TC03753

Appeal number: TC/2013/05485

CUSTOMS & EXCISE DUTIES – Hydrocarbon Oils – Vehicles legally seized for using rebated heavy oil as a road fuel and putting same in a road vehicle – whether contamination of DERV (Diesel Fuel for road use) by faulty supply line – no - whether unmitigated restoration fee disproportionate – no – Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS RUSSELL MCALLISTER
t/a PALLET RECYCLING SERVICES

- and -

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS

TRIBUNAL: JUDGE W RUTHVEN GEMMELL,WS
MRS CHARLOTTE BARBOUR, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 29 and 30 May 2014

Richard Spence, for the Appellants

Ian Artis, Advocate, instructed by the Office of the Advocate General, for the Respondents

DECISION

1. This is an appeal by Thomas Russell McAllister ("TRM") trading as Pallet Recycling Services ("PRS") against a decision by the Commissioners for HM Revenue & Customs ("HMRC") on 11 July 2013 to confirm their Decision ("the Restoration Decision") to restore five vehicles to the Applicant following their seizure on payment of a fee of, in total, £3,292.00 in terms of Sections 12 and 13 of the Hydrocarbon Oil Duties Act 1979 ("HODA") and Section 152(b) of the Customs and Excise Management Act 1979 ("CEMA").

2. This Appeal was for an amount of £3,292.00 which was the total restoration fee for five vehicles being made up of £820 for one vehicle, registration PO56 BBN, seized on 2 March 2012 near Broxburn, Midlothian and £2,472 for a further four vehicles seized on 2 March 2012, at Rigside, Lanark. The review communicated on 11 July 2013 although reviewing the five vehicles and their related fees, concluded that, "the Decision to restore five vehicles for a fee totalling £2,472 should be maintained".

3. The Tribunal, in assessing the letter of 11 July considered that a review of all five seizures had been carried out and understood the use of £2,472 to be a careless error consistent with a number of grammatical and other errors in the same letter (eg "Her Majesties Revenue and Customs").

Legislation

Hydrocarbon Oil Duties Act 1979

Section 12 Rebate not allowed on fuel for road vehicles

(1) If, on the delivery of heavy oil for home use, it is intended to use the oil as fuel for a road vehicle, a declaration shall be made to that effect in the entry for home use and thereupon no rebate under section 11 above shall be allowed in respect of that oil.

(2) No heavy oil on whose delivery for home use rebate has been allowed (whether under section 11 above or 13AA(1) below)—

(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.

(3) For the purposes of this section and section 13 below -

(a) heavy oil shall be deemed to be used as fuel for a road vehicle if, but only if, it is used as fuel for the engine provided for propelling the vehicle or for an engine which draws its fuel from the same supply as that engine; and

(b) heavy oil shall be deemed to be taken into a road vehicle as fuel if, but only if, it is taken into it as part of that supply.

Section 13 Penalties for misuse of rebated heavy oil

(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).

(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.

(2) Where any person supplies heavy oil having reason to believe that it will be put to a particular use and that use would, if a payment under subsection (2) of section 12 above were not made in respect of the oil, contravene that subsection his supplying the oil shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties)..

(3) A person who, with the intent that the restrictions imposed by section 12 above should be contravened,—

(a) uses heavy oil in contravention of subsection (2) of that section; or

(b) supplies heavy oil having reason to believe that it will be put to a particular use, being a use which would, if a payment under that subsection were not made in respect of the oil, contravene that subsection,

shall be guilty of an offence under this subsection.

(4) A person who is liable for heavy oil being taken into a road vehicle in contravention of subsection (2) of section 12 above shall be guilty of an offence under this subsection where the oil was taken in with the intent by him that the restrictions imposed by that section should be contravened.

(5) A person guilty of an offence under subsections (3) or (4) above shall be liable—

(a) on summary conviction, to a penalty of the prescribed sum or of three times the value of the oil in question, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or

(b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

(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.

(7) For the purposes of this section, a person is liable for heavy oil being taken into a road vehicle in contravention of section 12(2) above if he is at the time the person having the charge of the vehicle or is its owner, except that if a person other than the owner is, or is for the time being, entitled to possession of it, that person and not the owner is liable.

