TC02265

Appeal number: TC/2011/03839

EXCISE DUTY – use of red diesel – assessment in relation to a number of vehicles – HMRC v Jones and Jones considered – whether one vehicle was an excepted vehicle within Schedule 1 HODA 1979 – agricultural tractor – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER TAYLOR **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 15 March 2012 and 19 July 2012

The Appellant appeared in person

Mrs Jennifer Newstead of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Background

1. Mr Taylor appeals in relation to an assessment to excise duty made on the basis that he has allegedly fuelled various road vehicles with rebated diesel ("red diesel"). The assessment was made on 3 February 2011 in the sum of £3,408 ("the Assessment"). Following a request for a review the Assessment was confirmed in a review decision dated 14 April 2011. Mr Taylor appeals against the review decision.

2. Mrs Newstead opened the appeal on behalf of HMRC at the invitation of the tribunal and Mr Taylor. Mr Taylor has considerable difficulty reading and writing. I made appropriate provision for this during the hearing. I heard evidence from the review officer Miss Frances Manley and from the officer who issued the Assessment, Mr Kenneth Goodliffe. I also heard evidence from Mr Taylor and gave him every assistance in putting his case.

3. By way of summary the Assessment relates to four vehicles owned by Mr Taylor. These are a Peugeot 106, a Mercedes A170, a Mercedes E300 ("the domestic vehicles") and a Mercedes Unimog. The latter vehicle ("the Unimog"), which I describe in more detail below, is used by Mr Taylor in his business providing tree felling services. It is in the nature of an off road vehicle and is used by Mr Taylor solely for business purposes. Put briefly, the following broad issues arise on this appeal:

(1) To what extent did Mr Taylor fuel each of the domestic vehicles with red diesel?

(2) Was Mr Taylor entitled to use red diesel in the Unimog?

4. There are other issues of law and fact which arise and I deal with these in detail below. Before doing so, and before considering the legal framework, I shall set out certain background findings of fact which are not in dispute. I deal with my findings in relation to disputed facts in a separate section.

Background Findings of Fact

5. Mr Taylor has been in business providing tree felling services for more than 10 years. On 2 October 2010 officers from HMRC road testing unit had cause to test the fuel in a Peugeot 106 belonging to Mr Taylor. It was found to contain traces of red diesel. They also tested fuel in the Unimog and found it to contain traces of red diesel. During the course of an interview Mr Taylor stated:

(1) He owned and operated both vehicles.

(2) He had previously put red diesel in the Peugeot 106 because he had run out of fuel.

(3) The Unimog was used on customer sites when providing tree felling services. He had owned it for 4 years and it had cost £4,000.

(4) He believed he was entitled to use red diesel in the Unimog as it was classed as a tractor and used for forestry work. He received advice to this effect from the vendor of the vehicle.

6. Both vehicles were seized and immediately restored to Mr Taylor on payment of £500 in respect of each vehicle. These sums equated to two penalties of £250 in respect of each vehicle. Mr Taylor was issued with a Seizure Information Notice (C156), HMRC Notice 12A and a Restoration Agreement, Disclaimer and Warning Letter. It is clear that Mr Taylor did not challenge the seizure of the Unimog. The respondents say this is a point of some significance in the context of this appeal and I deal with this in detail below.

7. On 8 November 2010 Mr Goodliffe wrote to Mr Taylor indicating the power of HMRC to raise assessments and issue penalties. He requested records in relation to each of the vehicles detected, including for example mileage records and fuel receipts. There was no response to this request or to a further request dated 30 November 2010. On 17 December 2010 Mr Goodliffe issued a civil penalty of £250 for failure to produce records. He also indicated his intention to issue an assessment in the sum of £6,885 relating to red diesel estimated to have been used in the Peugeot 106, the Unimog and a Mercedes A170. It is not clear how Mr Goodliffe had obtained details about the Mercedes A170 but nothing turns on that. Mr Goodliffe was subsequently made aware that Mr Taylor had been caring for his mother who was terminally ill and the penalty was withdrawn.

8. On 21 December 2010 Mr Taylor's accountants, Halliwell & Co replied on behalf of Mr Taylor. They indicated that Mr Taylor did not keep mileage records but enclosed listings of purchases used in preparing his annual accounts for the years ended 5 April 2009 and 5 April 2010. The accounts included fuel purchases of £538 and £366 respectively. Mr Taylor's annual accounts for the year ended 5 April 2009 were enclosed, incorporating the 2008 figures by way of comparison. Halliwells also enclosed bank statements and vehicle documentation for the Unimog, the Peugeot 106 "*and also Mr Taylor's girlfriend's car, a Mercedes that is the usual private use vehicle*". This was a reference to the Mercedes A170.

