[2017] UKFTT 097 (TC)

TC05614

Appeal number: TC 2015/06889

Excise duty – Hydrocarbon oil – Rebated heavy oil ("red diesel") – Unauthorised use in road vehicles – Penalty – Basis and amount – Finance Act 2008 sch 41

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDRZEJ STASKO **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC
CHARLES BAKER FCA

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 2 December 2016

The Appellant in person (the tribunal provided an interpreter)

Ms Amelia Walker, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against two personal liability notices issued on 22 January 2015. These in turn followed from penalty notices dated 15 January 2015 in respect of Transpol Services Ltd, a company of which Mr Stasko was formerly a director. The first is for £9,159.78 and the second is for £2,055.90. The penalties relate to the use of rebated diesel fuel (commonly known as "red diesel" on account of the marker dye added to it) in motor vehicles used on the roads by Transpol.

2. For the reasons given in this decision we have concluded that the first penalty of £9,159.78 should be reduced to £8,396.46. We find that the second penalty of £2,055.90 is correct.

Evidence

3. We had before us an extensive bundle of documents. Mrs Juniper, an officer of HMRC, made a witness statement, gave oral evidence and was cross-examined. Mr Stasko made a witness statement, addressed us on oath speaking through an interpreter and was cross-examined. We accept the witnesses' evidence.

The legislation

4. Hydrocarbon oils are subject to excise duty under section 6 of the Hydrocarbon Oil Duties Act 1979. They include diesel fuel, which falls within the definition of "heavy oil" in the Act. Section 11 of the Act provides for a rebate of the duty on heavy oil. Section 12, however, provides that heavy oil which has received a rebate must not be put into a road vehicle as fuel unless the rebate on it has been repaid to HMRC. The practical effect of this is that no duty is charged on heavy oil which is used for purposes other than fuelling road vehicles.

5. The penalty notices referred to schedule 41 to the Finance Act 2008. Ms Walker referred us to paragraph 4 of that schedule. We note that in a similar case heard in Manchester the day before we heard the present case (*Anthony Maffei v HMRC* [2017] UKFTT 828 (TC)) HMRC relied instead on paragraph 3(1) of schedule 41. In our view paragraph 3 is the correct basis for the penalties in this case. Section 12(2) of the Hydrocarbon Oil Duties Act 1979 prohibits the taking of rebated heavy oil into a road vehicle as fuel. Where there has been a contravention of that prohibition, section 13(1A) of that Act allows the Commissioners to assess the amount rebated. That in turn causes a penalty to be payable under paragraph 3 of schedule 41 to the Finance Act 2008.

6. Paragraph 4 of schedule 41 makes a person liable to a penalty if they deal with goods that are subject to excise duty while a payment of duty on the goods is outstanding. No payment of duty on the red diesel was outstanding at the time the company put it into the vehicles. Putting the red diesel into the vehicles without

having previously repaid the rebate was illegal and entitled HMRC to assess an amount equal to the rebate on the misused fuel "as being excise duty due" from the person who used it, but that assessment was only made later on.

7. Schedule 41 goes on to prescribe the calculation of penalties. By virtue of paragraph 6B, where an act is deliberate but not concealed, the penalty (before reduction) is 70% of the potential lost revenue. In a case where the penalty arises under paragraph 3 of the schedule, the potential lost revenue if the amount of the duty which may be assessed as due (see paragraph 9).

8. Paragraph 13 requires HMRC to reduce a penalty where the person liable has made a "disclosure"; the reduction must be to a percentage that "reflects the quality of the disclosure". In the case of a prompted disclosure, the minimum to which the penalty can be reduced is 35% of the potential lost revenue.

9. HMRC's Factsheet CC/FS12 explains that in assessing the quality of a disclosure HMRC look at the penalty range – in this case between the statutory minimum of 35% and the statutory maximum of 70% of the potential lost revenue – and give a reduction of up to 100% percent of the range (i.e. down to 35% of the potential lost revenue); the possible reduction is split between up to 30% for "telling", up to 40% for "helping" and up to 30% for giving access to records. There is no statutory basis for this split, but other tribunal panels have adopted it.

10. The Notice of Appeal asks for the penalties to be reassessed, reduced or revoked as the Tribunal thinks fit. At the hearing Mr Stasko agreed that he deserved to be punished but asked for the penalty to be lowered. We have made use of our power under paragraph 19 of the schedule to consider whether the amount of the penalties should be upheld or a different amount substituted.

11. Paragraph 14 empowers HMRC to reduce a penalty further if there are special circumstances. In this case HMRC decided that there were no special circumstances. Our powers on appeal in respect of that are limited (see paragraph 19(3)).