Customs and Excise Management Act 1979

Section 152 Powers of Commissioners to mitigate penalties, etc

The Commissioners may, as they see fit -

(a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeited under the customs and excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or

(c) after judgment, mitigate or remit any pecuniary penalty imposed under those Acts; or

Finance Act 1994

Section 16 Appeals to a Tribunal

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say—

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and

(b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(2) An appeal under this section shall not be entertained unless the appellant is the person who required the review in question.

(3) An appeal which relates to, or to any decision on a review of, any decision falling within any of paragraphs (a) to (c) of section 14(1) above shall not be entertained if any amount is outstanding from the appellant in respect of any liability of the appellant to pay any relevant duty to the Commissioners (including an amount of any such duty which would be so outstanding if the appeal had already been decided in favour of the Commissioners) unless—

(a) the Commissioners have, on the application of the appellant, issued a certificate stating either—

(i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or

(ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;

or

(b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.

(3A) Subsection (3) above shall not apply if the appeal arises out of an assessment under section 8, 10 or 11 of the Alcoholic Liquor Duties Act 1979.

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 14(1)(a) to (c) above.

(9) References in this section to a decision as to an ancillary matter do not include a reference to a decision of a description specified in the following paragraphs of Schedule 5—

(a) paragraph 3(4);

(b) paragraph 4(3);

(c) paragraph 9(e);

(d) paragraph 9A.

SCHEDULE 5 DECISIONS SUBJECT TO REVIEW AND APPEAL

The Management Act

2(1) The following decisions under or for the purposes of the Management Act, that is to say -

(r) any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored.

Case References

Lindsay v Customs and Excise Commissioners [2002] STC 588
Thomas Corneill & Co Ltd V Revenue and Customs Commissioners [2007] EWHC 75 (Ch)
Revenue and Customs Commissioners v Jones and Another [2011] EWCA Civ 824

Evidence and Findings of Fact

4. PRS is wholly owned by TRM and operates at Muirfoot Garage, Rigside, South Lanarkshire.

5. PRS buys, restores and then resells pallets which are collected around the country, taken to Muirfoot Garage, treated and renovated and then resold and transported to customers. Those employed on restoring the pallets work in "the shed" and one employee, Peter Johnston, ('PJ') who gave evidence, and was a credible witness, manages "the yard" and is, primarily, concerned with managing the fleet of vehicles and the stores of fuel. TRM's daughter dealt with all paperwork and worked in "the office" at the premises.

6. In addition to buying broken pallets, PRS also purchases Intermediate Bulk Storage (IBS) containers which are generally clear plastic cubes which are used to store liquids ("Cubes"). They are used at the premises to store fuel but others are washed out and sold, often to farmers for water for their animals.

7. PJ gave evidence that he alone is responsible for "dieseling up" which involves making sure that the vehicles all have sufficient fuel for the next day's work.

8. The Cubes containing fuel are kept in an area in the yard where there is close circuit television.

9. On 2 March 2012, one of two articulated lorries owned by PRS, registration number PO56BBN, was stopped near Broxburn by HMRC. The fuel was tested and proved positive for a Euromarker Coumarin, resulting in the vehicle being seized by HMRC but which was restored to the PRS within hours on payment of a restoration fee of £820, comprising of excise duty and penalties. On the same day, HMRC visited PRS's business premises and tested the fuel in four other vehicles with the registration numbers PO56BBK, another Volvo articulated lorry, SJ11NTD, and SJ11NTE, two MAN "rigid" lorries, and NG07KWL, a Ford Transit Pick-up.

10. All were seized by HMRC for the same reasons as PO56BBN but PRS refused to pay a restoration fee of £2,472 and the four vehicles were removed from the premises by HMRC.

11. TRM was a credible witness and gave evidence that he refused to pay the £2,472 restoration fee because he could not understand how the fuel was contaminated and had only paid the first restoration fee of £820 on vehicle PO56BBN because the lorry involved contained a delivery of pallets which a customer was demanding to receive. In addition, the driver of the vehicle required to return home.