9. On 4 January 2011 Mr Goodliffe requested certain further information. By this stage he had become aware of the Mercedes E300 and also that it had been "scrapped" on 26 May 2010. The information was provided by Halliwells and on 3 February 2011 Mr Goodliffe issued the Assessment which is in dispute. The basis of the Assessment is an assumption that each vehicle had been fuelled using red diesel as follows:

Peugeot 106 – 278 litres of fuel for an estimated mileage of 3,068 from the date of acquisition, 15 July 2010 to 2 October 2010.

Mercedes A170 – 1,891 litres of fuel for an estimated mileage of 23,723 from the date of acquisition, 29 March 2009 to 2 October 2010.

Mercedes E300 – 7,778 litres of fuel for an estimated mileage of 32,334 from 4 February 2008 to 26 May 2010, date of off road notification.

Unimog – 2,682 litres of fuel for estimated hourly use of 213.8 hours from 4 February 2008 to 2 October 2010.

10. Mr Taylor disputes that the three domestic vehicles were fuelled using red diesel, apart from an isolated incident in which he put red diesel in the Peugeot 106. He also contends that he was entitled to use red diesel in the Unimog. Apart from these matters, the underlying basis of the Assessment, in particular the periods of ownership of the various vehicles and the mileage or hours they were driven is not in dispute.

11. When Halliwells received Mr Goodliffe's assessment they requested a review by letter dated 28 February 2011. For the purposes of that review they stated:

(1) The calculation for the Peugeot 106 was accepted.

(2) The Mercedes A170 was never fuelled using red diesel and was never tested by HMRC. This vehicle was for private use only by Mr Taylor and mainly his girlfriend, Siobhan Wardle. She purchased fuel from garages and did not keep receipts as there was no business use.

(3) The Mercedes E300 was never fuelled using red diesel and was never tested by HMRC. This vehicle was for private use only by Mr Taylor and mainly his girlfriend, Siobhan Wardle. She purchased fuel from garages and did not keep receipts as there was no business use.

(4) They also contended, wrongly as it turned out, that legislation in relation to the Unimog only came into force 18 months previously and the assessment should be limited accordingly.

12. Miss Manley reviewed the decision and confirmed it in her letter dated 14 April 2011. The notice of appeal dated 12 May 2011, which was completed by Halliwells, effectively repeated the contents of their earlier letter requesting a review. In addition they contended that the Unimog was an excepted vehicle used only for forestry and horticulture.

13. This appeal originally came on for hearing on 15 March 2012. On that date I heard evidence from Miss Manley and Mr Goodliffe who were both cross-examined by Mr Taylor for which purpose I gave Mr Taylor some assistance. The appeal was adjourned part heard for two reasons:

(1) To enable HMRC to consider new material in relation to the Unimog produced by Mr Taylor on the day of the appeal, to give further consideration to the excepted vehicle provisions and to consider the significance in the context of the present appeal of the decision of the Court of Appeal in *HMRC v Jones and Jones* to which I refer below.

(2) To give the appellant an opportunity to produce further documents he indicated he might have and to give him the opportunity to call his girlfriend, Siobhan Wardle as a witness.

Legal Framework

14. In this section I set out matters of law relevant to the issues I have to determine on the appeal:

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

> "*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."

Hydrocarbon Oil Duties Act 1979 ("*HODA*") 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(1) Where any person –

(a) uses heavy oil in contravention of section 12(2) above, or

(b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection,

his use of the oil or his becoming so liable (or, where his conduct includes both, each of them) shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

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.

