TC05504

Appeal number: TC/2016/00936

HYDROCARBON OIL DUTY – fuel duty relief scheme for remote areas (Isles of Scilly) – operators reducing prices as condition of scheme and later reclaiming cost from HMRC - failure to make two monthly claims for repayment within 30 days – whether "reasonable cause" for failure – whether "reasonable cause" is same as "reasonable excuse": held no – who has to show "reasonable cause": held claimant – whether claimant has reasonable cause: yes – whether HMRC would have had reasonable cause if burden on them: no – whether claimant would have had reasonable excuse if that was the test: yes – whether Tribunal jurisdiction full review or supervisory: full review – decision quashed, appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIBLEYS FUEL AND MARINE SERVICES **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 18 November 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 8 February 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 May 2016 and the Appellant's Reply dated 31st August 2016 (with enclosures) and other correspondence.

DECISION

1. This is an appeal by Sibleys Fuel and Marine Services ("the appellant") against the refusal by the respondents ("HMRC") to pay two claims made under the Hydrocarbon Oil and Biofuels (Road Fuel in Defined Areas) (Reliefs) Regulations 2011 (SI 2011/2935) ("HOBDAR"). I have allowed the appeal and quashed HMRC's decision.

2. One of the defined areas is the Isles of Scilly[1]. The appellant carries on business there as a fuel retailer (ie a petrol station). The business is carried on in partnership, but all dealings with HMRC and the Tribunal have been carried out by Mr Ian Sibley, one of the partners.

Background to the regulations

3. As this seems to be the first published decision on these particular regulations and as they have some unusual features, I am providing some background information about them, derived from official sources such as the Explanatory Memorandum ("EM") to HOBDAR and from Europa, the official website of the European Union.

4. Part 7 of the EM said:

> "7.1 Budget March 2011 announced that the Government had applied to the European Commission to implement a rural fuel duty relief scheme intended to deliver a 5 pence per litre duty relief on unleaded petrol and diesel for road use across the Inner and Outer Hebrides, Northern Isles, islands in the Clyde and Isles of Scilly.
>
> 7.2 The price of fuel on the Scottish islands is on average 10ppl and on the Scilly Isles is 25ppl more than in other parts of the UK, due mainly to higher transport and distribution costs. The 5ppl relief will offer some help to consumers in the areas concerned who are faced with the high costs of petrol and diesel."

5. Part 4 had this:

[1] I did ask myself whether it was beyond doubt that the Isles of Scilly were part of the UK (as a member state) for the purposes of Excise Duties. It is well known, at least to some – see *Evans v HMRC* [2016] UKFTT 683 (TC) – that the Canary Islands have a special non-EU status for excise and customs duties, and that the Åland Islands in the Gulf of Bothnia are similarly placed. It is clear however from Article 5 of the Excise Duties Directive (EC/2008/118) that the Isles of Scilly are within the scope. They have not always been within the reach of the UK tax collector however. From s 29 FA 1953 and s 27 FA 1954 it can be seen that before 1954/55 no assessment to income tax could be made on residents of the Isles since there was no division of General Commissioners of Income Tax whose powers of assessment extended to the Islands. Section 29 deemed the Isles always to have been in the Division of West Penwith in the County of Cornwall, but without retrospective effect as far as assessments were concerned. All this is no doubt familiar to Scillonians.

> "4.2 … In order to provide for lower rates on unleaded petrol and gas oil in the defined areas the United Kingdom had to apply for a derogation from Council Directive 2003/96/EC [OJ;L 283, 31,10.2003, p 51] restructuring the Community framework for the taxation of energy products and electricity. Article 19(1) of that Directive provides that the Council, acting unanimously on a proposal from the Commission, may authorise Member States to introduce reductions in taxation for specific policy considerations.
>
> 4.3 The Council Decision authorising the United Kingdom to apply reduced rates to unleaded petrol and gas oil was made on 24 November 2011 [2011/776/EU]. Under the Council Decision the reduction cannot exceed 5 pence per litre."

6. The Directive's full title is "Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity". Some relevant paragraphs of the preamble ("Whereas …") are:

> **"**(3) The proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products, including electricity, natural gas and coal.
>
> (4) Appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market.
>
> (24) Member States should be permitted to apply certain other exemptions or reduced levels of taxation, where that will not be detrimental to the proper functioning of the internal market and will not result in distortions of competition.
>
> (27) This Directive shall be without prejudice to the application of the relevant provisions of Council Directive 92/ 12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, when the product intended for use, offered for sale or used as motor fuel or fuel additive is ethyl alcohol as defined in Directive 92/83/EEC.
>
> (32) Provision should be made for the Member States to notify the Commission of certain national measures. Such notification does not release Member States from the obligation, laid down in Article 88(3) of the Treaty, to notify certain national measures. This Directive does not prejudice the outcome of any future State aid procedure that may be undertaken in accordance with Articles 87 and 88 of the Treaty."

7. When seeking an authorisation the United Kingdom explained:

> "Operation of the measure
>
> In the UK, excise duty on road fuels is accounted for at the point when the fuel leaves the refinery, when it is imported or when it leaves an

excise warehouse. At this point it would be difficult to identify the amount of fuel destined for eligible regions.

Therefore, the relief will be given at the point of sale on the eligible areas, *thus avoiding any risk arising from diversion of reduced rate fuel*. Fuel retailers in the concerned areas would be registered with HM Revenue and Customs (HMRC) as approved retailers and would be required to reduce the price of a litre of fuel by the amount of the duty relief. They would in turn be entitled to claim a refund of duty from HMRC, on a periodic basis, based on the litres of fuel sold." [My emphasis]

8. The Tax Information and Impact Note ("TIIN") for the regulations stated:

"The Hydrocarbon Oil and Biofuels (Road Fuel in Defined Areas) (Reliefs) Regulations 2011 SI/2011/[xxxx][2] introduce a new relief scheme intended to reduce the price of road fuel in the Scottish islands and the Scilly Isles. Retailers of road fuel within these areas will be eligible to register with HMRC and to claim back 5ppl duty relief on purchases of unleaded petrol and diesel for retail sale within the eligible areas. They will be entitled to claim the relief from HMRC on a monthly basis. After 60 days they will be required to reduce the price of a litre of fuel by an amount equivalent to the relief claimed."

The regulations and the 2015 amendment: the law (hard and soft) and other material

9. HOBDAR provides (relevantly):

"**Qualified claimant**

3. A person is a qualified claimant if that person—

(a) supplies qualifying fuel by retail sale from premises situated in a defined area; and

(b) has notified the Commissioners of that fact and is registered by them to make a claim for relief.

Relief

4. Relief is allowed in accordance with these Regulations if a quantity of qualifying fuel has been purchased by a qualified claimant to be supplied by that person for use as fuel in a road vehicle.