12. On hearing that the vehicle registration number PO56BBN had been stopped and seized, PJ was of the view that the driver of that vehicle who had kept the lorry at his house overnight had swapped some of the diesel for kerosene. It was only when the subsequent vehicles tested positive that PJ concluded that all the vehicles had been fuelled from a Cube of fuel which must have been contaminated by the driver who delivered that fuel.

13. It was suggested that if PRS had known that the other four vehicles were likely to test positive they would have been removed before Customs and Excise had had an opportunity to test them.

14. Two vehicles did not test positive and this was because, PJ said, they had not been fuelled from the Cube which PJ claimed was contaminated.

15. In light of his new suspicion, PJ spoke to HMRC's officer, Mr Abercrombie, and asked him to check the paper work at Brogan Fuels, the fuel delivery company. The reason for this request was to ascertain whether the delivery immediately before the one made to PRS had been of kerosene, or not. If it had been, this, PJ said, would have lent credence to the belief that contamination was by the driver of the delivery vehicle as a result of his having failed to clean the delivery line through which the fuel was delivered on 29 February, 2012.

16. It was explained that the two articulated lorries, PO56BBK and PO56BBN, had a capacity of approximately 400 litres and that one of the vehicles was 'a spare' and was unlikely to have had an empty fuel tank. The MAN lorries, SJ11 NTD and SJ11 NTE, were deemed to have a fuel capacity of approximately 25 litres.

17. In evidence, PJ admitted that his belief that there had been contamination from an unclean delivery line was speculation. The fuelling on 29 February was for 1,000 litres of fuel and there were 300 litres left when HMRC tested the Cube. It was estimated that approximately 550 litres had been used from the Cube to fuel the vehicles which had been seized.

18. PJ was concerned that the fuel had been contaminated and on 2 March or, shortly thereafter, looked at the close circuit television recording system to see whether there was any evidence of anyone having tampered with the Cube but could find no evidence of this.

19. TRM confirmed that he had spoken to Brogan Fuels and asked them if it was possible that the fuel supply could have become contaminated or the delivery line not adequately cleaned after the previous delivery, which they denied. Their view was that they did not wish to become involved in this issue and requested that PRS obtain their fuel from another supplier.

20. It was confirmed that kerosene had been delivered to the premises two to four months before February 2012 but it had been removed and TRM stated that it had not been used for the company activities at the yard.

21. There were in total 16 to 18 Cubes in the yard.

22. TRM stated that he was not at the yard when the initial seizure took place but on 15 March 2012 he attended an interview with HMRC and paid the restoration fee of £2,472 in respect of the four vehicles which were seized on 2 March 2013 and which were then restored to him.

23. He was also required to pay a removal, storage and delivery charge of £2,585 as a result of the vehicles having been removed from his premises.

24. The Tribunal had an incomplete transcript of the interview between TRM and two officers of HMRC. In this TRM was asked if he wished to receive legal advice, which he declined. During the interview TRM confirmed that the approximate value of the vehicles that had been seized was £80,000 and that he had had a car seized some years before because it had proved positive for red diesel. In relation to quantities of red diesel supplied to PRS, TRM refused to provide the name of the seller.

25. On 15 and 19 March 2012, PRS wrote to HMRC stating that they did not agree with the seizures carried out on 2 March 2012 and "wished to challenge the validity of the seizure".

26. The letter of 15 March continued "I believe the fault to lie with our fuel suppliers – Brogan Fuels – and would therefore like to appeal against the matter". The letter of 19 March 2012, being an addition to the letter of 15 March 2012, repeated the wish to "challenge the validity of the seizure" and added the Volvo articulated lorry PO56BBN which has been omitted from the list of vehicles noted in the letter of 15 March 2012. The letters although purporting to be signed by TRM were signed by his daughter.

27. Those letters were then considered by HMRC as a Notice of Claim by which PRS sought to challenge the seizure of the vehicles and, accordingly, on 11 April 2012, Condemnation Proceedings were initiated by HMRC in Lanark Sherriff Court.

28. HMRC had visited Brogan Fuels and carried out tests of their tanks and found no contamination with kerosene. There was no evidence that they had checked the paperwork of Brogans to ascertain whether the delivery prior to PRS had been of kerosene or oil as PJ says he requested so there was no evidence that might have supported the PRS contention that the contamination arose from the delivery fuel supply line.

