[2016] UKFTT 0629 (TC)

TC05365

Appeal number: TC/2014/03563

EXCISE DUTY – Hydrocarbon Oil and Duties Act 1979, sections 12(2) and 13(1A) – improper use of rebated fuel in vehicles – best judgment assessment – Finance Act 1994, section 12A – time limit for making assessment – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOUGHSHORE AUTOS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR MOHAMMED FAROOQ

Sitting in public at Belfast on 22 and 23 March 2016

Mr D McNamee of McNamee McDonnell Duffy, solicitors, for the Appellant

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

DECISION

Introduction

1. Loughshore Autos Ltd (the "Appellant" or the "Appellant company") appeals against an assessment dated 9 December 2013 made by the Respondents ("HMRC") pursuant to s 13(1A) of the Hydrocarbon Oil and Duties Act 1979 ("HODA"), as subsequently reduced in an HMRC review decision dated 3 June 2014.

Facts

2. On the basis of the evidence and submissions presented to it, the Tribunal makes the following background findings of fact.

3. At times material to this appeal, a business trading as Quinn's Coach Hire ("Quinn's") has operated as a separate department within the Appellant company. At material times, Quinn's had some 19 coaches of different sizes which it hired out to customers.

4. On 28 April 2012, one of Quinn's coaches was stopped by the Road Fuel Testing Unit ("RFTU") and was found to be running on fuel that tested positive to Euromarker, indicating that the fuel was rebated kerosene. On 30 April 2012, RFTU attended the Appellant's premises and conducted further tests on a number of Quinn's other vehicles. The fuel in the tanks of three other coaches also tested positive to Euromarker. All four vehicles that tested positive were seized and were subsequently restored to the Appellant on payment of a restoration fee.

5. HMRC consequently decided to conduct a fuel audit on Quinn's business. In a letter dated 22 August 2012, HMRC requested the Appellant to provide certain information, including details of the vehicles which operated within Quinn's business. The Appellant responded by a letter of 7 September 2012, which included details of 15 vehicles. In a letter dated 18 October 2012, entitled "Notice of Intention to Assess", HMRC informed the Appellant that the fuel audit had been completed and that HMRC intended to raise an assessment under s 13(1A) HODA in the sum of £10,611. That letter invited the Appellant to provide any further relevant information within 21 days. The letter set out the basis on which the figure of £10,611 had been arrived at. The audit covered the period 1 July 2009 to 27 April 2012. HMRC calculated that the Appellant's fuel requirements for all of its vehicles during that period was 134,601.69 litres (the letter noted that this had been determined on the basis of vehicle service records provided by the Appellant). The Appellant had produced receipts for 116,079.04 litres during that period, leaving a shortfall of 18,522.65 litres. £10,611 was the amount of duty payable on 18,522.65 litres of fuel.

6. A letter from HMRC to the Appellant dated 6 November 2012 then noted as follows. The Appellant's accountant, Mr Corr of Corr & Corr, had contacted HMRC to explain that the Appellant provided some coaches on a self-hire basis where the customer is responsible for fuelling the vehicle. In order for HMRC to take this into

account, the Appellant would need to provide documentary evidence for each individual lease on a self-hire basis within the audit period.

7. A letter from Mr Corr to HMRC dated 19 December 2012 stated as follows. The Appellant provided vehicles on a number of different bases, namely (1) short term or weekend hire with the company providing the driver and the customer fuelling the vehicle, (2) weekend hire without a driver, with the customer fuelling the vehicle, (3) vehicles on long term hire to other companies, (4) vehicles provided on behalf of insurance companies, and (5) other short term hire/loan agreement. The company had two loan/hire books over the period in question, one of which had been supplied to HMRC, and the other of which had been destroyed in a recent fire at the Appellant's premises.

8. In a letter dated 15 January 2013, entitled "Notice of Intention to Assess", HMRC informed the Appellant that HMRC now intended to raise an assessment in the sum of £5,602. The letter set out the basis on which the figure of £5,602 had been calculated. In this calculation, the audit period and amount of fuel for which the Appellant had provided receipts were the same as in the earlier 18 October 2012 letter. HMRC's calculation of the Appellant's fuel requirements in the audit period for all of its vehicles had now been reduced to 125,858.83 litres (presumably to take account of the evidence of occasions where the customer had been responsible for providing the fuel), leaving a shortfall of 9,779.79 litres. £5,602 was the amount of duty payable on that shortfall.

