[2017] UKFTT 0828 (TC)

TC05553

Appeal number: TC/2016/02010

EXCISE DUTY – misuse of rebated fuel - assessment - penalty – quantum of assessment and penalty- appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY MAFFEI **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MRS ANN CHRISTIAN

Sitting in public at Manchester on 1 December 2016

Mr Maffei, the Appellant, was unrepresented

Ms Aspinall, Counsel for the Respondents

DECISION

Background

1. This is an appeal against HMRC's decision dated 28 January 2016 to raise an assessment pursuant to the Hydrocarbon Oils and Duties Act 1979 ("HODA") in the sum of £8,058.00 and an Excise Wrongdoing Penalty in the sum of £2,820.30.

2. By way of background on 1 March 2015 HMRC's Road Fuel Testing Unit ("RFTU") were part of a police road check at Piccadilly Railway Station, Manchester where they took a sample of fuel from a vehicle belonging to the Appellant (registration MA06 VNO) which tested positive for rebated gas oil, commonly known as "red diesel".

3. Mr Renato Maffei, the driver of the vehicle, confirmed that it was registered to A Maffei & Sons which employed him as a driver.

4. The officers then attended the Appellant's business premises where they took a further sample from a second vehicle (registration T616 EOB) which also tested positive for red diesel.

5. The fuel was seized as liable to forfeiture under section 13(6) HODA. The vehicles were also seized under section 141(1)(a) of the Customs and Excise Management Act 1979 ("CEMA"). Following an interview with the Appellant in which he stated that there was a 1,000 litre fuel tank on the premises for marked gas oil which is used for heaters the fuel was restored for nil and the vehicles were restored for a fee of £533.00 each. The Appellant did not challenge the legality of the seizure of the fuel or vehicles.

6. The Appellant stated in interview that the business operated four vehicles. He stated that the two vehicles which were seized were fuelled using red diesel but that the other two were fuelled with white diesel in case they were stopped and tested.

7. On 1 December 2015 the Appellant provided HMRC with V5 certificates for the four vehicles together with insurance documents and MOT certificates. 30 purchase invoices for red diesel were also provided but no receipts for white diesel. A pre-assessment letter and penalty explanation letter were issued to the Appellant on 15 December 2015. The Appellant responded on 7 January 2016 expressing shock and confusion at the assessment and penalty. He also advised that each driver purchased £40 - £50 of fuel for business use but that the vehicles were also used for personal use. On 28 January 2016 HMRC issued the assessment and penalty. Maximum reduction to the penalty was given for the Appellant's cooperation. On 16 August 2016 the assessment and penalty were amended to take account of further receipts which were provided by the Appellant.

Legal Framework

8. There was no issue between the parties in relation to the law. It is well known that it is unlawful to use red diesel in the running tank of a road vehicle, save in respect of certain excepted vehicles. Where such fuel is used unlawfully HMRC can assess an amount of excise duty equivalent to the amount of the rebate pursuant to section 13(1A) Hydrocarbon Oil Duties Act 1979. They can also assess a penalty pursuant to Schedule 41 Finance Act 2008 up to a maximum of 100% of the potential lost revenue depending on the level of culpability.

9. The penalty in the present case was assessed on the basis that the Appellant's behaviour was "deliberate but not concealed" and credit was given for prompted disclosure by the Appellant.

10. The relevant legal provisions are as follows:

Customs & Excise Management Act 1979 ("*CEMA*") provides:

> "*139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…*
>
> …
>
> *141(1) …where any thing has become liable to forfeiture under the customs and excise Acts -*
>
> > *(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and*
> >
> > *(b) any other thing mixed, packed or found with the things so liable,*
>
> *shall also be liable to forfeiture.*
>
> …
>
> *152 The Commissioners may as they see fit –*
>
> *… (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]…*"

Paragraph 3 Schedule 3 CEMA provides:

> *"Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners …"*

Paragraph 5 Schedule 3 CEMA provides:

"*If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.*"

11. *The Hydrocarbon Oil Duties Act 1979* provides as follows:

"*12(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.