Amount and form of relief

5. The amount of the relief shall be 5 pence per litre and shall be in the form of a repayment by the Commissioners to the qualified claimant.

Application for relief

6.—(1) Relief is allowed only upon the written application of a qualified claimant.

[2] This is what the TIIN shows as it would have been produced before the regulations were made and allocated a number in the SI series.

(2) Each application must contain the particulars specified in the Schedule and be made on a form provided by the Commissioners for the purpose.

(3) The qualified claimant must sign and date the form and declare that the information provided on it is true and complete.

(4) An application must be made no later than 30 days after the end of the month to which it relates.

Conditions

7.—(1) Relief is allowed subject to the following conditions. (2) The qualified claimant must—

(a) if so required by the Commissioners, provide to their satisfaction evidence of the purchase of the qualifying fuel in relation to which any application for relief is made;

(b) give to the person to whom the qualifying fuel is supplied for use in a road vehicle a reduction in the price per litre that is equivalent to the relief per litre that has been claimed (or will be claimed) on it;

(c) keep and preserve such records as the Commissioners may specify.

Cancellation of Relief

8.—(1) If there is a failure to comply with any condition imposed by regulation 7 the relief allowed shall be cancelled.

(2) Where any relief is cancelled, any person who is a qualified claimant in relation to the application for relief shall, on demand, be liable to repay the amount of the relief.

SCHEDULE

PARTICULARS TO BE CONTAINED IN APPLICATION

a) The name, address and telephone number of the qualified claimant.

b) The month to which the application relates.

c) The total volume of unleaded petrol purchased by the qualified claimant in that month.

d) The total volume of heavy oil (diesel) purchased by the qualified claimant in that month.

e) The name of the person from whom the unleaded petrol and diesel was purchased.

f) The date on which the unleaded petrol and diesel was purchased.

g) The amount of the claim."

10. The regulations have been amended once, in 2015. The Hydrocarbon Oil and Biofuels (Road Fuel in Defined Areas) (Reliefs) (Amendment) Regulations 2015 (SI 2015/550) ("the 2015 Regulations") added more areas to the list, and importantly for

this appeal amended regulation 6 of HOBDAR, the amendment coming into force on 1 April 2015. After amendment it reads (with new material emboldened):

> "**Application for relief**
>
> 6.—(1) Relief is allowed only upon the written application of a qualified claimant.
>
> (2) Each application must contain the particulars specified in the Schedule**s** and be made on a form provided by the Commissioners for the purpose.
>
> (3) The qualified claimant must sign and date the form and declare that the information provided on it is true and complete.
>
> **(4) Unless, for reasonable cause, the Commissioners allow an application to be made at a later date, no relief shall be allowed if the application is received by the Commissioners later than 30 days after the end of the month to which it relates**.".

11. The Explanatory Notes say that the regulations :

> " … extend the fuel duty relief scheme to more defined areas from 1st April 2015 and make explicit that no relief is allowed if a claim is received later than 30 days after the month to which it relates unless, for reasonable cause, the Commissioners allow a claim to be made late."

12. This is simply a rephrasing of the new paragraph, not an explanation for it, though it contains an important admission (see §102). The Explanatory Memorandum for the regulations ("EM") merely referred, in the context of the substitution of regulation 6(4), that the 2015 regulations "make some other amendments to the scheme". The EM did promise a "Revenue and Customs Brief" in "early March" [2015] but I could find no such brief on HMRC's website.

13. The website does show an Excise Notice, Notice 2001 which says, among other things:

> "**2.10 Under what circumstances would HMRC accept claims that are submitted later than 30 days after the end of the month to which it relates?**
>
> Late claims will only be accepted in exceptional circumstances – genuine mistakes, honesty and acting in good faith are not accepted as a reasonable cause for submitting the claims late (ie outside the 30 day period).
>
> You must send your returns as soon as possible after your reasonable cause is resolved [*sic*]."

14. This notice is dated 31 October 2015 and is said to replace the April 2015 version which I assume was the first one, given paragraph 2.10. At 1.3 it says:

> "**What has changed?**
>
> Changes include:

- *clarification* of the circumstances in which we will accept late claims
- … " [my emphasis]

Other relevant law

15. By s 13A Finance Act 1994 ("FA 1994") a decision by HMRC under the regulations is a "relevant decision". As a result when HMRC make such a decision they must offer a review (s 15A FA 1994) and if the offer is accepted and a review carried out, the appellant may notify an appeal against the relevant decision to this Tribunal (s 16(1B) FA 1994).

16. In the event HMRC did not offer a review, contrary to s 15A, but the appellant requested one and it was carried out. HMRC did not dispute the appellant's right to appeal to this Tribunal.

Evidence

17. I should explain that this was a case which was initially allocated to the Standard category under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and proceeded in accordance with Rule 27. But after it was found impossible to find a date and location that Mr Sibley would be able to leave the Isles of Scilly for, the case was reallocated, under Rule 27(3) by direction of the Tribunal and with the agreement of the parties, to the Default Paper category.

18. I have a bundle of papers that was prepared by HMRC in accordance with the usual directions for a Standard case. This bundle contains

(1) The Notice of Appeal.

(2) HMRC's Statement of Case ("SOC").

(3) Correspondence including the appellant's application to participate in the scheme of relief under the regulations and the two monthly returns on Form HO81 which were not allowed.

(4) A Schedule prepared by HMRC of all HO81s submitted with each one's date of submission.

(5) Witness statements of an HMRC officer (not one who was involved in the decisions).

(6) The appellant's documents, those which he informed the Tribunal that he wished to rely on, including his reply to the HMRC SOC.

19. I also have HMRC's further submissions for my consideration on paper.

20. The SOC contains some factual material about the appellant's history of making claims, and the appellant's grounds of objection to the decision and of appeal.

Facts

21. The appellant operates a "family business" on St Mary's, one of the Isles of Scilly.

22. One of the businesses carried on by the appellant in the Isles of Scilly is as a fuel retailer.

23. On 12 December 2011 the appellant applied to register for the scheme (before the regulations came into force on 1 January 2012). The Form stated that the previous year's purchases were 196,000 litres of petrol and 94,000 litres of diesel. [This amount would if repeated give rise to a claim of £14,500 for a year].

24. The appellant's application was approved and they were registered with effect from 1 January 2012.

25. The appellant received a letter of confirmation on 23 January 2012. It informed the appellant that monthly claims must be submitted no later than 30 days after the end of the claim period, and that no later than 60 days after the date of registration the appellant must reduce the cost of road fuel it sold by an amount equal to the relief it had claimed.