9. Subsequently, on 12 February 2013, HMRC Officer Daly issued an assessment in the sum of £5,321 (the reason why this was reduced from £5,602 is not entirely clear).

10. In a letter dated 14 February 2013, HMRC informed the Appellant that it intended to charge a wrongdoing penalty under Schedule 41 to the Finance Act 2008 in relation to the fuel duty that was the subject of the assessment.

11. In a letter dated 26 February 2013, Mr Corr on behalf of the Appellant requested a review of the assessment. That letter stated as follows. (1) The Appellant "provides coaches for hire without a driver and it is the responsibility of the hire party to provide the fuel". The assessment did not take into account all of the information in the hire book that was provided, and the second hire book had been destroyed in the fire. (2) Rebated fuel was found in only four vehicles yet the assessment related to all of the Appellant's 15 vehicles. (3) Coaches were provided to Belfast City Sightseeing Ltd ("BCSL") who were responsible for providing fuel during the period of usage. An apparently undated letter from BCSL was provided, stating that BCSL had been using the Appellant's vehicles "on an ad-hoc basis with vehicles being collected and returned when necessary" and that BCSL "fuelled the vehicles". That letter also noted that Mr Kevin Quinn of Quinn's was also a director of BCSL.

12. HMRC's decision on the review of the assessment is dated 10 April 2013. That letter concluded that the methodology followed in the assessment had been correct (that is, the methodology of estimating the mileage of all of the Appellant's vehicles

during the audit period, of calculating the total fuel required to cover that mileage, of deducting from that the amount of unrebated fuel purchases evidenced by the Appellant, and of assessing the Appellant for the shortfall). However, the letter concluded that "The [assessment] is withdrawn … because the method of calculation used by Officer Daly does not reflect the actual fuel misused in each of the periods assessed". The letter concluded by stating that the assessment would be cancelled, but that HMRC was likely to make a fresh assessment.

13. It is not entirely clear from the documents before the Tribunal exactly why the 12 February 2013 assessment was considered to be incorrect such that it should be cancelled. However, from the material before it, the Tribunal understands that the main reason was as follows. On 23 August 2010 vehicles of the Appellant had been fuelled tested, and were all found to contain only legitimate fuel. On that basis, it had been decided that the audit period should commence only from 24 August 2010. A letter from HMRC to the Appellant dated 7 June 2013 stated that the calculations of the fuel required were being revised for a reduced period of 24 August 2010 to 27 April 2012.

14. A letter from HMRC to the Appellant dated 20 June 2013 noted that the audit leading to the 12 February 2013 assessment had been based on 15 vehicles which the Appellant had confirmed operated within the Quinn's hire business. The Appellant was asked to confirm whether there were any other vehicles that operated within the Quinn's hire business. It appears that the reason for this letter was that the HMRC Officer Daly who was conducting the audit had noticed that there was a large surplus of fuel in the last duty period.

15. A letter dated 29 June 2013 from the Appellant's accountant, Mr Corr, identified a further four vehicles relating to the coach hire business.

16. A letter from HMRC dated 7 August 2013 stated that checks had been undertaken on the additional four vehicles identified. One had been excluded from the audit as it was found to have been acquired by the Appellant only after the end of the audit period. The other three vehicles were to be included in the audit.

17. Officer Daly subsequently re-examined the matter, and consequently issued a new assessment dated 9 December 2013, in the sum of £12,717. This is the assessment against which the Appellant now appeals.

18. This new assessment was now in respect of the period from 24 August 2010 to 27 April 2012, and involved 18 vehicles. Most of the vehicles were owned by the Appellant for the whole of the assessment period, although some had only been acquired part way through that period, and this was taken into account in the assessment. The assessment based the mileage each vehicle on information from vehicle service records and information provided by the Appellant's accountants. The assessment applied a miles per gallon figure for each vehicle based on information provided by the Appellant or the Appellant's accountants. A deduction from the fuel requirements was made where evidence was provided of a vehicle having been hired out on a self-drive basis. The calculation of the Appellant's fuel requirements for all

of its vehicles was considered to be 124,039.99 litres. The Appellant was found to have produced receipts for 102,051.04 litres during the revised assessment period, leaving a shortfall of 21,988.95 litres. The Appellant was assessed to duty on this shortfall.