13(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…"

…

(6) Any heavy oil –

(a) taken into a road vehicle as mentioned in section 12(2) above or supplied as mentioned in subsection (2) or (3) above; or

(b) taken as fuel into a vehicle at a time when it is not a road vehicle and remaining in the vehicle as part of its fuel supply at a later time when it becomes a road vehicle;

shall be liable to forfeiture.

12. *Schedule 41 of the Finance Act 2008* provides:

3(1) A penalty is payable by a person ("P") where P does an act which enables HMRC to assess an amount as duty due from P under any of the provisions…below.

HODA 1979 section 13(1A) Rebated heavy oil

Evidence

13. We heard evidence from two HMRC officers and the Appellant. Mr John Mawdsley is employed as a Road Fuel Testing Officer. Mr Mawdsley was on duty on 1 March 2015 when the Appellant's Citroen Berlingo Van registration number T616 EOB tested positive for rebated fuel. The oil in the company's stock tank used for the heaters inside the premises also tested positive for rebated fuel. The Appellant was interviewed by Mr Mawdsley during which he stated that he and his brother owned the business A Maffei & Sons which sharpens knives for the catering industry. The company has 4 vehicles and the Appellant accepted that red diesel was used to fuel two of those vehicles. As for the other two the Appellant stated:

"No they're Paul's and Joe's. We use them during the week and put white in them in case they get stopped."

14. The Appellant went on to say that the red diesel was mainly used for the heaters at the business premises.

15. In oral evidence Mr Mawdsley agreed that he had seen heaters at the Appellant's premises and accepted that there were four heaters in total. He explained that as a result of HMRC being satisfied that red diesel was used for the heaters HMRC restored it for no fee. Mr Mawdsley stated that he had accepted the Appellant's account given in interview, namely that red diesel was only used in two of the vehicles. At first he could not recall whether the other two vehicles had been tested but in response to a question from the Appellant Mr Mawdsley accepted that the vehicles had been tested and showed no sign of containing red diesel.

16. Mr Tidmarsh was the officer responsible for issuing the assessment and penalty. He explained that he had kept the quantum under review and made a number of amendments to the calculations as and when information was received from the Appellant.

17. Mr Tidmarsh explained that he had based the assessment on all four vehicles which was standard practice within HMRC. He stated that the reason for including all vehicles was that the receipts sent in for diesel in cases where assessments of this type are raised are often generic and HMRC are unable to establish whether the receipts relate to a vehicle which tested positive or not. Mr Tidmarsh explained the calculation of quantum which is based on the mileage of vehicles over four years if ownership. Once the miles per gallon is established the total amount of fuel can be calculated. Fuel legitimately accounted for is taken off the calculation.

18. Mr Tidmarsh's written evidence set out the information he had received from the Appellant. Correspondence received on 1 December 2015 explained that fuel

receipts were not retained and that there is a 500 litre tank on site used to store the red diesel. A handwritten letter which was headed "Mr Anthony Maffei" but which appeared from the text to show the author as Mr Joe Maffei stated that the latter operates a separate business to the Appellant but which is located at the same premises and which uses the Appellant's vehicle insurance to save costs. The letter stated that the employee who had been found using red diesel was travelling to Glasgow to visit his daughter.

19. On 4 February 2016 Mr Tidmarsh received a telephone call from the Appellant who stated that the interview notes were incorrect in contending that he had misused red diesel in two vehicles for 3 years; the Appellant explained that there had been a misunderstanding and that he had performed a certain "run" once a month and used two gallons of red diesel for that specific journey.

20. On 15 August 2016 Mr Tidmarsh received 113 fuel receipts. All receipts relating to before or after the assessment period were discounted. The remaining 83 receipts were deducted from the assessment which also resulted in a deduction to the penalty.

21. The Appellant explained in oral evidence that he had used heaters in the business premises for 20 to 30 years and the only proof he could obtain was the receipts showing the purchase of the red diesel. He stated that the company is not VAT registered and he did not retain receipts for white diesel. The Appellant confirmed that red diesel was used in two of the four vehicles. He stated that he would use red diesel for long business journeys such as deliveries to Blackburn. The Appellant submitted that whilst he agreed that the two vehicles which used red diesel should be included in the assessment, the two which had tested negative for red diesel should be discounted.