12. Paragraph 17 entitles a person to appeal against the imposition of a penalty or its amount. Under paragraph 22, where a penalty is payable by a company for a deliberate act which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be all of it) as HMRC may specify by written notice to that officer. "Officer" includes a director. Paragraph 22(5)(e) gives an officer who receives such a notice a right to appeal against it.

The facts

13. Mr Stasko was the sole director of Transpol, which ran a skip hire and vehicle recovery business. On 25 November 2013 a flatbed truck belonging to the company was tested by an HMRC road fuel testing unit (RFTU) at a roadside in Essex. The test was carried out after telephone calls between the driver and the company's manager in which the manager admitted to the HMRC officer that 10-20 litres of red diesel had been put into the lorry. The test showed the presence of red diesel in its

fuel tank. The lorry was formally seized and forfeited, but then restored on payment of a restoration fee of £566.

14. Following this incident, on 25 April 2014 Mrs Juniper of HMRC wrote to Transpol asking for various information and documentation relating to diesel vehicles owned or operated by Transpol and the company's fuel purchases over the period since 1 July 2010. This was with a view to her conducting a road fuel audit of the company. The information was required to be provided by 27 May 2014.

15. About a week later, on 2 May 2014, HMRC officers from the RFTU visited the company's yard. They were told that all the vehicles on site were running on red diesel. They proceeded to test their tanks. Mr Stasko then arrived at the yard. He told the officers that he was the owner of the company and wished to cooperate fully with HMRC. He was formally interviewed under caution. In the interview he admitted that he had put the red diesel into the vehicles from two 1,000 litre tanks kept in the yard; the tanks were there to store fuel for an excavator which was also in the yard. The tanks were filled about twice a month; Mr Stasko produced a delivery note from the fuel supplier as well as some receipts for unrebated ("white") diesel fuel bought at fuel stations.

16. Mr Stasko admitted that the drivers bought white diesel when the vehicles were out on the road and that he put red diesel into them in the yard. He admitted knowing that it was an offence to put red diesel into road vehicles. He said that he had only done so that week; this was because he had very little money – a customer had been paying him with stolen debit and credit cards and two weeks previously the money had been reclaimed. The vehicles were formally seized and restored upon payment of £4,600.

17. During the visit the RFTU officers spoke by telephone with a colleague of Mrs Juniper. The papers include a copy of the colleague's note of the conversation, from which it appears that the RFTU officers discussed with Mr Stasko a list of vehicles registered at the DVLA in the company's name. HMRC have accepted that some of them were private cars or had been disposed of, since no red diesel usage by those vehicles is included in the assessment calculation.

18. On 26 June 2014 Mrs Juniper wrote to Transpol again, pointing out that Mr Stasko had failed to produce the information required in her letter of 25 April (arising out of the incident on 25 November 2013). Her letter contained details of an assessment that HMRC intended to make of excise duty due from the company and of a penalty that HMRC intended to impose. The assessment was calculated on the assumption that the company's vehicles had been run exclusively on red diesel since August 2010. It was calculated from information obtained from DVLC about vehicles registered in the name of the company together with average mileage and fuel consumption data. The duty assessment came to £43,402.64. In calculating the penalty, Mrs Juniper reduced the standard percentage of 70% by 3½ percentage points reflecting the company's admission that the driver had been instructed to fuel the vehicle with red diesel, resulting in a penalty of approximately £28,000. The letter asked Mr Stasko to read the calculation schedule carefully and give HMRC any

information relevant to the assessment and penalty calculation that had not been taken into account. He was to do this by 16 July.

19. On 9 July 2014 Mr Stasko telephoned Mrs Juniper and a conversation took place in which she was told that he had had fuel receipts that he intended to send that day. Mrs Juniper asked for the material to be sent directly to her and gave her office address (which is different from that on HMRC's letterhead). The deadline of 16 July remained. There is an issue as to whether the whole of the conversation was with Mr Stasko or partly with a colleague of his. We return to this below.

20. On 16 July 2014 Mr Stasko delivered materials to Mrs Juniper's office; in her witness statement she described these as two boxes of tachograph records but in oral evidence she indicated that Mr Stasko had also provided MOT test certificates, V5 vehicle registration documents and some purchase receipts in respect of white diesel; these were for intermittent purchases of while diesel over the assessment period. Mrs Juniper did not know who delivered the records; she told us that they did not ask to see her. Mr Stasko says (and we accept) that he delivered them. He also told us that he waited an hour before being told by "security" that Mrs Juniper did not want to see him. The building does not in fact have a security or reception desk, so we can only conclude that Mr Stasko gave the materials to another member of HMRC staff who happened to pass through the entrance while he was waiting.