19. On 13 January 2014, HMRC issued a wrongdoing penalty to the Appellant in respect of the inappropriate use of the rebated fuel to which the assessment related. The Appellant has not appealed against the penalty. It is common ground between the parties that if the appeal against the assessment succeeds in whole or part the penalty will fall away or be reduced accordingly, and that if the appeal against the assessment is unsuccessful, the penalty will stand as is.

20. On 14 January 2014, Mr Quinn and Mr Corr had a meeting with HMRC. Mr Quinn said that he believed that the vehicles in question had been tampered with as part of a vendetta against his company, with a view to discredit him and his business. He offered to pay the assessment if the penalty was withdrawn, but HMRC said that the legislation did not allow HMRC to do this.

21. In letters dated 14 January 2014, the Appellant's accountant, Mr Corr, indicated the Appellant's desire to appeal against the assessment and penalty.

22. On 3 June 2014, following communications with the Appellant's representatives, HMRC issued a review decision. The review decision did not accept the points made by the Appellant. However, the review decision noted that the assessment had used an incorrect miles per gallon figure in respect of one of the vehicles. After making a correction for this, the review decision reduced the amount of the assessment to £8,330. The amount of the penalty was also revised in line with the revision of the amount of the assessment.

23. On 10 June 2014, a new penalty was issued.

24. By a notice of appeal dated 26 June 2014, the Appellant appealed to this Tribunal against the assessment as upheld but reduced by the review decision. The grounds of appeal stated merely as follows: "The Appellant herein is not liable in for the duty assessed. Either in fact or in law".

25. On 9 October 2014, the Tribunal required the Appellant to provide further and better particulars within 28 days. The Appellant provided these on 20 October 2014.

26. On 11 December 2014, the Appellant's representatives in this appeal, McNamee McDonnell Duffy Solicitors, submitted a Schedule created by Mr Corr, showing the amount of moneys generated by the Appellant's self-hire business, and the average mileage of such journeys and the amount of fuel required.

27. A letter from McNamee McDonnell Duffy Solicitors dated 22 December 2014 submitted to HMRC a further letter from Mr Corr dated 17 December 2014, in which Mr Corr gives further explanations of the schedule he had prepared. The latter letter explained that Mr Corr's methodology had been as follows. He had taken the shortfall amount of fuel, and converted this to a mileage based on an assumed average

of 20 miles per gallon. He then converted this to amounts paid by customers for vehicle hires based on the assumption that a typical hire journey would be 360 miles (say, Galway races and return) and that a typical hire cost for a 360 mile journey would be estimated at £660.

28. A letter from HMRC dated 25 February 2015 disputed that the information provided by Mr Corr could affect the assessment. The letter also stated that the HMRC had revisited its calculations and now considered that the assessment should have been £11,167. However, HMRC accepted that because the statutory time limit had now passed, the actual assessment would remain unchanged at £8,330.

Applicable legislation

29. Section 12(2) HODA relevantly provides:

> (2) No heavy oil on whose delivery for home use rebate has been allowed … shall—
>
> (a) be used as fuel for a road vehicle; or
>
> (b) be taken into a road vehicle as fuel,
>
> unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.

30. Section 13(1A) HODA provides:

> (1A) Where oil is used, or is taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may—
>
> (a) assess an amount equal to the rebate on like oil at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle, and
>
> (b) notify him or his representative accordingly.

31. Section 12A(3)-(5) of the Finance Act 1994 provides:

> (3) Where an amount has been assessed as due from any person under—
>
> …
>
> (c) section … 13 … of the Hydrocarbon Oil Duties Act 1979…
>
> and notice has been given accordingly, that amount shall, subject to any appeal under section 16 below, be deemed to be an amount of excise duty due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

(4) No assessment under any of the provisions referred to in subsection (3) above … shall be made at any time after whichever is the earlier of the following times, that is to say—

(a) …

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

(5) Subsection (4) above shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making the assessment concerned, to the making of a further assessment within the period applicable by virtue of that subsection in relation to that further assessment.