26. On 3 July a letter was issued to the appellant[3] on 3 July 2015 as, it said, part of an assurance exercise. It stated that "the scheme is aimed at giving financial help to consumers in qualifying areas who face high costs of petrol and diesel." The letter enclosed a Business Brief to explain how the scheme works – there is no copy of this in the papers.

27. It went on to say that to ensure the scheme was operating as intended HMRC would be running an assurance exercise:

> "to confirm that all claimants understand the scheme and to verify the accuracy of claims. For example that [*sic*] rural fuel claim forms (HO81) must be received by HMRC no later than 30 days after the end of the month to which it relates".

It repeated the wording of the confirmation letter about reducing prices.

28. On 19 November 2015 the appellant submitted a claim on Form HO81 for relief for the months of August and September 2015, in the amounts of £1,863.22 and £1,026.00 respectively. There was also a claim for October which was in time and the HO81 for which is not in the bundle. I assume it was paid.

29. On the first page of each Form HO81 are the words:

> "A separate claim must be made for each calendar month. Claims must be made within 30 days of the end of the claim period."

30. Each Form contains the following on page 2:

> "Adjustments – underclaimed and overclaimed
>
> If you need to claim for a purchase in an earlier period or you claimed too much, enter the period of claim and the amount.

[3] It was addressed to "Sibleys Fuel & Marine Serv. See Folder re Adjustment"!

Period of adjustment (month and year) eg mm yyyy

Amount underclaimed £

Amount overclaimed £

Adjusted claims total £ ”

31. On each form the first three entries were blank and the last contained the same figure as in the claim. The instructions on the forms show that they have to be completed online.

32. On 8 December 2015 the claim for August and September was rejected by Ms Carole Bowman, an officer of HMRC, on the grounds that the regulations state that “[a]n application must be made no later than 30 days after the month to which it relates”.

33. Ms Bowman told the appellant that “you can request a formal departmental review”.

34. On 14 December the appellant requested a review. He gave reasons why the claim was late which I describe at §48.

35. On 7 January a letter was sent to the appellant on behalf of Mr Mark Severin in the Appeal & Reviews Unit of ISBC Dispute Resolution. It stated (among other things):

> “After consideration of the application and examination of the circumstances related to this request, it will be decided if a review is appropriate.
>
> If a review is considered to be appropriate it will be carried out by Mark Severin ….
>
> At the conclusion of the review, there may be the right of appeal to the independent Tribunal Service
>
> If there is any further information you would like to be considered, please send this as quickly as possible to the review officer …. he/she can be contacted on the number above.”

36. On 14 January Mr Severin upheld the original decision to refuse the claim. He related in his decision that:

> “the initial regulations did not allow for a consideration of reasonable excuse, if a fuel retailers claim had been submitted after the statutory period of 30 days after the end of the claim period month.”

37. He added that the 2015 regulations had come into force and that the amendment to regulation 6(4) introduced a “reasonable excuse” defence to a refusal of a late claim.

38. He pointed out that Ian Sibley had signed several previous claims (but did not say which) and mentioned that he had reviewed the submission history of the business and that 11 of the 43 claims submitted were out of date. There is no evidence in the

letter that any schedule of claims was provided to the appellant, though it is in the bundle immediately after the letter.

39. He considered that on the balance of probabilities the business would have been aware of the deadline, by reason of the Forms HO81 and previous advice issued via HMRC correspondence.

40. He said that 54 and 24 days (the delay in filing the claims in dispute) was a substantial period of delay, for which there was no convincing explanation. The matters set out in the appellant's letter of 14 December 2015 did not constitute a reasonable excuse. Thus he upheld Ms Bowman's decision.

41. The Schedule shows that 11 claims were marked as "paid – out of date". These include seven late claims for 2012, two for 2013 and two for 2014. The number of days late was 11, 3, 7, 3, 5, 5 and 9 for 2012, 2 and 4 for 2013 and 24 and 83 for 2014.

42. On 8 February 2016 the appellant appealed to the Tribunal.

43. I find as fact all of the above save the reasons that Mr Severin gave for the conclusion he drew about whether the appellant had a reasonable excuse (§§38 to 40), as that is the matter I have to decide. The same applies to the appellant's reasons for lateness (§§34 and 48).

Further findings of fact

44. There were a number of statements made by Mr Sibley in the correspondence and other documents which are clearly asserted to be true but which I could not verify from the evidence I had. I therefore need to make findings of fact about them.

45. In his correspondence with HMRC, his grounds of appeal and in his reply to HMRC's Statement of Case Mr Sibley made the following points.

(1) There was a change of personnel in the summer. The size of the fuel business had declined in recent years due to the smallness of the market (St Mary's, the island concerned, has a resident population of 2000) and the trend to renewables.

(2) As a result the partnership was split, with Mr Sibley's partner, Clive, leaving the day to day running of the firm to concentrate on new business. Ian remained as sole working partner taking on all Clive's work in the business.

(3) From its inception in 2012 Ian had administered the scheme, but for the last couple of years it had been Clive's responsibility.

(4) The refusal to pay the relief for two of the business's busiest months will have a significant impact on profit.

46. I am satisfied, particularly from the lack of challenge to them, that it is more likely than not that these statements are true and I find them as fact.

The appellant's submissions

47. In summarising his grounds of appeal Mr Sibley had said:

(1) A change in personnel had meant that the claims were late.

(2) There is no reward for the business for administering the scheme – they participate in it for the benefit of the customers. They funded the relief upfront.

(3) He was honestly not aware of the 30 day limit, though he accepted that perhaps he should have been. Otherwise, he asked rhetorically, why would he have made late claims? He was working flat out during the busy summer period and it did not occur to him there was such a short time limit.

(4) All later returns have been and future returns will be on time.

(5) The 30 day limit is unreasonable. He said "[t]his is not tax I owe the government, it is tax the government owes me."

(6) He accepts that HMRC have a record of the late claims. On this he says that being island based with irregular postage it is not unusual for correspondence to take an excessive time to arrive and many of these occasions will have been outside our control.

(7) HMRC send out no reminders about claims.

(8) "On a technicality" each month the retailer is allowed to adjust their claim by any overclaim or underclaim for the previous month.

48. I should point out here, as it may be relevant, that in his response to Ms Bowman's letter of 8 December he had mentioned only:

(1) The change in personnel but with no further detail

(2) That he was not aware of the 30 day limit

(3) The partners did their best to administer the scheme on behalf of HMRC.

HMRC's submissions

49. The appellant had not put forward submissions that show that they had a reasonable excuse for the delay in making the claims. In particular:

(1) The appellant was aware of the time limit from the two letters sent on registration and on 3 July 2015 and from the Forms HO81. He had administered the scheme from inception and should therefore have been aware of the time limit. He had indeed acknowledged that he should have been aware of the limit.

(2) He admitted that the need to make claims was not given his full consideration.