Finance Act 1994 provides as follows:

> "*9(1) This section applies, subject to section 10 below, to any conduct in relation to which any enactment (including an enactment contained in this Act or in any Act passed after this Act) provides for the conduct to attract a penalty under this section.*
>
> *(2) Any person to whose conduct this section applies shall be liable –*
>
> *(a) in the case of conduct in relation to which provision is made by subsection (4) below, or by or under any other enactment, for the penalty attracted to be calculated by reference to an amount of, or an amount payable on account of any duty of excise, to a penalty of whichever is the greater of 5 per cent, of that amount and £250; and*
>
> *(b) in any other case, to a penalty of £250.*
>
> *…*
>
> *10(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.*"

15. *Section 12(2) HODA 1979* provides that red diesel shall not be used to fuel a road vehicle. For these purposes *Section 27* defines a "road vehicle" as:

> "*… a vehicle constructed or adapted for use on roads but does not include any excepted vehicle.*"

16. There was no suggestion before me that the Unimog was not constructed or adapted for use on roads. The arguments before me focussed on whether it was an "excepted vehicle". That term is defined in *Schedule 1 HODA 1979* which sets out various categories of excepted vehicles. For present purposes Mr Taylor argues that the Unimog is an agricultural tractor in *Paragraph 2 of Schedule 1*:

> *"(1) A vehicle is an excepted vehicle if it is—*
>
> *(a) an agricultural tractor, …*
>
> *(b) …*
>
> *(2) In sub-paragraph (1) above "agricultural tractor" means a tractor which –*
>
> *(a) is designed and constructed primarily for use otherwise than on roads, and*

(b) is used on public roads solely for

(i) purposes relating to agriculture, horticulture or forestry

(ii) cutting verges bordering public roads; or

(iii) cutting hedges or trees bordering public roads or bordering verges which border public roads."

17. *Section 14 Finance Act 1994* makes provision for a person to require a review of a decision of HMRC under *section 152(b) CEMA* not to restore anything seized from that person. *Section 15A* provides for HMRC to offer a review of a "relevant decision" which includes the Assessment under appeal in the present appeal.

18. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against the review carried out by HMRC in the present case. The decision to make the Assessment and confirm it on review is not an ancillary matter. As such the tribunal's jurisdiction is not limited to considering whether the decision of the review officer was reasonable under *section 16(4)*. The tribunal has what is called a full appellate jurisdiction under *section 16(5)*. Hence it can consider whether liability to the assessment is justified as a matter of law and if so whether or not the assessment is excessive.

19. *Section 16(6)* makes provision as to the burden of proof on an appeal. For present purposes the burden is on Mr Taylor to satisfy the tribunal that the grounds of his appeal are established.

Further Findings of Fact

20. Mr Taylor gave evidence as to the use that was made of the various vehicles which are the subject of the Assessment and how they were fuelled.

21. Mr Taylor stated that the Peugeot 106 had only been owned for a couple of months before the seizure. It was used by both himself and his girlfriend as a "general runabout". It was fuelled by whoever was using it at the time it needed fuel. Shortly before 2 October 2010 Mr Taylor had been driving it with Miss Wardle and their children also in the car. Close to where the Unimog was stored they had run out of fuel. The fuel gauge in the Peugeot did not work. They were about a mile away from their home. They had no money or payment cards with them and no money at home. In order to get his family home he obtained some red diesel stored with the Unimog and put about 3 ½ gallons in the Peugeot. He knew this was wrong but he was desperate to get his family home.

22. I do not accept this account of the circumstances in which red diesel was put into the Peugeot fuel tank. At the hearing on 15 March 2012 I gave Mr Taylor the opportunity of an adjournment partly in order to consider calling his girlfriend as a witness to support his evidence. He chose not to do so. At the adjourned hearing he

said that he did not hear what I had said at the first hearing. He hadn't considered calling her as a witness. I asked whether she could attend later that day at which stage he offered to phone her, before then saying that she could not come because their children were off school ill. I find that Mr Taylor did not call Miss Wardle to give evidence because he realised that her evidence would not support his own.

23. The Assessment in relation to the Peugeot 106 is not in dispute on this appeal. However the circumstances in which that vehicle came to have traces of red diesel in the running tank are relevant to Mr Taylor's evidence generally, and his credibility in particular. In my view Mr Taylor's account of the circumstances in which he put red diesel in the Peugeot 106 is not credible.

24. Mr Taylor stated that the Mercedes A170 was being repaired at a garage on the day HMRC tested the other vehicles. It was used by Mr Taylor and Miss Wardle as a general runabout. It was fuelled by whoever was using it at the time it needed fuel. Mr Taylor would occasionally use it for business purposes when he needed to attend on site to give a quote for tree felling work. I can accept this evidence as it is relatively uncontroversial.

25. Mr Taylor also said that he had never put red diesel in the Mercedes A170. The burden is on Mr Taylor to establish that the assessment is wrong or excessive. I cannot be satisfied on the uncorroborated oral evidence of Mr Taylor that he had not put red diesel in the Mercedes A170.