The witness evidence

The evidence of Mr Corr

32. Mr Corr is the Appellant's accountant. In his witness statement he states that he disagrees with the assessment raised by HMRC, in that HMRC have not allowed for the mileage that would naturally occur in the course of private hire, which is a natural part of the Appellant company's business, and that this has caused HMRC to over-estimate the quantity of fuel provided.

33. In examination in chief, Mr Corr said amongst other matters as follows.

34. Mr Corr is a chartered accountant and a partner in a medium size firm of accountants. He has been dealing with the Appellant's matter since 2012 or 2013. Having considered the Appellant's bank statements, he considers that the level of the Appellant's private hire business over the period of assessment was £150,000 to £160,000. He calculated this by looking at the level of individual lodgements in the business bank accounts. Vehicle rentals on a self-hire basis tended to be to large bodies who paid every two weeks or once a month. On the other hand, a small lodgement of £100 would probably be for a private party hiring a vehicle on an owner operated basis. Mr Corr produced for the hearing a schedule of all lodgements during the audit period, and indicating which of the lodgements he believe related to private hire.

35. Mr Corr himself is not involved in the Appellant's business, and his knowledge of the Appellant's business is based on what the Appellant tells him. Vehicles are hired out by the day so that it is not possible to say how far a vehicle is driven on each occasion. The turnover of the Appellant's business during the audit period was £800,000 to £1 million. The business spent about £300,000 per year on fuel, which is some £500,000 during the audit period. The challenged assessment is in the sum of some £8,000, which would represent the duty on some 10,000 litres of fuel. This is about 2% of the Appellant's total fuel spend.

36. In cross-examination, Mr Corr said amongst other matters as follows.

37. Private hire rentals were recorded in one of two books. One book was kept in the depot, and one was kept in a vehicle. The latter book rotated between different vehicles. A person wanting to hire a vehicle would come to a porta cabin to do the paperwork, but the porta cabin was locked over the weekend so another book would be kept in a vehicle. Mr Corr did not know personally that the porta cabin was locked over weekends, but considered that any business would do so to meet insurance and health and safety requirements. He considered that the book in the vehicle would also be required if someone wanted to hire a vehicle at night. It was put to Mr Corr that the hire agreements did not state that the customer was responsible for supplying fuel, and there was no entry in the incoming vehicle form to check that the fuel tanks were full when the vehicle was returned. Mr Corr said he was not familiar with the forms, but that this did not mean that the customer was not responsible for the fuel, and that a customer would be told this at the time of hiring a vehicle. Vehicles were generally hired on the basis of time rather than on the basis of mileage driven, so that it was not possible to say exactly how many miles a vehicle was driven each time it was hired. The profitability of the business in fact was affected more by depreciation of the vehicles over time than by the amount of miles they were driven.

38. Mr Corr confirmed that he did not dispute the beginning and end mileage of the vehicles used by HMRC in calculating the assessment. Nor did he dispute the miles per gallon figures for each vehicle used by HMRC in calculating the assessment, which had in fact been provided by the Appellant. Mr Corr further confirmed that HMRC had given credit for each occasion on which the Appellant had provided evidence that the vehicle had been hired out on a self-drive basis. He confirmed that the Appellant's case was that there were additional occasions on which the vehicles had been hired out on a self-drive basis for which credit had not been given by HMRC, due to the fact that the evidence had been lost in a fire.

39. It was put to Mr Corr that the methodology he had used in producing his schedule of lodgements was not consistent. He had said in examination in chief that customers hiring out vehicles on a self-drive basis tended to pay fortnightly or monthly, so that payments for self-drive rentals tended to be larger amounts, while lodgements for rentals on an owner operated basis tended to be for smaller amounts. However, Mr Corr's schedule of lodgements showed some smaller amounts as being for self-drive rentals, yet did not include some larger amounts as self-drive rentals. It was also noted that some of the larger payments indicated as self-drive rentals were for odd amounts, rather than rounded figures. Mr Corr responded that the odd amounts of figures may be the results of several cheques being paid in together, or of some vehicles being hired out on a per mileage basis rather than on a daily basis. However, he said that he was not involved in the operation of the business and could not know for certain.