(3) When there was a shortage of personnel Ian Sibley failed to respond effectively and it was reasonable that the claims should be given a high priority given the sums involved. By their own admission the appellant operates in a challenging and marginal market.

(4) The appellant had made 43 claims before the one in dispute and 11 were out of time.

(5) Reliance on a third party (ie Clive and/or Royal Mail) is not a reasonable excuse – see s 10(3) Finance Act 1994 ("FA 1994").

(6) As to the "technicality" HMRC say that adjustments can be made for previous months but they must be submitted on time and within 30 days. What the adjustments are for is to take into account invoices received late by the trader too late to be included in the monthly claim.

50. The refusal is in line with HMRC guidance and legislation, as there is no reasonable excuse and the appellant has failed to meet their obligations under the Scheme as set out in legislation.

Discussion

Reasonable excuse?

51. The first occasion on which Mr Sibley was made aware that a late claim might be accepted under the regulations was when Mr Severin wrote to him on 14 January 2016. He was told in that letter that from 1 April 2015 "[t]his [the 2015 change to the regulations] allows HMRC to consider reasonable excuse" (but, Mr Severin added, the appellant did not have one). The assurance letter of 3 July 2015 did not mention it (even though the 2015 regulations were in force by then) and nor did Ms Bowman on 8 December 2015 (even though the 2015 regulations were still in force)

52. The SOC under "Burden of Proof" says "[t]here is no statutory definition of reasonable excuse" and "it's a matter to be considered in the light of all the circumstances of the case". They then went on to quote Excise Notice 2001 which explains that "late claims will only be accepted in exceptional circumstances – genuine mistakes, honesty and acting in good faith are not accepted as a reasonable cause for submitting the claims late".

53. Later in the SOC they refer again to the appellant not having a reasonable excuse.

54. The HMRC officers in this case who reviewed the appeal and who compiled the SOC seemed to think that what I have to do in this appeal is decide whether or not the appellant had a reasonable excuse for not submitting the two claims on time. If that were so it would of course be a task which every judge or presiding member in this Tribunal is familiar with, as it is a very well known phrase where VAT default surcharges and the whole range of penalties for all taxes and duties are in issue.

55. This field of operation for the phrase, where a person has failed to observe a time limit for performing an obligation and has incurred a penalty for so doing, is very different from that here, where the appellant is seeking repayment from HMRC of money due to them for their playing an important part in a Government scheme to assist drivers in remote areas, as the SOC says at [3] and the appellant rightly emphasises.

56. And until recently it was not thought that a reasonable excuse provision would apply to claims by a person to obtain a relief. That changed with the decision of the Upper Tribunal in *Raftopolou v HMRC* [2015] UKUT 579 (TCC) but that is, I understand, under appeal to the Court of Appeal[4]. But the point remains that it is exceptional to find a reasonable excuse provision applying to a claim for relief.

57. But despite what HMRC have said to the appellant and to the Tribunal, the term used in regulation 6(4) HOBDAR and in official documentation including Excise Notice 2001 is not "reasonable excuse" but "reasonable cause". Mr Severin did in fact use the term reasonable cause in his review letter of 14 January 2016 but only when actually quoting regulation 6(4) HOBDAR (and this passage was repeated in the SOC). So HMRC clearly operate on the basis that the two terms have the same meaning – indeed they pointed to s 10(3) FA 1994 in further submissions to the Tribunal to demonstrate that the appellant's reliance on Clive or the Royal Mail cannot be a reasonable excuse.

58. Section 10 of that Act indeed says:

> "(1) Subject to subsection (2) below and to any express provision to the contrary made in relation to any conduct to which section 9 above applies, such conduct shall not give rise to any liability to a penalty under that section if the person whose conduct it is satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for the conduct.
>
> (2) Where it appears to the Commissioners or, on appeal, an appeal tribunal that there is no reasonable excuse for a continuation of conduct for which there was at first a reasonable excuse, liability for a penalty under section 9 above shall be determined as if the conduct began at the time when there ceased to be a reasonable excuse for its continuation.
>
> (3) For the purposes of this section—
>
> (a) an insufficiency of funds available for paying any duty or penalty due shall not be a reasonable excuse; and
>
> (b) where reliance is placed by any person on another to perform any task, *then neither the fact of that reliance nor the fact that any conduct to which section 9 above applies was attributable to the conduct of that other person shall be a reasonable excuse*." [my emphasis]

59. By this reference HMRC have indeed demonstrated that reliance on a "another person" to perform a task does not of itself give the person placing reliance on the other a reasonable excuse for their conduct *in a case where it is expressly mentioned.* Where it is not expressly mentioned there is no bar on such reliance amounting to a reasonable excuse, and in any case as this business is a partnership then if Ian relied on Clive the same person is the placer of reliance and the person relied upon. There is no restriction of the sort in s 10(3)(b) FA 1994 to be found in regulation 6 HOBDAR.

[4] In my view, for what it is worth (which is not very much in this context), the Upper Tribunal was wrong for historical reasons among others.

60. Section 10 FA 1994 is about appeals against penalties imposed for breaches of any enactment (including an enactment contained in FA 1994 or in any Act passed after it) which provides for the conduct to attract a penalty under section 9 FA 1994. It is wholly consistent with what I say at §55 that there is a reasonable excuse provision in those circumstances. I also note the irony in HMRC praying in aid s 10(3) FA 1994: how could the appellant put forward insufficiency of funds as a reasonable excuse for claiming their relief late? If he had an insufficiency of funds, and he says he had, then it is because HMRC will not pay his claim!

61. But in any event s 10 FA 1994 is wholly irrelevant because HOBDAR does not impose a penalty under s 9 FA 1994, or at all, and is arguably not an enactment. And of course it is irrelevant because the term used is "for reasonable cause"

62. I need then to consider not only what regulation 6(4) means but what it says. To repeat, it says:

> "(4) Unless, for reasonable cause, the Commissioners allow an application to be made at a later date, no relief shall be allowed if the application is received by the Commissioners later than 30 days after the end of the month to which it relates."

63. So the question for me is what does "for reasonable cause" mean, and who has to show that they acted or failed to act for it?

"For reasonable cause": what does it mean?

64. As I have pointed out, HMRC in the form of Mr Severin and (if another officer) the drafter of the SOC clearly assume it has the same meaning as "reasonable excuse" and therefore it is something that an applicant has to show to HMRC.

65. The question that arises in relation to whether there is a difference in meaning is why did the drafter of the 2015 Regulations, who is after all an officer of HMRC, a lawyer in HMRC's Solicitor's Office, not a member of the Office of Parliamentary Counsel, not use the extremely familiar term "reasonable excuse" if that was what was wanted by those responsible for Excise Duty policy who instructed the Solicitor's Office.