22. In cross-examination the Appellant confirmed that he had paid the fee for restoration of the seized vehicles, likening the fee to a fine for the use of red diesel. He confirmed that he had known that the driver who was stopped at Piccadilly had used red diesel for a trip to Glasgow. The Appellant explained that the receipts he provided to HMRC were only found after the death of his brother; the receipts belonged to his brother who retained paperwork related to the business unlike the Appellant.

Submissions

23. On behalf of HMRC Ms Aspinall submitted that HMRC had acted fairly in issuing the assessment and penalty. Even though the Appellant had initially stated that no receipts were retained the officer nevertheless offset the receipts subsequently provided by the Appellant. Whilst HMRC accepted that the Appellant is not VAT registered and there is less of a duty upon him to retain records Ms Aspinall submitted that it was prudent to do so. In the absence of any documentary evidence to show purchases of white diesel, other than the receipts taken into account, the amount of the assessment was appropriate. The inclusion of all four vehicles was reasonable and standard practice.

24. The Appellant accepted that he had been wrong to use red diesel in the two vehicles but contended that only the two vehicles which tested positive should be used to calculate the assessment and penalty.

Discussion and Decision

25. An assessment under section 13(1A) must be made to best judgment. The evidence necessary to support an assessment or to challenge an assessment will depend on the facts of the particular case. The Appellant challenges the assumption used by the assessing officer that all four vehicles owned by the Appellant contained red diesel.

26. In *Thomas Corneill v HM Revenue & Customs [2007] EWHC 715 (Ch)* Mann J stated at [31]:

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

27. In *Corneill* the only direct evidence of the use of red diesel in road vehicles was the one lorry which was actually tested. No other red diesel was found in tanks on the premises or in other road vehicles tested at the premises. However there was indirect evidence in relation to supplies of red diesel. The case makes clear that the evidence as to use of red diesel must be considered in the context of the particular case and the facts found by reference to the balance of probabilities. The issue we must determine in relation to the assessment is the correct quantum. The burden is on the Appellant to satisfy us that it is excessive.

28. As regards the penalty the issue is whether the Appellant deliberately put red diesel into the vehicles and concealed the fact that he had done so. The burden is on the Appellant to satisfy us that the quantum of the penalty is excessive.

29. We found that HMRC justified its position in making the assessment on the basis that the documentary evidence provided did not show a clear source of white diesel. The Appellant's position was not helped by his poor record keeping. That said, we had the benefit of hearing the Appellant give evidence and we found the Appellant to be a credible witness. We accepted his explanation that he did not keep records and was under no obligation to do so.

30. It was not clear why HMRC omitted from its case the evidence relating to the two vehicles which tested negative. Clearly the more vehicles tested the better the evidence is from which the Tribunal can determine the extent of the Appellant's use of red diesel. The Appellant was understandably aggrieved at the omission of a relevant fact which in our view assisted his case. Only when this was raised by the Appellant did the officer recall the information.

31. We also noted that Mr Mawdsley who interviewed the Appellant accepted the account given as to red diesel being used in only two of the vehicles. The Appellant reiterated this in oral evidence which was, in reality, the only evidence before us as to the fuelling arrangements and we accept it as such.

32. Accepting the Appellant's explanation, as we do, we therefore find that the Appellant was misusing red diesel in only two of the four vehicles. It follows that we are not satisfied that HMRC have established on the balance of probabilities that red diesel was used in the two vehicles which tested negative and for that reason we consider that the assessment is excessive in that regard.

33. In respect of the penalty we are satisfied that the Appellant deliberately put red diesel into two of the vehicles and concealed the fact that he had done so; indeed the Appellant admitted this from the outset. We therefore find that the penalty is excessive in so far as it relates to all four vehicles.

34. We should note that in accepting the Appellant's evidence we have concluded that the receipts provided and which were deducted from the assessment by the officer belonged to the Appellant's brother and therefore related to one of the vehicles which tested negative for red diesel. The receipts therefore do not assist the Appellant and are unlikely to be included in any amendment to the assessment.

35. It follows from our findings that the appeal is allowed in principle in so far as the two vehicles which tested negative should be excluded from the calculations. The assessment and penalty should be recalculated on the basis of our findings. If the parties are unable to agree on quantum either party has the right to apply to the Tribunal within 3 months of the date of this decision for a determination.

36. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 23 DECEMBER 2016