40. It was put to Mr Corr that the company would have needed to have an alternate means of showing when vehicles had been hired, for instance for insurance purposes. Mr Corr was asked whether it would not have been possible to get records from the insurance company. Mr Corr responded that he thought that it was not necessary to inform the insurance company every time that a vehicle was hired.

41. It was put to Mr Corr that in a letter from the Appellant to HMRC dated 7 September 2012, there had been no mention of the claim that some vehicles had been hired out on a self-drive basis. Mr Corr responded that he had only become involved in January 2013. It was then put to Mr Corr that it was in a letter from Mr Corr dated 19 December 2012 that the claim was made that some vehicles were hired on a self-drive basis. However, that letter stated that some hires involved the Appellant providing a driver but the customer providing the fuel, which was not what Mr Corr was saying now. It was also put to Mr Corr that in a letter dated 14 January 2014, he had said that "my client has had his vehicles tampered with". Mr Corr said that this is what the Appellant had said at the outset.

42. Mr Corr accepted that the methodology in his schedule of lodgings was based on arbitrary figures, since he did not know the precise figures for each of the variables involved in his calculation.

43. In re-examination, Mr Corr said amongst other matters that he considered that his figures were generous to HMRC.

The evidence of HMRC Officer Fearon

44. In his witness statement, HMRC Officer Fearon gives details of how he tested fuel the Appellant's vehicle on 28 April 2012 which tested positive for Euromarker, and of how he tested the fuel in several other vehicles of the Appellant at the Appellant's premises on 30 April 2012 when the fuel in three of the vehicles tested positive for Euromarker. At the hearing he adopted his witness statement, and there was no cross-examination.

The evidence of HMRC Officer Daly

45. In her witness statement, HMRC Officer Daly gives details of how she undertook the fuel audits leading to the 12 February 2013 assessment, and then leading to the assessment that is the subject of the present appeal.

46. At the hearing, Officer Daly adopted her witness statement. In cross-examination, she said amongst other matters as follows.

47. She gave credit to the Appellant where she had documentary evidence of hire on a self-drive basis. She had given no credit where there was no documentary evidence. She would reduce the assessment in accordance with Mr Corr's methodology if he had documentary evidence to support it. Without looking at it in detail, she cannot say whether Mr Corr's methodology would lead to the assessment being reduced to zero. She accepted that she was subject to statutory time limits for issuing an assessment. She acknowledged that she had sufficient information to issue an assessment at the time that she sent the Appellant a letter dated 18 October 2012, entitled "Notice of Intention to Assess". She added that the Appellant had however provided further information later. It was put to her that if the primary documents had been destroyed, HMRC had to consider the evidence as a whole. Officer Daly responded that there was no other evidence. The bank statements and analysis of Mr

Corr were provided post-assessment, and in any event Mr Corr's analysis was assumption based. It was not clear from the evidence whether or not the customer had provided the fuel. Officer Daly said that she could not comment on the review decision. She accepted that the Appellant had not been in trouble before, and that on 23 August 2010 tests of the Appellant's vehicles had found everything to be in order.

The evidence of HMRC Officer Stewart

48. In her witness statement, HMRC Officer Stewart gives details of how she issued the 3 June 2014 review decision. She did not attend the hearing to give oral evidence.

The Appellant's arguments

49. The time limit under s 14(4)(b) of the Finance Act 1994 for issuing the assessment began to run on 28 or 30 April 2012 when the vehicles were tested and seized, as it was quite clear at that point that liability to pay duty had arisen. Alternatively, the time limit began to run on 18 October 2012, when HMRC issued a letter entitled "Notice of Intention to Assess". The assessment under appeal is dated 9 December 2013, and is outside the statutory time limit. The whole assessment is invalid if any part of it is out of time (reliance was placed on *Cozens v Revenue & Customs* [2015] UKFTT 482 (TC) ("*Cozens*")). If an assessment for sum A is out of time but HMRC find out facts which justify making an assessment for sum B, HMRC cannot make up a global sum by combining sum A and sum B (relying on *Cozens* at [35]). The first assessment in this case was not withdrawn because of the discovery of new information, but because there was an error in the first assessment.