66. To someone who has a background in direct tax or VAT the phrase "reasonable cause" will be an unfamiliar one. It is not however unfamiliar in the field of customs and excise duties.

67. A search I carried out on legislation.gov.uk for the phrase "for reasonable cause" in all current legislation, primary and secondary, produced 60 hits.

68. 36 of those hits have no relevance to tax, the vast majority relating to the NHS and its disciplinary procedures. Of the 24 that do relate to tax, they all without exception relate to excise or customs matters. But what they do *not* do in the legislation in which they appear is provide an equivalent to a "reasonable excuse" for a failure by a person other than HMRC to do something. The most recent example put on the statute book can be found in s 179 FA 2016. This inserts a lot of new

sections into the Tobacco Products Duty Act 1979 ("TPDA") concerning the raw tobacco approval scheme.

69. In those sections we find that there is, as one would expect in any excise duty scheme, a penalty for contravening the requirement for official approval in relation to the scheme. Section 8O charges the penalty. Section 8R is headed "Penalties under section 8O: reasonable excuse". It looks familiar:

> "**Penalties under section 8O: reasonable excuse**
>
> (1) A person is not liable to a penalty under section 8O in respect of a contravention if—
>
> (a) the contravention is not deliberate, and
>
> (b) the person satisfies the Commissioners that there is a reasonable excuse for the contravention.
>
> (2) For the purposes of subsection (1)(b)—
>
> (a) where the person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the contravention;
>
> (b) where the person had a reasonable excuse for the relevant act or failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the contravention is remedied without unreasonable delay after the excuse has ceased."

70. Where "reasonable cause" comes in is in section 8L which is about the requirement for approval. It says:

> "(1) A person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.
>
> (2) The Commissioners may approve a person to carry on a controlled activity only if satisfied that—
>
> (a) the person is a fit and proper person to carry on the activity, and
>
> (b) the activity will not be carried on for the purpose of, or with a view to, the fraudulent evasion of the duty of excise charged on tobacco products under section 2(1).
>
> (3) An approval may—
>
> (a) specify the period of approval, and
>
> (b) be subject to conditions or restrictions.
>
> (4) *The Commissioners may at any time* ***for reasonable cause*** *revoke or vary the terms of an approval*." [My emphasis and emboldening]

71. It is this type of formulation that is found in all the other 23 hits that refer to customs or excise duties, except one – regulation 6 HOBDAR. The other 23 references also make it clear (see s 8L(4) TPDA above) that the person who has to have reasonable cause is HMRC, not the person being regulated or investigated.

72. When one turns to the 36 hits that do not relate to tax some do however show the term being used in relation to failure to observe time limits. Regulation 10(a) of the National Health Service (General Medical and Pharmaceutical Services) (Scotland) Amendment Regulations 1991 (SI 1991 No. 572 (S. 57) is typical and contains this:

> "(2) A doctor may appeal by sending to the Secretary of State a notice of appeal within 14 days, *or within such longer period as the Secretary of State may for reasonable cause allow*, of the date on which notice of the decision of the Health Board or, as the case may be, the Medical Practices Committee is given to him. [My emphasis]
>
> (2A) A notice of appeal shall contain a concise statement of the point or points of law in respect of which the doctor contends that the decision of the Health Board or, as the case may be, the Medical Practices Committee is erroneous."

73. In the General Medical Council (Suspension and Removal of Members from Office) Rules Order of Council 2004 (SI 2004/215) Regulation 4 provides that a member of the GMC may be removed from office if:

> "(c) his attendance at meetings of the Council or Council committees falls below a minimum level as set out in standing orders of the Council and *the Council are satisfied that this is not for reasonable cause*" [My emphasis]

74. This is akin to a time limit. But there are also provisions similar to the other 23 tax and duty hits. For example paragraph 11 of Schedule 1 to the Home Energy Efficiency Scheme (Scotland) Regulations 2006 (SI 2006/570) says:

> **"**An agency may terminate or suspend the appointment of a registered installer for reasonable cause."

75. The first two examples seem much closer to the way regulation 6(4) HOBDAR is phrased than the 23 tax and duty hits, while the last more resembles those 23 hits.

76. What seems a common thread in most of the examples is that where a Government body or other regulating institution (the body") proposes to do something which could be prejudicial to the person against whom that something is to be done, the body can only do it "for reasonable cause" and that it is the body which must have reasonable cause. For doing something to someone that may be prejudicial to their interests a body does not need to offer excuses, it needs to demonstrate that it has reasonable cause for doing it. It reads oddly for HMRC, for example, to say to a person approved to carry on a controlled activity for excise duty purposes (see §70) that HMRC have to show a reasonable excuse for varying the terms of an approval.

77. There is no binding authority that I can find on what "for reasonable cause" actually means. But there is plenty on the very similar question of what having reasonable cause to believe or reasonable cause for doing something means. Perhaps the best known (and most notorious) use of "reasonable cause to …" was in regulation 18B(1A) of the Defence (General) Regulations 1939:

> "(1A) *If the Secretary of State has reasonable cause to believe* any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, any such organisation as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

78. As many readers of this decision will know, this paragraph of the regulation was famously litigated in *Liversidge v Anderson and another* [1941] UKHL 1, and it was somewhat notoriously held, in the words of Lord Atkin's coruscating dissent, that "the words "if the Secretary of State has reasonable cause" merely mean "if the Secretary of State thinks that he has reasonable cause."

79. My point in referring to this famous case is that throughout the report it is clear that the Appellate Committee uses the term "reasonable cause" and "reasonable grounds" interchangeably. And many provisions of law that are of the type referred to in §76 use "reasonable grounds" rather than the slightly old-fashioned feel of "reasonable cause.

80. In all these cases where a body is proposing to do something that may be prejudicial to the person who is the object of the action, the requirement to show that it is done "for reasonable cause" clearly means that it is to be done only on reasonable grounds, and not because the body has a reasonable excuse for doing it.

81. There are though a few cases in which someone is required to have reasonable cause for *not* having done something, such as appealing within 14 days as in the doctor case (§72) or not attending sufficient GMC meetings (§73). So HOBDAR is not completely out of line. In these cases it makes more sense to say that what they are being required to show is a reasonable excuse.

82. But while it makes sense for a doctor who has failed to appeal a decision which could prejudice their career or a member of the GMC who fails to turn up to sufficient meetings that their membership is in danger of being terminated to be required to offer an excuse, in regulation 6 HOBDAR the claimant is seeking something to their advantage, not seeking to show why they should not be prejudiced, and it is odd to talk about the claimant in this situation having a reasonable excuse for failing to ask for their advantage in time. It makes more sense to say they have to give reasons or grounds for the failure.