21. The tachograph records were not complete, so on 17 July Mrs Juniper telephoned Mr Stasko and asked him for a complete set. In a confirmatory e-mail she asked to receive the information by 23 July, telling him which days she would be on the office and giving him a telephone number on which to telephone her upon arrival. On the same day she also wrote a letter asking for other information and giving a deadline of 15 August. That letter arose out of the visit to the company's yard on 2 May 2014.

22. Mrs Juniper did not receive the material by 23 July; in the afternoon of that day she e-mailed Mr Stasko extending the deadline to 29 July. On 28 July Mr Stasko replied to that e-mail, attaching electronic copies of tachograph records.

23. In a letter of 5 September 2014 Mrs Juniper notified Transpol of her assessment of the company's liability for excise duty in respect of red diesel used between 1 August 2010 and 24 November 2013 (the day before the Transpol lorry was tested in Essex). Her letter refers to a letter from Mr Stasko of 10 July 2014, which is not in the papers or (as far as we can see) referred to in them. In that letter Mr Stasko had made the point that the vehicles were not used every day; Mrs Juniper's response was that the calculations were based on mileage records and therefore took account of that. She also enclosed a schedule (not included in our papers) of white diesel purchases for which Mr Stasko had produced receipts. Her letter offered the opportunity to submit further information within 30 days or to seek a review or to appeal. The assessed amount was £21,809.

24. The calculation is based on 12 vehicles. In each case there are two mileage readings taken from tachograph records, MOT certificates or mileage readings taken

by RFTU officers on 25 November 2013 or 2 May 2014. From them Mrs Juniper calculated an average daily mileage which she applied to the period from 1 August 2010 to 24 November 2013 or, if less the period during which the vehicles had been used by Transpol. To those mileages she applied fuel consumption data for the models of vehicle in question to arrive at a total consumption of diesel fuel (approximately 80,000 litres), from which she subtracted the volume of white diesel evidenced by purchase receipts (approximately 34,000 litres) and applied the prevailing rates of duty to the balance of approximately 46,000 litres.

25. A week later, on 12 September 2014, Mrs Juniper sent Transpol a pre-assessment letter based on the detection of red diesel in the vehicles in Transpol's yard on 2 May 2014. The provisional assessment covered the period from 25 November 2013 to 1 May 2014; it was calculated in a similar way to the first assessment and was for £5,874. This was based on an estimated fuel usage of nearly 14,500 litres, of which under 2,000 litres was accounted for by purchase receipts for white diesel. The letter invited Transpol to send any relevant information by 2 October. Mr Stasko responded on behalf of Transpol in a letter of 30 September in which he did not contest the calculation but apologised for misusing red diesel and promised not to do it again. He asked for as low a penalty as possible, referring to the company's losses of £30,000 caused by customer card fraud and the difficulties for himself, his wife and two children.

26. On 3 October 2014 Mrs Juniper issued a formal assessment of £5,874 excise duty due and warned Transpol that a penalty notice would be sent separately. Mr Stasko responded on 20 October referring to his fear of bankruptcy and losing his company. He asked HMRC to cancel or reduce the liability or accept instalments of £400 per month. Mrs Juniper's response was that she could not reduce the assessment without supporting evidence; she gave an address for Mr Stasko to write to about difficulty in making payments.

27. On 13 November 2014 Mrs Juniper wrote separate letters to Transpol giving details of the penalty she proposed to impose in respect of the two assessments of excise duty. The first was based on potential lost revenue of £21,809; in calculating it Mrs Juniper gave a full reduction of 30% of the penalty range for Mr Stasko's admission of misusing red diesel, and the same full reduction of 30% for giving access to records (since all necessary records were eventually produced) but only half the available reduction of 40% for helping. This was on the grounds that records were not offered until late in the process and were not provided until after considerable work had been done in producing the first assessment and penalty warning (paragraph 18 above). Consequently the penalty was set at 42% of the potential lost revenue, i.e. £9,159.78.

28. The second penalty was based on potential lost revenue of £5,874. In respect of this penalty Mrs Juniper gave a full reduction; full credit for "helping" was given on the basis that, as this was a second detection, all the required records were already in her possession when she calculated the assessment. The penalty was therefore 35% of the potential lost revenue, i.e. £2,055.90.

29. On 3 December 2014 Mr Stasko wrote offering to pay the first assessment (£21,809) in instalments of £1,100 per month and the first penalty (£9,159.78) by instalments of £350 per month. Mrs Juniper replied saying that she could not reduce the excise duty assessments without evidence but reminding him of his right to a review or to appeal; she also forwarded his request for time to pay to the appropriate team.