50. The cost of the fuel over the period of assessment was some £700,000 to £750,000. The assessment was for only £8,000 and such a small amount must be within the margin of error. It is unreasonable to maintain the assessment for such a small amount by comparison with the amount of fuel purchased, given especially that the Appellant had previously offered to pay the assessment on a without prejudice basis if HMRC would waive the penalty. The Appellant has gone to great lengths to assist HMRC with its enquiries in this case.

51. HMRC have not given sufficient credit for the private hire business of Quinn's Coach Hire. Relevant business records were destroyed in a fire at the Appellant's business premises, of which the Appellant has produced documentary evidence. HMRC have given credit for private hire based on the documentary records that were not destroyed in the fire, but evidence of some of the private hire business has been lost in the fire. HMRC wrongly assumed that the book lost in the fire would have been in a chronological sequence with the book that was produced by the Appellant, but in fact the two books existed and were used at the same time in parallel with each other. If there is no other evidence for payments going into the Appellant's account other than that provided by the Appellant, it is unreasonable for HMRC to reject that explanation.

The HMRC arguments

52. HMRC do not challenge the correctness of *Cozens*; it is accepted that the assessment under challenge is a global assessment for different quantities of fuel each with different duty points, and that the assessment will be invalid if any part of it is out of time. However, in applying the statutory time limit under s 14(4)(b) of the Finance Act 1994 it is necessary to look at the assessment under challenge, and to ask whether *that particular* assessment could have been made more than 12 months earlier than it was. An assessment is not out of time merely because HMRC had sufficient information to make *an* assessment more than 12 months earlier (reliance was placed on *ERF Ltd v HMRC* [2012] UKUT 105 (TCC) ("*ERF*") at [27]-[32]). In the present case, it was not possible for HMRC to make the assessment that it ultimately did on 9 December 2013 more than 12 months before that date. This is because HMRC only acquired information about the four additional vehicles on 29 June 2013. The Appellant was continuing to put forward information, and it was reasonable for HMRC to continue to give the Appellant the opportunity to do so. A taxpayer cannot ask for more time to produce information which would exceed the time limit for making an assessment, and then at the end of that requested time period provide no new information but contend that HMRC is now out of time to make an assessment.

53. The assessment under challenge is a best judgment assessment. The Appellant cannot challenge it successfully unless the Appellant provides a more reliable figure than that contained in the assessment. The Appellant has not provided reliable evidence that the level of self-drive hires was greater than that allowed for in the challenged assessment. Even if some records were destroyed in a fire as claimed, the Appellant should have been able to provide some other documentary evidence of additional self-drive hires. The letter from BCSL, a company of which Mr Quinn was also a director, was self-serving. Inconsistent accounts were given by the Appellant as to the circumstances in which customers provided the fuel. The methodology of Mr Corr was based on assumptions for all variables. To succeed, the Appellant needs to produce some evidence to explain the shortfall of fuel, and the Appellant has simply not done so.

The Tribunal's findings

54. The Appellant argues that the 9 December 2013 assessment was made outside the time limit under s 12A(4)(b) of the Finance Act 1994, in that it was made more than a year after "the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge".

55. The Tribunal rejects the Appellant's argument that the time limit under this provision commenced to run on 28 or 30 April 2012, when four of the Appellant's vehicles tested positive for Euromarker. At that time, HMRC had at most sufficient evidence to issue an assessment for the fuel in the tanks of those four vehicles at that time (and arguably HMRC were entitled to consider that they needed to undertake further investigations and give the Appellant an opportunity to make representations before being satisfied even of that). In order to be able to issue an assessment relating to all 18 vehicles over the entire audit period, HMRC needed to have evidence of all

of these vehicles, and of their mileage and fuel consumption, as well as of the Appellant's legitimate fuel purchases during the audit period. This means that the statutory limitation period could not begin to run until after HMRC had completed its fuel audit in respect of all of these matters.

56. Officer Daly accepted that she had sufficient information to issue *an* assessment when she issued her 18 October 2012 "Notice of Intention to Assess" letter. However, the audit on which that letter and the subsequent 12 February 2013 assessment were based included only 15 vehicles, and was for a different audit period.

57. It seems that the 12 February 2013 assessment was withdrawn in the light of the consideration that the Appellant had been fuel tested on 23 August 2010 without any irregularity being detected. It may be that this was information that was or should have been known to HMRC at the time of the 12 February 2013 assessment and which would therefore not justify an extension of the statutory time period (the Tribunal makes no finding on this point as it was not argued by the parties).