83. I therefore approach this case with no preconception that any decisions of the Upper Tribunal or a Court on the term "reasonable excuse" are binding on me, and nor are any of the qualifications found in some reasonable excuse provisions. But I do approach it on the basis that "for reasonable cause" means "on reasonable grounds".

Who has to show "reasonable cause"?

84. The formulation in regulation 18B considered in *Liversidge v Anderson* obviously demonstrates that it is the Secretary of State who has to have reasonable

cause because it says so. In the legislation I have quoted at §§70 and 74 it is the "body", HMRC or the agency which clearly has to show reasonable cause.

85. But in the legislation at §73 while it is the body which as to be satisfied that the member did not have reasonable cause, it must be for the member to show what the reasonable cause was or the body could not be satisfied, but it is not explicit.

86. It is less clear it is the doctor in the medical appeal case (§72), because of the slightly elliptical wording, which again does not use the term "show" or any equivalent.

87. It would be reasonable to expect based on the legislation in §72 and §73 that in regulation 6 HOBDAR it is the claimant who has to show reasonable cause. But not only does paragraph 4 not use a term like "show" it does not mention the claimant, the person who has failed to do something, at all, unlike in the doctor or GMC member example.

88. There was one hit that makes it very clear that a "claimant" rather than the body has the burden of showing reasonable cause:

> **"…**
>
> Provided always, that in the event of any in-pensioner . . . being allowed by the commissioners of the said hospital at Chelsea to resign and quit . . . as an in-pensioner, **for reasonable cause shown to them**, it shall and may be lawful for the said commissioners of the said hospital at Chelsea to restore the non-commissioned officer or soldier so ceasing to be an in-pensioner . . . , either to the same out-pension to which such non-commissioned officer or soldier was entitled at the time of his entering . . . , or to any less rate of pension, according to the discretion of the said commissioners."

89. This is the proviso to s 24 Chelsea and Kilmainham Hospitals Act 1826 (7 Geo. IV c. 16) ("the 1826 Act"). It is somewhat odd to use an 1826 Act, drafted before the establishment of the Office of Parliamentary Counsel, to demonstrate clearly a point which much more modern legislation does not. But by using the word "shown" it puts the matter beyond doubt.

90. As I have said, there is no such help to be found by the use of the word "show" in the elliptical (and very modern) regulation 6(4) HOBDAR. Removing the ellipsis and doing some expansion, if it is to be said that HMRC are the ones who have to show reasonable cause, the provision when written out to reflect that would say something like:

> "Unless the Commissioners show that they have reasonable cause to allow an application to be made at a later date, no relief shall be allowed if the application is received by the Commissioners later than 30 days after the end of the month to which it relates."

91. But if in removing the ellipsis and doing some expansion, it is to be said that the clamant is the one who has to show reasonable cause, the provision when written out to reflect that would say something like:

> "Unless the qualified claimant shows reasonable cause for failure to ensure that the application is received by the Commissioners no later than 30 days after the end of the month to which it relates, no relief shall be allowed."

92. Better drafters than me might be able to recast paragraph 4 to demonstrate the burden is on the claimant without the wholesale rewriting of the paragraph that I have carried out. One problem with the wording of regulation 6(4) is that the time limit in it relates to the receipt by HMRC of the claim.

93. This contrasts with for example s 8 Taxes Management Act 1970 ("TMA") where the obligation is on the taxpayer to "make and deliver to the officer" a return on or before the filing date. This may explain why the drafter did not refer to the claimant, though in a case where the return must be made online, the date of delivering and the date of receipt by HMRC will inevitably be the same, so a provision based on delivering could have been used.

94. As I have attempted to show, the answer to the question (who has to show reasonable cause?) is by no means as clear cut as in other examples I have pointed to, and the formulation in §90 seems to make sense. But in the light of the way other legislation puts the burden on the claimant or appellant and not the body, I prefer a reading of regulation 6(4) that does puts the burden on the claimant to show reasonable cause for the lateness such that HMRC should allow the claim to proceed.

95. But because I am by no means completely certain about this, I will also consider what would be the outcome of the appeal if the burden were on HMRC to show reasonable cause. And because HMRC think "reasonable cause" and "reasonable excuse" mean the same and have proceeded on that basis, I will also consider what the outcome would be if the provision only allowed a late claim to be accepted if the applicant has a reasonable excuse for the lateness.

Powers of the Tribunal in this case

96. HMRC have not suggested that I have anything other than a full review jurisdiction rather than a supervisory one. So by virtue of s 16(5) FA 1994 I have power to quash or vary the decision and power to substitute my own, as well as the implicit power to affirm HMRC's decision.

97. Though had it been HMRC who had to show reasonable cause then I would think that, in accordance with the decision of the Court of Appeal in *John Dee Ltd v Commissioners of Customs & Excise* [1995] STC 941, my jurisdiction might well be supervisory.

98. I shall approach this appeal in much the same way as a reasonable excuse appeal is approached, by considering all the facts, as Excise Notice 2001 say HMRC must do. This is of course an appeal against a decision of HMRC and it seems clear

to me that it is the relevant decision, that of Ms Bowman, that is under appeal (s 16(1B) FA 1994 - contrast with s 16(1) and (1A) where it is the review decision that is under appeal). I do not think I am limited to considering just the facts that were before Ms Bowman or even just before Mr Severin: I can consider all the facts I have found even if some of them were only known to HMRC and arguments on them only put to HMRC in the grounds of appeal or subsequent correspondence. Equally I am not confining HMRC to the grounds given by Mr Severin.

99. I also recognise that the appellant is not only a litigant in person but that he may have been misled by HMRC as to what he has to demonstrate to succeed. I therefore intend to consider arguments that he might have raised had he been legally advised or represented at a hearing.

The appellant's grounds for saying they had reasonable cause for the lateness

100. In my view the strongest ground that the appellant has is an apparent own goal by HMRC. In his review letter Mr Severin mentioned to Mr Sibley that he had calculated that 11 out of 43 previous claims were late. I have the Schedule Mr Severin prepared and they *were* late, and in two cases extremely late, 24 and 83 days late (see §41). The claims in question in this appeal were 24 and 54 days late. But what Mr Severin did not say was that the 2014 claims, 24 and 83 days late as they were, *were paid*, as were the other nine claims even though they were out of date and made in periods when there was no "reasonable cause" provision in the regulations.

101. This conduct by HMRC in letting 11 late claims be paid when there was no let out available would have led the appellant (the partnership, whether Clive or Ian was administering the scheme) to think that the 30 day rule that had been notified to the appellant, was not taken seriously by HMRC.