26. Mr Taylor stated that he had owned the Mercedes E300 for several years. It had been scrapped in or about May 2010 when he had sent a statutory off road notification to the DVLA. It had been used and fuelled exclusively by Mr Taylor. He would use it occasionally for business purposes when he needed to attend on site to give a quote for tree felling work.

27. In contrast, Halliwells in their letter requesting a review and in the notice of appeal had stated that Miss Wardle was the main user of this vehicle. Notwithstanding this conflict I am prepared to accept Mr Taylor's evidence as to the use of the vehicle.

28. Mr Taylor also said that he had never put red diesel in the Mercedes E300. Again, I am not satisfied that this is the case. The annual accounts for Mr Taylor's business show the Mercedes E300 as an asset of the business. They also identify motoring costs which the listings provided by Halliwells show include purchases of diesel. It is clear therefore that some legitimate diesel was being purchased for use in the Mercedes E300 and treated as a business expense. Mr Taylor is obliged to keep proper business records to support his expenditure. In fact however he described a system for keeping fuel receipts which was hit and miss – some would be kept, some would be thrown away and some would be lost. In the absence of legitimate fuel receipts to justify the mileage of this vehicle I cannot be satisfied that Mr Taylor did not use red diesel in this vehicle. Mr Goodliffe has given credit in the Assessment for the legitimate receipts which were available.

29. Mr Taylor also gave evidence as to his use of the Unimog. There is no dispute that red diesel was used to fuel the Unimog. The issue between the parties is rather more technical, namely whether it is an excepted vehicle for the purposes of HODA 1979. I deal with this issue below based on the following findings of fact.

30. There was no suggestion that Mr Taylor's use of the Unimog had changed over time. Mr Taylor uses the Unimog for tree work, generally in the area of Ramsbottom where he lives. His customers are mainly private individuals who need tree work to be carried out in their gardens. The work involves trees of all kinds, including for example trees overhanging pavements and verges. He may also trim hedges shrubs and bushes. He drives the Unimog from where it is kept to the customer's premises using public roads.

31. In addition to work for private individuals he does work for local farmers and also for the East Lancashire Railway. The East Lancashire Railway is a heritage railway operated by a trust. Mr Taylor's evidence which I accept is that he generally does work on the railway line every few months, possibly once a year. The last work he did on the railway was about 9 months ago. He will be engaged if a tree has fallen on the line or if there is a tree they are worried about. The Unimog enables him to deal with trees on any type of land.

32. Once Mr Taylor has finished at a site, he will have logs from the felled tree, together with woodchip from the branches which he chips on site. He takes the logs and the woodchip to a local farm. They take the logs and woodchip from him without payment. I infer that they use woodchip on the farm and that they sell or use the logs on the farm.

33. I was shown various photographs of the Unimog. It looks similar to a military type off road vehicle. It has large tyres similar to those of an agricultural tractor, in the non-technical sense. It has a load carrying body at the back which lifts hydraulically to the side of the vehicle enabling loads to be tipped. It also has a hydraulic wood-chipper permanently attached to the rear of the vehicle with a three-point linkage and power take-off.

34. Mr Taylor produced copies of Vehicle Excise Licences for the Unimog. These show that he paid a nil rate of road tax because the Unimog was classified as an agricultural machine.

35. Mr Taylor said that he had been given to understand by the vendor of the vehicle and by one of the main dealers that it was classed as an agricultural or forestry tractor if it had a permanent wood-chipper on the back. As such he could use red diesel. I accept that Mr Taylor had been led to believe this was the case. He produced a report addressed to a main dealer of Unimogs suggesting that they are excepted vehicles. Whether or not that is right is the issue I have to determine. Mr Taylor also provided me with various articles seeking to clarify the circumstances in which agricultural and other vehicles may be treated as excepted vehicles.

Decision

36. I shall deal with the domestic vehicles and the Unimog separately. In each case the burden is on Mr Taylor to satisfy me that the Assessment should not have been made or that it is excessive.

Domestic Vehicles

37. Based on the findings of fact set out above I am not satisfied that the Assessment is excessive in so far as it relates to the domestic vehicles. I cannot be satisfied that Mr Taylor used only legitimate diesel to fuel the two Mercedes. He has accepted that he used red diesel to fuel the Peugeot and does not dispute the Assessment in relation to that vehicle. The Assessment gives credit for receipts for those purchases of legitimate diesel that Mr Taylor retained and provided to his accountants for the purposes of his annual accounts.