30. On 13 January 2015 an insolvency practitioner wrote to HMRC informing them that Mr Stasko had instructed him to convene a meeting of creditors with a view to putting Transpol into liquidation. On 15 January formal Notices of Penalty Assessment were sent to Transpol and on 22 January notices were sent to Mr Stasko personally, saying that he was liable to pay the penalties in full; this was because they had been imposed because of his actions and Transpol was likely to become insolvent. Transpol was subsequently put into liquidation on 27 January. On 29 January the liquidator wrote to notify HMRC of his appointment and stated that there was no prospect of a payment to the creditors.

31. On 19 February 2015 Mr Stasko wrote requesting a review of the penalty decisions. In his letter (drafted by a legal adviser) he asked whether HMRC had pursed Transpol for the penalties; he also asked for the first penalty to be reduced to 35% of the potential lost revenue given that both penalties flowed from the same circumstances. Thirdly, he argued that he should not have been made liable for 100% of the penalties he had made full and frank disclosure, telling everything he could about the extent of what was wrong as soon as HMRC knew about it, answering questions in full and helping HMRC to understand the accounts and records. Mrs Juniper replied on 5 March explaining that he had not been given the full reduction for helping in relation to the first detection because he had failed to correspond until extremely late in the audit, requiring her to make significant adjustments to the assessment when he finally began to participate. She reminded him of his right to a review. On 29 April Mr Stasko asked for a review. The review decision was given on 27 October; it was that the penalties were legally and technically correct.

The Grounds of Appeal

32. There are five grounds of appeal in the Notice of Appeal. They are: (1) that HMRC were wrong to calculate the first penalty at a higher rate than the second; (2) HMRC were wrong to make Mr Stasko personally liable for the whole amount of the penalties: he was not personally at fault since he fully cooperated with the HMRC officers on both occasions and supplied additional information to HMRC; (3) this information was not taken into consideration by the review officer; (4) he is not proficient in English and dealt with the officers through one of his employees whose English was only a little better than his; and (5) he was forced to "own up" by threats to seize his vehicles.

The evidence

33. Mrs Juniper's witness statement recounts the facts of the case. In her oral evidence she explained that, in addition to the vehicles found in Transpol's yard on 2

May 2014 she obtained details from the DVLA of more vehicles of which Transpol was the registered keeper. She referred to the one telephone conversation she had with Mr Stasko (see paragraph 19 above) saying that he and she were able to communicate in English; she did not get the impression that he was unable to understand anything that he was saying. Mr Stasko asked her whether she remembered that he passed the telephone to someone else who spoke better English; she said that she did not recall this happening. He also asked her why she had not reduced the first penalty to 35%; she said that she could not do so in the circumstances.

34. Mr Stasko's witness statement says that on 2 May 2014 the HMRC officers told him that they would take his vehicles away if he did not own up, giving him no option but to agree to an interview. It also referred to the company's financial difficulties due to a customer fraud and other problems and to the need to move out of its then yard. Some documents were lost in the process of moving.

35. At the hearing Mr Stasko told us that he accepted HMRC's calculation of the mileage driven using red diesel. He explained that Transpol was the first company he had run in England, that he had put his heart into it and wanted to save it from insolvency. The company had been cheated in various ways. He had lost everything as a result of its insolvency. He understood Mrs Juniper's calculations of the assessments and did not find any errors in them, but maintained that they over-stated the amount of red diesel used on the roads. He explained that Transpol was registered for VAT and that he would pass the relevant papers to the company's external accountant to prepare its VAT returns; the accountant would then return the papers to him. He kept some at his home and some in a Portakabin in the company's yard.

36. The company's most recent move, which took place in July 2014, involved emptying the Portkabin so that it could be transported to the new yard. He added that the company had moved seven times since 2010 and that things had been lost in the process. He had sent to Mrs Juniper any receipts for purchases of white diesel that the accountant had and any others he could find himself.

37. In cross-examination Mr Stasko accepted that, as a VAT-registered trader, Transpol was obliged to keep receipts for white diesel purchases on which VAT had been reclaimed for six years. When asked about his delay in responding to Mrs Juniper's letter of 27 April 2014, he said that after receiving the letter and then having the control visit he knew that he was in a serious situation and needed time to think what to do with his life. It was difficult to find someone to deal with HMRC on his behalf. He did not tell HMRC that he had lost receipts for white diesel because it was his fault that he had lost them. He accepted that HMRC had to do their calculations on the basis of the receipts produced; for that reason he did not dispute the calculation.