102. In fact HMRC seem to have had an internal unpublished policy of allowing late claims. That HMRC were it seems offering a non-statutory approach can be discerned from the Explanatory Note to the 2015 Regulations, regulation 4 of which substituted the current regulation 6(4) of HOBDAR:

> "They extend the fuel duty relief scheme to more defined areas from 1st April 2015 *and make explicit* that no relief is allowed if a claim is received later than 30 days after the month to which it relates unless, for reasonable cause, the Commissioners allow a claim to be made late." [My emphasis]

103. In my view this conduct of HMRC's is a reasonable ground for having the claims admitted and therefore the claimant has shown that its failure was for reasonable cause.

104. I add in this context that Mr Sibley's argument on the schedule of late claims about postal delays to the Isles of Scilly may or may not be correct, but it is beside the point. If correct, it could only give him reasonable cause in relation to some or all of the early appeals, and not the 2014 ones or more relevantly the 2015 ones in this appeal, but of course in 2012 and 2013 there was no let out and the claims were in fact accepted.

105. I do think though that Mr Sibley's submissions about the appellant's role in the scheme and the nature of the scheme gives the appellant reasonable cause. Mr Sibley said in his representations that he was doing his best to "administer the scheme on behalf of HMRC". That points up the unique nature of this scheme. He may be aware, being a Scillonian, of another fuel duty relief – that for growers of horticultural produce. There are in fact many such schemes of relief. What is striking about them is the difference between this scheme, the one HMRC calls Rural Fuel Duty Relief scheme ("RFDR") and them.

106. Other reliefs under the Hydrocarbon Oil Duties Act 1979 ("HODA") operate where a person purchases the fuel, uses the fuel in their business (eg power stations, horticultural enterprises) where it represents an overhead cost, and then claims relief.

107. The scheme of RFDR is that the retailer must reduce the price of petrol at the pump by 5 pence per litre and so receive a reduced amount of takings (regulation 7(b) HOBDAR). The retailer can reclaim the amount of the reduction from HMRC. Admittedly the claim is for relief by repayment based on purchases of fuel in the month (items c) and d) of the Schedule to HOBDAR) but it is reasonable to suppose that sales in a particular month will use up most or all of the fuel purchased in that month or the previous one, especially if as here monthly claims are made (I would assume nil claims are not required).

108. Thus the retailer will have suffered detriment (reduced takings) before the repayment is made. The person who benefits immediately from the RFDR scheme is the purchaser of fuel from the appellant. But HMRC also benefits in that it has collected duty from the person supplying the retailer (or from the person who released the fuel for consumption further back in the chain) but does not give the relief and make a repayment until it is claimed. HMRC justified their not giving the relief on release of the fuel on the grounds that to do so would be difficult and, I assume, would be subject to diversion from use in the remote areas, and they stressed to the Council of Ministers in the EU that the scheme adopted would be immune from fraud.

109. Another difference between the RFDR scheme and other fuel duty schemes is that in those other schemes the time limit for claiming is different:

(1) For the Marine Voyages Relief the limit for a claim is 3 months – see the Hydrocarbon Oil Duties (Marine Voyages Reliefs) Regulations 1996 (SI 1996/2537) and Excise Notice 263 paragraph 4.4

(2) For relief for growers of horticultural produce the limit is 3 months – regulation 7 of the Hydrocarbon Oil (Amendment) regulations 1981 (SI 1981/1134) and Excise Notice 183 paragraph 2.3

(3) For relief for power stations generating electricity the limit is 9 months - regulation 8 of the Hydrocarbon Oil Duties (Reliefs for Electricity Generation) Regulations 2005 (SI 2005/3320)

(4) For industrial reliefs the limit is 3 months – regulation 9 of the Hydrocarbon Oil (Industrial Reliefs) Regulations 2002 (SI 2002/1471)

(5) For drawback claims for ships and aircraft stores the limit is 2 years - Excise Goods (Drawback) Regulations 1995 (SI 1995 No 1046) and Excise Notice 172 paragraph 2.3.

110. This list does not tell the whole story. Whereas claims under the remote areas relief are made for a monthly period, item (3) above uses an annual period, and items (1), (2) and (4) a period of between 2 months and 3 years. Item (5) is based on an event, rather than a period.

111. In fact the RFDR scheme more closely resembles income tax relief at source schemes such as MIRAS (Mortgage Interest Relief At Source) and Life Assurance Premium Relief by Deduction, where a tax relief is given to taxpayers by reducing mortgage interest payable to the bank or premiums payable to the insurance company, and the bank or insurer then reclaims the amount of the relief from HMRC.

112. In the Income Tax (Life Assurance Premium Relief) Regulations 1978 (SI 1978/1159) a "deficiency" claim is made on an annual basis, but interim claims may be made. These may be made for a month or more and may be made at any time up to one month *before* the period for which it is made (regulation 6(1)).

113. Interim claims may be also be made in arrear up to 6 months after the end of the relevant period. Failure to make them does not invalidate any claim, as an annual claim would still be capable of being made and that could be made up to six *years* (probably now four) – regulation 9(1).

114. Similar periods are to be found in the Income Tax (Interest Relief) Regulations 182 (SI 1982/1136) (MIRAS) and the Personal Pension Schemes (Relief at Source) Regulations 1988 (SI 1988/1013).

115. I am not saying that HMRC should act as if the time limit in the regulations was longer than 30 days – say three months or six years. What I think is that in considering whether a claimant can show reasonable cause for being 54 days late and arriving at an answer to the reasonable cause question, HMRC should have taken into account that the benefit of the claim is entirely that of the claimant. HMRC does not suffer *any* detriment as a result of a late claim, unlike the position where say a person makes an income tax or VAT return late or pays that tax late. Because of that the benefit of the doubt should be given to a claimant. HMRC may have legitimate concerns about false claims: but a person who delays making a claim for three months is unlikely to be doing so because they want to extract money from HMRC to which they are not entitled. Until the claim is made HMRC can have no concerns: when it is made they can investigate it if they wish. They have no legitimate interest in pressing people to make claims quickly or in denying genuine claims that have the effect that HMRC is enriched and not impoverished.

116. I also consider that the fact that Ian Sibley was unaware of the 30 day rule may give him reasonable cause to have the claims admitted. He may not have seen the "assurance letter" of 3 July 2015, as that may have then have been Clive's responsibility, and the only other place that he would have seen it was on the HO81. The HO81 is an online form, not a form posted to the appellant, at least at the time Ian

Sibley was administering the scheme. He would not have seen the online warning until November when he did complete three months claims.

117. Nor would the fact that he had administered the scheme in the early days mean that he must have been aware of the 30 day limit when he took over responsibility. In those early days what he would have known was that no claim was ever disallowed.

118. For all these reasons I consider the claimant has shown reasonable cause to HMRC to enable the claims to be allowed.

What if it was HMRC who had to show reasonable cause for disallowing the claim on lateness grounds?