38. I understand that HMRC do not generally assess back duty in relation to non-business vehicles where the particular vehicle has not itself tested positive for red diesel. HMRC do assess back duty in relation to business vehicles, whether or not all the vehicles used in a business have tested positive for red diesel. The relevant HMRC internal manual states at HCOS4425 as follows where a business vehicle has tested positive for red diesel:

> "*… It is NOT just those testing positive that are to be included in the calculation. The assessment method is to calculate the total fuel usage of the business and deduct purchases of legitimate fuel to reveal mileage done using rebated oil…*
>
> *You should also include any diesel vehicles privately owned by the trader as these will probably [have] been fuelled from business stock, or if not, fuel receipts for diesel put into the private vehicles might be claimed as business fuel receipts. No assessments should normally be issued for private vehicles (see below).*
>
> *To establish the extent of misuse by private vehicles is not considered viable because there is no legal obligation to retain fuel receipts … If a businessman uses rebated fuel in his private vehicle you cannot treat him any differently from the way a member of the public is dealt with. That would be inconsistent.*"

39. I have found as a fact that the Mercedes A170 and the Mercedes E300 were both used partly for business purposes. However the internal manual sets out the practice of HMRC and does not have the force of law. I have therefore considered the appeal in relation to the domestic vehicles in two stages:

(1) Was there material on which to make a reasoned judgment as to the extent red diesel was used, and if so

(2) Has Mr Taylor satisfied me that the resulting assessment was excessive?

40. Based on my findings of fact I am satisfied that there was sufficient material to justify the making of an assessment in relation to the domestic vehicles. The two Mercedes were both used occasionally for business purposes. I find that Mr Taylor was aware that he ought to keep fuel receipts for the purposes of his business accounts. HMRC were entitled to expect that he would do so and in the circumstances of this case Mr Goodliffe was entitled to infer that mileage not supported by receipts for legitimate fuel was referable to red diesel. I am not satisfied that the resulting assessment was excessive.

The Unimog

41. Mrs Newstead raised a point of jurisdiction which I must consider before addressing issues in relation to the Unimog. She submitted that because Mr Taylor did not contest the seizure of the Unimog he is bound by the deeming provision in Paragraph *5 Schedule 3 CEMA*. In particular it is implicit in the seizure of the Unimog that it is not an excepted vehicle. The fact that the Unimog was *"deemed to be have been duly condemned as forfeited"* meant that it was deemed not to be an excepted vehicle. In making this submission she relied on the decision of the Court of Appeal in *HMRC v Jones and Jones [2011] EWCA Civ 824*.

42. Mr and Mrs Jones were stopped at Hull Ferry Port with a large amount of tobacco, wine and beer which was seized on the basis that is was for commercial use. The seizing officer reached that view following a detailed interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially they challenged the legality of the seizure by serving a notice of claim. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who had at that time instructed solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods.

43. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the First-tier Tribunal ("the FTT"). The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal upheld this decision. HMRC appealed to the Court of Appeal maintaining that the FTT was not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use.

44. The Court of Appeal carried out an extensive review of the authorities in this area of law. I shall set out in full the conclusion given in the judgment of Lord Justice Mummery at [71]:

> *" I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.*

(1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.

(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.

(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in Gora and as approved by the Court of Appeal in Gascoyne. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in Gascoyne on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in Gora did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in Gascoyne are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum."

45. Mrs Newstead argued that the same principles summarised by the Court of Appeal in *Jones and Jones* applied on the facts of the present appeal to prevent Mr Taylor from arguing that the Unimog was and is an excepted vehicle. She submitted that there is nothing in *Jones and Jones* to confine the principle to appeals against restoration decisions.

46. It is understandable and plainly within the scope of the deeming provision that it should prevent Mr Taylor from challenging the legality of the seizure. The deeming provision would also clearly prevent Mr Taylor from arguing on an appeal against a refusal to restore or against the conditions imposed on restoration that the vehicle was an excepted vehicle. However if Mrs Newstead is right the deeming provision would also prevent Mr Taylor from challenging an assessment to duty which could go back for a period of three years prior to the date of the seizure. Indeed taken to its extreme, the principle Mrs Newstead seeks to apply would prevent Mr Taylor from arguing at any time in the future that the Unimog is an excepted vehicle, unless perhaps there is some change in circumstance. For example because of a subtle change in the way the Unimog is used.

