision and that she simply followed HMRC policy without even considering the possibility of making an exception.

102. Officer Brown's conclusion that this was the Company's third offence was certainly at the tougher end of the spectrum. However, we do not consider that it was unreasonable. For the reasons set out below we will not direct that Officer Brown's conclusion be reviewed again.

103. As a preliminary point, we do not consider that it is unreasonable for HMRC's starting point to be, in accordance with their policy, that the Vehicles would not be restored on the occasion of a third "offence". It is appropriate that sanctions should increase in severity and HMRC had given a clear warning on 16 June 2009 that restoration of vehicles subsequently seized was unlikely. The result of this policy is that the sanctions for a third seizure are tough and it is, therefore, important that HMRC consider questions of proportionality before applying these tough sanctions. However, HMRC's policy itself recognises this as noted at [78]. Therefore, we do not consider that HMRC's policy on a third seizure is inherently unreasonable.

104. We do not accept that Officer Brown failed to consider exercising her discretion to restore the vehicle at all, for reasons that we have set out at [78]. We do not consider that there is any error of law in her decision. Nor do we consider that she has failed to perform her review in accordance with the directions that this Tribunal gave in the First FTT Decision.

105. Officer Brown did consider the fact that the two seizures in 2009 were close together. Her conclusion that they were two separate "offences" rather than a single one was not unreasonable. The Company had been told specifically that it should remove all traces of red diesel from the running system of the vehicle concerned but had not done so. It was not unreasonable to conclude that a failure to respond to a direct instruction to this effect should attract the sanction of being counted as a separate "offence". Moreover, at the time of the seizure on 16 June 2009, Officer Brown understood that the running tank of the vehicle was full and the Company's

letter of 16 June 2009 referred to at [38] indicated that it had indeed been refuelled. If there was still red diesel in the running system of the vehicle when its tank was full, it was, at the very least, reasonable to consider that the fuel with which it had been refuelled might itself be contaminated.

106. Officer Brown accepted that she did not take into account at the time of her review the fact that the Company had initiated the process in 2009 that led to the fuel in its vehicle's running tank being tested. Mr Powell overstates matters when he refers to this as a "self-referral" as the Company was inviting HMRC to test the fuel in its vehicle's storage tank (that it was supplying to its customer) and not the fuel in the running tank. Nevertheless, we agree that the fact the Company contacted HMRC suggests that those staff members in the vehicle at the time (and those making the decision to contact HMRC) were not aware of the presence of contaminated fuel in the vehicle's running tank as, if they were aware, they surely would not have wished HMRC's officers to perform tests on any of the Company's fuel. However, this does not demonstrate that everyone at the Company was unaware of the presence of contaminated fuel. Nor does it suggest that the Company took any particular steps to ensure that it was not using contaminated fuel in its vehicles. Therefore, even if Officer Brown had taken into account the evidence of the "self-referral" at the time of her review decision, she would have noted only that, at the time of the two seizures in 2009, there were doubts as to whether the Company was aware of the presence of contaminated fuel in the running tank of its vehicle.

107. As noted at [80], we accept Officer Brown's evidence that knowledge of the "self-referral" would not have made any difference to her decision. We also consider that was a reasonable stance to take. Even if the Company had demonstrated that it was completely unaware that it was using contaminated fuel in 2009, there were aggravating factors associated with the seizures of the Vehicles in 2013. Firstly, those seizures involved four vehicles and so were not merely an isolated incident. Secondly, the fuel found in the running tanks of the Vehicles was not merely contaminated: it was positively laundered and the Company has not satisfied us that it was not involved in the laundering. Officer Brown had assumed in her review that it was not open to her to take account of suspicions that the Company was involved in the laundering. For reasons set out at [12], she was wrong to make that assumption and, for reasons set out at [70], it would have been reasonable for her to conclude that the Company was involved in laundering. Thirdly, the Company had RDCO status and it was reasonable to assume that the fuel found in the running tanks of the Vehicles had ultimately come from the Company's white diesel storage tank and was thus the same fuel that was being sold to the Company's customers. Given that HMRC's stated policy is to refuse to restore vehicles following a third seizure (subject to questions of proportionality and human rights), we consider that, even if she had considered the "self-referral" at the time she would inevitably have come to the same conclusion, given the findings of fact that we have made, and such a conclusion is both reasonable and proportionate.

108.It follows, therefore, that there was a defect in Officer Brown's review decision in that it did not take into account the "self-referral" which was a relevant factor.

However, applying the approach set out at [94] and [95], we will not direct that her decision be reviewed again.

Conclusion

109. The Company's appeals are dismissed.

110. 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 RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 24 MARCH 2016