58. However, it was only on 29 June 2013 that the Appellant's accountant identified a further four vehicles relating to the coach hire business, and was only around August 2013 that HMRC had undertaken checks and confirmed that three of those four vehicles had been acquired by the Appellant before the end of the audit period. Thereafter, HMRC presumably needed some additional time to revise its fuel audit in the light of this new information.

59. HMRC had asked the Appellant for details of the vehicles operating in the coach hire business in a letter dated 22 August 2012. The Appellant responded in a letter dated 7 September 2012, giving details of only the 15 vehicles that were considered in the initial 12 February 2013 assessment. The Appellant has given no explanation for the delay until 29 June 2013 in providing HMRC with details of the additional three vehicles. Indeed, as late as 26 February 2013, a letter from Mr Corr on behalf of the Appellant to HMRC refers expressly to 15 vehicles. The information that the coach hire business had an additional three vehicles during the audit period must have been known to the Appellant at the time of the Appellant's 7 September 2012 letter, as well as at the time of Mr Corr's 26 February 2013 letter. There has been no suggestion that HMRC can be faulted for not being aware of these three additional vehicles prior to 29 June 2013. The 9 December 2013 HMRC letter that accompanies the assessment under challenge begins by stating: "Based on information which you have provided in respect of the additional vehicles within your business, I write to inform you that I have completed a road fuel audit on your business". The Tribunal is satisfied that the information about the additional vehicles was crucial to the making of the assessment.

60. The Tribunal accepts that if HMRC had had for more than a year sufficient evidence to issue the assessment that it did in relation to 15 vehicles, then this new information in relation to a further three vehicles might not justify the making of an assessment in relation to all 18 vehicles: see *Cozens* at [35] referred to in paragraph 49 above. The new information might justify the making of an assessment in relation

to the three vehicles, but an assessment in relation to 18 vehicles would be invalid in respect of all of them: see *Cozens* generally.

61. However, the Tribunal accepts the argument in *ERF* at [30], relied on by HMRC, that in relation to each of the vehicles, the assessment is not out of time merely because HMRC had sufficient information to make *an* assessment more than 12 months earlier, and that an assessment will only be out of time if HMRC had sufficient information to make *the assessment that it did* in relation to that vehicle more than 12 months earlier.

62. The approach of HMRC in making the assessment was to establish the total mileage of all of the Quinn's vehicles during the audit period, and to establish the total fuel requirements for the totality of that mileage. HMRC could not possibly have made an assessment according to that methodology without first knowing all of the vehicles that were used by the Quinn's business during the audit period. The Appellant in effect argues that HMRC had sufficient evidence to justify the making of the assessment prior to 29 June 2013, even though the Appellant itself withheld from HMRC until 29 June 2013 information that was critical to the making of an assessment according to the methodology that HMRC was using. The Tribunal rejects any such argument. It would have been apparent to the Appellant from the 18 October 2012 and 15 January 2013 HMRC letters what methodology HMRC was using. It would have been apparent to the Appellant from those letters that in order to apply that methodology that HMRC required details of all of the vehicles operating as part of the Quinn's business during the audit period. The Appellant was aware that HMRC had expressly requested those details in a letter dated 22 August 2012.

63. The Tribunal therefore finds that the statutory time limit under s 12A(4)(b) of the Finance Act 1994 did not begin to run until, at the earliest, 29 June 2013, when the Appellant provided the details of the additional vehicles. In fact, the time limit would have begun to run some time after that date, for the reasons given in paragraph 58 above. The assessment was made within 12 months of 29 June 2013. The Tribunal therefore rejects the argument that the assessment is out of time.

64. The Tribunal then turns to the challenge to the assessment itself.

65. HMRC was entitled in this case to make a "best judgment" assessment (see for instance *Corneill v Revenue and Customs* [2007] EWHC 715 (Ch)). The Tribunal finds that HMRC was entitled to do so by applying the methodology that it did, that is to say, by calculating the total mileage of all of the vehicles of the Quinn's business during the audit period, by calculating from this the gross fuel requirement of the Quinn's business during the audit period, by making a deduction from the gross fuel requirement to allow for occasions on which the customer rather than the Appellant was responsible for providing fuel, by calculating the shortfall between the net total fuel requirement and the amount of legitimate fuel purchases for which the Appellant had provided evidence, and by assessing the Appellant to duty on that shortfall.