47. In my view that is not the effect of the deeming provision in *paragraph 5 of Schedule 3*. Mr Taylor's appeal is not against a restoration decision or anything connected with the seizure of the vehicle. The Unimog was restored to him immediately following seizure on payment of £500. He is not challenging the seizure or the terms on which the vehicle was restored. He could not do so because the Unimog was certainly deemed to have been duly condemned as forfeited at the date of the seizure.

48. It is necessary to consider what facts are necessarily implicit in such a deemed forfeiture. As Mummery LJ stated, "*deeming something to be the case carries with it any fact that forms part of the conclusion*". It is implicit that the Unimog was not an excepted vehicle at the time it was seized. That is so even though there is no evidence before me that the seizing officers gave any consideration at all to what use the Unimog was put. The notes of interview simply record that it was used in Mr Taylor's tree felling business.

49. The fact that it is implicit that the Unimog was not an excepted vehicle on 2 October 2010 says nothing about whether it was an excepted vehicle in February 2008 which is the earliest date to which the Assessment relates. There is nothing in the deeming provision from which it is implicit that the Unimog was not an excepted vehicle between 4 February 2008 and 2 October 2010.

50. Mrs Newstead argued that Mr Taylor would have to establish some change in use occurring prior to 2 October 2010 before he could argue that the deeming provision did not have effect. I do not accept that argument. If Mrs Newstead's submission is correct then it appears to defeat the object of the deeming provision. The tribunal must still embark on a detailed fact finding exercise to establish whether a change in use before or after the seizure, however subtle, is such as to permit an appellant to make the argument on excepted vehicle status. Further, on the facts of the present case there was no detailed consideration of what the use of the vehicle was at the time when the vehicle was seized or at any other time. I cannot think that the deeming provision was intended to operate in those circumstances.

51. The position can be contrasted with an individual unlawfully importing tobacco and alcohol for commercial use. The question of restoration which comes before the FTT in that context is concerned only with goods or vehicles seized at a particular

time. The tribunal cannot go behind the deemed forfeiture because it is implicit that those particular goods on the occasion of the particular importation were intended for commercial use.

52. The Unimog was seized on 2 October 2010. Mr Taylor's right to give notice of claim under *paragraph 3 Schedule 3* expired on 1 November 2010. There is no provision to extend the one month time limit. The first contact between HMRC and Mr Taylor in relation to a possible assessment to back duty was 8 November 2010. Nowhere in the documentation given to Mr Taylor is it made clear that a failure to challenge the seizure will also affect his right to challenge a subsequent assessment to excise duty. Indeed the documentation does not clearly state that there is the possibility of an assessment going back over a period of 3 years. The closest it comes is the Seizure Information Notice in which Mr Taylor acknowledges:

> "*I am aware that the Excise Assurance Team may be asked to complete a full road fuel audit of my business and that I may need to produce my books and records to them if required.*"

53. In my view the real principle which applies in cases such as the present is whether it would be an abuse of process for Mr Taylor to contend that the Unimog was an excepted vehicle prior to the 2 October 2010 or indeed after that date. I recognise that the abuse of process argument was rejected by the Court of Appeal in *Jones and Jones*. However that was in the context of a restoration appeal. For the reasons I have given above the context of an assessment to duty is altogether different.

54. That being so, I have to consider whether it is an abuse of process for Mr Taylor to seek to argue that throughout the period of the Assessment the Unimog was an excepted vehicle. I have no hesitation in concluding that it is not an abuse of process. There was no real reason for Mr Taylor to raise the issue in condemnation proceedings. He had paid £500 and the Unimog had been restored. There is no suggestion that Mr Taylor was aware he might be confronted with an assessment going back up to 3 years. I was not taken to any material from which it would have been apparent to Mr Taylor, a person who has great difficulty reading and writing, that in order to contest a subsequent assessment to duty he might have to contest the seizure of the Unimog. In those circumstances I am satisfied that it is not an abuse of process for Mr Taylor to seek to reduce the assessment in these proceedings by arguing that the Unimog is an excepted vehicle.

55. I now turn to the question of whether the Unimog was in fact an excepted vehicle for the purposes of the Assessment. I am conscious that this type of vehicle may be used by other businesses similar to that of Mr Taylor and that this decision may have significance beyond Mr Taylor's particular circumstances.