Our decision

38. We agree with Mr Stasko that Mrs Juniper's calculation of the potential lost revenue cannot be faulted in the circumstances. It may be that Transpol in fact

purchased more white diesel in the assessment periods than Mr Stasko was able to produce evidence of but, like Mrs Juniper, we can only proceed on the basis of the evidence available to us. Any attempt by us to put a figure on any additional white diesel that was purchased would be pure speculation.

39. We have to apply schedule 41 to the Finance Act 2008, which both makes Transpol liable to a penalty in the circumstances of this case and specifies how it is to be calculated. As we have said, we can find no fault in Mrs Juniper's calculation of the potential lost revenue figures used in calculating the penalties. We find that the disclosure was prompted: it was made after HMRC had found out about the company's use of red diesel in road vehicles. The law did not therefore allow HMRC to reduce the penalties below 35% of the potential lost revenue. The second penalty was set at 35%. The first penalty was set at 42%, because Mrs Juniper only gave Transpol half of the available credit for "helping".

40. We consider that Mrs Juniper was right not to give Transpol full credit for helping in respect of the first penalty: he did not begin to provide information in response to her letter of 27 April 2014 until 16 July, and did not provide all the available information until 28 July. In the meantime she had, perfectly reasonably, done the work of preparing a provisional assessment based the information then available to her (paragraph 18 above). The fact that Transpol received full credit in respect of the second penalty does not make it wrong for less than full credit to be given in respect of the first penalty. Mr Stasko had delayed in providing the information that Mrs Juniper was seeking as a result of the incident in November 2013. The fact that she had all the necessary information by the time she prepared the assessment arising out of the May 2014 control visit (and therefore gave full credit in relation to the second penalty) is irrelevant to the degree of credit to which Transpol was entitled as regards the first penalty.

41. However, on this appeal we have power to substitute for HMRC's decision another decision that HMRC had power to make. Having heard evidence from Mr Stasko, and therefore knowing more about Transpol's affairs than Mrs Juniper was in a position to know, we consider that the appropriate reduction for "helping" is 30% rather than the 20% allowed by her. We accept Mr Stasko's evidence that he attempted to see Mrs Juniper on 16 July and waited an hour to do so; we find that he was turned away because of a misunderstanding. We also accept that his delay in responding was due in part to his anxiety about the company's situation following her letter of April 2014 and the control visit of a few days later and to the pressures of the imminent expiry of the company's lease of its yard and the need to find and move to new premises. We also find that he did write to Mrs Juniper on 10 July 2014 (see paragraph 23 above) since we can find no other explanation of her reference to a letter from him.

42. Accordingly we vary HMRC's decision in case CFSS 1045646 by substituting a penalty of £8,396.46.

43. HMRC were correct in law to hold Mr Stasko liable for 100% of the penalties. The use of red diesel in the road vehicles was a deliberate act and was attributable to

Mr Stasko. He admitted putting it in the vehicles himself and at all events knew about it. He was the owner of and thus in charge of the company. In these circumstances personal blame attaches to him.

44. We have not been able to gauge Mr Stasko's degree of proficiency in English since he spoke to us through an interpreter, but do not consider that that could have any bearing on the issues that we have to decide. We accept that he passed the telephone to a colleague after introducing himself to Mrs Juniper on 9 July 2014, though we accept that she genuinely has no recollection of this. She may not even have understood that this was happening or noticed the change from one foreign-accented male voice to another. We are not aware of any relevant information that Mr Stasko was prevented from giving by difficulties with English or of any relevant information that he gave that was not taken into account.

45. We accept that Mr Stasko cooperated with HMRC but agree with Ms Walker that this is not in law a reason why he should be excused; the calculation takes into account his cooperation (and, as regards the first penalty, we have decided that the discount for cooperation should be increased).

46. Whilst accepting that the RFTU officers told Mr Stasko on 2 May 2014 that his vehicles would be taken away unless he cooperated in giving an interview, we do not see how that can be relevant either. Mr Stasko has not suggested that he made any false confessions as a result of this.

47. We have sympathy with Mr Stasko; we find that his evidence to us was given honestly and that his regret is genuine. We accept that he and his family have been left in a difficult and anxious position. However, we have to apply the legislation, which gives us no discretion simply to cancel the penalty. HMRC concluded that there were no special circumstances in this case; our powers on appeal are limited in respect of that and we cannot see anything about this case that would allow us to disagree with HMRC's conclusion. Nor do we have power to direct HMRC to accept payment in instalments, which must be a matter for discussion between him and them.

48. 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.

NICHOLAS PAINES QC
TRIBUNAL JUDGE

RELEASE DATE: 23 JANUARY 2017