66. In some of the correspondence referred to above that preceded the commencement of these Tribunal proceedings, the Appellant suggested that HMRC

could not make an assessment in respect of all 18 vehicles when rebated fuel was found in only four of the Appellant's vehicles. However, the Appellant did not pursue that argument at the hearing, and the Tribunal rejects it. Prior to these appeal proceedings, the Appellant also suggested to HMRC that the rebated fuel had been put in his vehicles by third parties with a vendetta against his business, but this contention was also not pursued at the hearing.

67. At the hearing, the Appellant did not otherwise challenge the general methodology applied by HMRC. Nor did the Appellant dispute the figures used in the HMRC assessment for the vehicle mileages, or their fuel consumption, or the gross fuel requirement, or the amount of the legitimate fuel purchases evidenced by the Appellant.

68. The Appellant's challenge in effect focussed solely on the deduction made by HMRC from the gross fuel requirement to allow for occasions on which the customer rather than the Appellant was responsible for providing fuel. The Appellant claims that there were a greater number of such occasions than were allowed for in the HMRC calculations.

69. In appeals against best judgment assessments, the burden of proof is on the taxpayer to establish the correct amount of tax due. Such HMRC assessments "are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right": *Pegasus Birds Ltd v Customs and Excise* [2004] EWCA Civ 1015 at [14], quoting *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC, per Lord Lowry. In other words, the burden is on the Appellant to establish by evidence a figure for the amount of fuel provided by customers that is more reliable than the figure used by HMRC.

70. However, the Appellant has provided virtually no evidence at all, let alone evidence that is sufficient to provide a figure that is more reliable than the figure used by HMRC.

71. Evidence was given by Mr Corr. However, Mr Corr is the Appellant's accountant. He said in his evidence that he had no involvement in the Appellant's business, and it was evident that he had no first-hand knowledge of how the Appellant's business operates. It would appear that he has no first-hand knowledge of the claim that the Appellant had two rental books that it was operating during the audit period, one kept in the vehicles and one kept in the business premises. His evidence to that effect was apparently based on what his client had told him. In any event, even if it was true that there were two books and that one of them had been lost in a fire, it cannot be known what information was in the lost book about occasions on which customers were responsible for providing fuel. In the absence of the second rental book, the burden would still remain on the Appellant to establish by some other means a more reliable figure than that used by HMRC.

72. Even if one of the rental books was lost in a fire, the Appellant might have sought to obtain other documentary evidence of occasions on which customers were

responsible for providing fuel. At the very least, in the absence of any other available documentary evidence, witness evidence might have been given by Mr Quinn and/or others directly involved in the running of the business, who could have given a detailed first-hand account of the way the business works and the extent to which vehicles were hired on the basis that the customer was responsible for the provision of fuel, and who could have been cross-examined on that evidence. Evidence might also have been given by customers of the Appellant who provided fuel themselves when hiring vehicles. The Tribunal was told that some of these customers were bodies such as education or health authorities, who presumably would have retained their own records of such matters. The letter from BCSL was far too vague to be of any assistance to the Appellant's case.

73. The Appellant relies on calculations prepared by Mr Corr. The calculations in his schedule were based on a typical hire journey of 360 miles and a typical hire cost of £660 for such a journey. However, if Mr Corr had no involvement in the Appellant's business, it is not apparent on what basis he could give evidence that these figures were indeed typical. In his oral evidence, he admitted that they could be described as "arbitrary" figures. For the hearing, there was a more detailed schedule of lodgements produced by Mr Corr indicating which lodgements into the Appellant's bank account related to hires where the customer was responsible for providing fuel. However, it was entirely unclear on what basis Mr Corr could reliably give any such indication.

74. The Tribunal therefore finds that the Appellant has not produced evidence capable of showing that the HMRC figure is wrong, and of showing positively what corrections should be made in order to make the assessment right or more nearly right.

Conclusion

75. The appeal is accordingly dismissed.

76. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 7 SEPTEMBER 2016