56. There was no issue raised that the Unimog was anything other than a tractor, or that it was not designed and constructed primarily for use otherwise than on roads. The issue between the parties and to which the evidence and their submissions were

directed was whether it satisfied the provisions of *Paragraph 2(2)(b) Schedule 1 HODA 1979*. I must decide therefore whether it was used on public roads solely for –

(i) purposes relating to agriculture, horticulture or forestry;

(ii) cutting verges bordering public roads; or

(iii) cutting hedges or trees bordering public roads or bordering verges which border public roads.

57. It is clear that if the Unimog is used for any purpose not within these sub-paragraphs then it will not be an agricultural tractor.

58. There was no suggestion that the Unimog was used to cut verges. It was used to cut trees and hedges bordering public roads. These would be trees in private gardens or perhaps on farmland. However the use of the Unimog went beyond this to include the cutting of trees, hedges and shrubs in private gardens generally and trees on farmland generally. The principal issue therefore is whether this use of the Unimog amounted to "agriculture", "horticulture" or "forestry".

59. There is no definition of these terms in *HODA 1979*. However it seems to me that they are to be given a wide meaning. It is for that reason that paragraphs (ii) and (iii) were expressly included for the purposes of defining an agricultural tractor. Any doubt as to whether cutting verges, hedges or trees bordering public roads were included in the terms agriculture, horticulture or forestry was resolved in favour of inclusion.

60. I was taken to various dictionary definitions during the course of submissions. For present purposes I consider the following definitions taken from the Oxford English Dictionary:

Agriculture	"The science and art of cultivating the soil; including the allied pursuits of gathering in the crops and rearing live stock; tillage, husbandry, farming (in the widest sense)."
Horticulture	"The cultivation of a garden; the art or science of cultivating or managing gardens, including the growing of flowers, fruits, and vegetables."
Forestry	"The science and art of forming and cultivating forests, management of growing timber."

61. I have no doubt that work on trees on farmland is part and parcel of farming in its widest sense and amounts to a purpose relating to agriculture. Indeed Mrs Newstead did not suggest otherwise.

62. Equally, I have no doubt that work on trees, hedges and shrubs in a private garden amounts to a purpose relating to horticulture. It is part and parcel of cultivating and managing a garden.

63. Mrs Newstead suggested that such use did not amount to horticulture for the purposes of defining an agricultural tractor. She referred me to a Memorandum of Agreement quoted in HMRC Notice 75 "*Fuel for Road Vehicles*". The agreement is between various parties interested in the use of agricultural vehicles on the road including HMRC and various faming and forestry bodies. It contains "*guidance to those engaged in agriculture, horticulture and forestry, and to agencies enforcing compliance with the legislation*". It does not have the force of law but it does identify certain activities accepted as falling within the definitions and certain activities accepted as falling outside the definition. The former includes "*growing or harvesting of flowering or ornamental plants*". The latter includes "*landscaping*".

64. Mrs Newstead suggested that tree work in gardens was not concerned with flowers or ornamental plants and was more akin to landscaping. I do not accept that submission. The Memorandum of Agreement is not intended to be exhaustive and in any event does not have the force of law. I am sure it offers a practical form of guidance in certain cases but tree work on trees in private gardens is not an area where any guidance is necessary. It is clearly a purpose relating to horticulture.

65. The only other use which Mr Taylor described was occasional work on trees on the East Lancashire Railway. From the way in which Mr Taylor described this work it was very occasional and it appears to me to be de minimis. In the context of a tree surgeon, or someone providing tree felling services, dealing with one tree on a railway every year or so does not prevent the Unimog from being treated as an agricultural tractor.

66. Even if it was not de minimis I would still be of the view that such use was consistent with the Unimog being an agricultural tractor. It cannot be described as agriculture or horticulture. However for the reasons given above I consider that the term forestry should be given a wide meaning. In the present context it seems to me that it was intended to include tree work generally and not simply that involved in commercial woodlands or large expanses of trees.

Conclusion

67. For the reasons given above I allow the appeal in so far as the Assessment includes red diesel used by Mr Taylor in the Unimog. HMRC should recalculate the Assessment to take out the 2,682 litres of red diesel estimated to have been used by Mr Taylor in the Unimog. Save for this element, I confirm the Assessment insofar as it relates to the other vehicles.

68. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 14 September 2012