119. My answer to this (in the event hypothetical) question is clear. By reason at least of their conduct set out in §§100 to 102 HMRC would have had no reasonable grounds for springing a policy, a restrictive version of a "reasonable excuse" policy, on the appellants without warning, a policy that was the complete opposite of the one they had applied in periods when there was no "reasonable cause" ground.

What if the test was *whether the claimant had a reasonable excuse?*

120. It is now well settled in this Tribunal that when considering whether a person has a reasonable excuse for a failure to do something that tax law requires to be done, the test to be applied is an objective one applied to the individual facts and circumstances of the appellant in question (see eg *Coales v CIR* [2012] UKFTT 477 (TC) (Judge Guy Brannan). In that case Judge Brannan quotes from *Bancroft and another v Crutchfield (HM Inspector of Taxes)* [2002] STC (SCD) 347 where the learned Special Commissioner (Dr John Avery Jones CBE) stated:

> "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way."

121. I also take into account that regulation 6(4) of HOBDAR does not contain the qualification as to reliance on another that is found in some provisions that contain a reasonable excuse let out (eg s 71 Value Added Tax 1994). Nor does it contain a provision such as that in s 118(2) TMA 1970 which causes what was a reasonable excuse for failure to become unreasonable if, the excuse having ceased to exist, the failure for is not righted within an acceptable time.

122. In my view the "individual facts and circumstances of the appellant" include the change in personnel responsible for making claims under the scheme leading to Mr Ian Sibley being required to obtain or remember, after two years when he was not involved with the scheme, the knowledge that HMRC required claims within 30 days.

123. The individual facts and circumstances also include the appellant's knowledge that 11 out of date claims were paid, even when they were as late or, in one case, much later than those in the present case, and the lack of any information about the change to regulation 6(4) and the apparent change of policy.

124. Those facts and circumstances also include the unique nature of the scheme as I have set out above, and that the benefit in making claims is entirely that of the

claimants, and that HMRC are not prejudiced in the slightest by a late claim, indeed they are enriched as they do not so far as I can tell pay interest on late claimed repayments.

125. I have no hesitation in finding that any reasonable claimant may have behaved as the appellant did in the same circumstances. Had it been necessary to make a decision on this point I would have held that the appellant had a reasonable excuse for not filing its claims in time.

An afterthought on "ancillary decision" and the powers of the Tribunal.

126. There was, as I have said, no suggestion by HMRC that I do not have a full review jurisdiction. But I have wondered why they think that.

127. Section 16(4) FA 1994 gives me a limited jurisdiction in cases where the subject matter of the decision appealed against is an "ancillary matter". Section 16 defines this term:

> "(8) … an ancillary matter is any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.
>
> (9) References in this section to a decision as to an ancillary matter do not include a reference to a decision of a description specified in the following paragraphs of Schedule 5—
>
> (b) paragraph 4(3)"

128. Schedule 5 includes at paragraph 4:

> "**The Hydrocarbon Oil Duties Act 1979**
>
> 4 …
>
> (1A) Any decision which is made under or for the purposes of any regulations made under section 20AA of the Hydrocarbon Oil Duties Act 1979 and is a decision as to whether or not relief is to be allowed."

129. Paragraph 4(3) Schedule 5 is wholly irrelevant to the matter in this appeal. For completeness I add that paragraphs (a) to (h) of s 13A(2) are also irrelevant, as a decision by HMRC which is of a description specified in Schedule 5 falls within s 13A(2)(j) (thus seeming to make wholly redundant the reference to other paragraphs of section 13A(2)).

130. Paragraph 4(1A) Schedule 5 was inserted by s 10 Finance Act 2000. It could therefore apply for example to the relief for electricity generation in SI 2005/3320 ("the EG regulations").

131. In the case of the EG regulations, regulation 3 is headed "Relief" and provides:

> "3.—(1) Relief is allowed in accordance with these Regulations if a quantity of qualifying oil has been used to produce electricity in a—
>
> (a) generating station;

(b) fully exempt combined heat and power station; or

(c) partly exempt combined heat and power station.

..

(4) No relief is allowed in respect of any relevant duty that is the subject of any other application or claim for repayment, remission or drawback."

132. Regulation 11 provides:

"(1) Relief is allowed only upon the written application of a qualified claimant."

133. There are at least two other regulations made under s 20AA (in their case also under other sections of HODA) which allow a relief in similar words to those in regulation 3 of the EG regulations, but they contain no time limit for a claim. In my view these show that paragraph 4(1A) Schedule 5 FA 1994 does not apply to the question of breach of a time limit for a claim for repayment. Had regulation 4 of HOBDAR been in issue, ie whether "a quantity of qualifying fuel has been purchased by a qualified claimant to be supplied by that person for use as fuel in a road vehicle", then paragraph 4(1A) would apply. I agree therefore with HMRC that what we are dealing with here is not an ancillary matter.

134. Had I disagreed with HMRC about this I would have, in accordance with s 16(4)(a) FA 1994 directed that HMRC's decision to disallow the claims cease to have effect, and therefore that the claims should be paid.

The technicality

135. I should deal with the appellant's "technicality". He pointed out that the HO81 claim form allows for adjustments (see §30). These are explained on the form thus: "[i]f you need to claim for a purchase in an earlier period or you claimed too much, enter the period of claim and the amount".

136. The Schedule to HOBDAR at f) requires that the form includes "[t]he date [in the month] on which the unleaded petrol and diesel was purchased". In this context purchased could either mean that an order was placed or that it was paid for. Clearly if the amount paid was more or less than the amount expected to be paid on order, then an adjustment would be required if the variation became apparent only in the next month. Possibly a purchase could be overlooked on a claim and then entered on the next month's claims when it came to light, because it was later paid for for example.

137. HMRC say (§49(6)) that what the adjustments are for is to take into account invoices received late by the trader too late to be included in the monthly claim. That assumes that a claimant enters on the Form only the amounts invoiced even though they may have been purchased earlier. HMRC went on to say that adjustments can be made for previous months but they must be submitted "on time and within 30 days". On time for what or by reference to what, I wonder. And within 30 days of what?

Suppose a claimant is claiming by reference to invoices and an invoice is rendered 60 days after the supply. Is HMRC saying no claim can be made?

138. It seems to me that the adjustment facility is a way of entering a claim in a month's return which because of delay by the supplier could not be entered in the correct month, or of dealing with a variation before payment. But it does not seem capable of allowing a claim for fuel purchased and invoiced in a month to be claimed in a later month because the claim was not made in time. I do not therefore accept that the adjustment facility helps the appellant at all.

Decision

139. In accordance with s 16(5) FA 1994 I quash HMRC's decision to disallow the appellant's claims under HOBDAR for August and September 2015. The claims must be allowed and the repayments made.

140. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016