29. PRS then received an Initial Writ from the Office of the Advocate General sent to his then solicitor, who advised him to contact a specialist solicitor, who referred him to Mr Spence.

30. TRM had believed that if the court found against him that his vehicles would be again seized. However, Mr Spence explained to him that his vehicles would not be taken from him but that he should not contest the proceedings because the legitimacy of the seizure was not in doubt as the vehicles contained contaminated fuel which meant that PRS had breached an absolute offence and, consequently, that the Sherriff would have no option but to confirm that the seizure was legal. In Mr Spence's view opposing the case would only have resulted in additional costs.

31. Mr Spence then wrote to a solicitor in the Office of the Advocate General explaining that PRS did not intend to raise any opposition to the legality of the seizure

and that what really PRS required was a review of the circumstances of the seizure and the amounts charged.

32. At this time, PRS were also contacted by HMRC to provide information regarding an audit of fuel usage of the business following the seizures.

33. It was agreed between the parties that the audit's conclusion was that during the audit period the amount of fuel delivered appeared to be ample to cover the amount of number of miles undertaken.

34. Mr Spence wrote on 6 March 2013 saying that he thought the examination tests indicated a low level of contamination which was consistent throughout the five vehicles sampled as having occurred by an accidental contamination at the point of delivery, as suspected by TRM.

35. Mr Spence stated that, on the balance of probabilities, the circumstances supported these grounds and that PRS had a reasonable excuse for the fuel contamination which must have happened accidentally.

36. The letter asked for a belated review of the case, requested further information and stated that the delivery company management at Brogans were highly unlikely to admit such an error of which presumably they had no knowledge.

37. On 8 February 2013, in the course of delivery by Johnston Oils, the driver made an error and discharged some rebated red diesel into a delivery of fuel duty paid diesel. As the former is red in colour it was easy to identify and, on it being identified, the driver admitted his error and TRM, on Mr Spence's advice, retained samples and took steps to properly address the mistake and resolve the matter with his fuel supplier without any risk of red fuel contamination. This was raised with HMRC in order to illustrate that such mistakes can, and do, happen.

38. The Cube in to which this contaminated fuel had been discharged was uplifted and removed from PRS's yard.

39. On 11 April Louise Binds ("LB") who gave evidence and is a Higher Officer at Specialist Investigations with HMRC, sent an email stating that "exceptionally" she was going to review the case of TRM/PRS outside the time limit.

40. She wrote "I must advise you that this is solely on the grounds that following me (sic) reading the the (sic) documents I have in the file I do feel that Mr McAllisters (sic) letter dated 15/03/2012 should have been queried with Mr McAllister as to whether it was a review of the decision or a challenge to to (sic) the legality of the seizure, or both, that he was requesting. You should be aware that because the review is being conducted exceptionally, it will not favour a more desirable outcome".

41. Mr Spence then wrote on 28 April 2013 setting out what he believed to be the facts of the case referring to the audit which had established "that there is no shortfall

between fuel usage against fuel purchases and such there are no grounds for an assessment".

42. The email drew attention to the contamination by Johnston Oils some 11 months after the seizure in 2012 and also of HMRC's Officers recently bringing to the attention of the companies supplying fuel of the need to ensure clean lines between deliveries and underlining the regulatory requirements in this respect.

43. The email continued "I believe that on the balance of probabilities the contamination was caused by a botched fuel delivery in which the driver either did not realise had happened or which he chose not to report. The contamination, based on the test results, was of kerosene and, therefore, not visible to the naked eye and I await the results of your review".

44. The review dated 11 July 2013 stated "Thank you for your letter dated 06/03/2013 requesting review of the decision to restore five vehicles to your client for a restoration fee of £3,292.00 following the vehicles testing positive for rebated fuel on 02/03/2012". The review letter treated the letter of 06/03/2013 as a valid request to conduct a review in accordance with the provisions of Sections 14 and 15 and Schedule 52 of the Finance Act 1994 which allowed HMRC to uphold, vary or cancel the original decision.

45. It continued "I have now completed my review and concluded that:- "The decision to restore five vehicles for a fee totalling £2,472 should be maintained".

46. LB was a credible witness and confirmed the points in her email concerning the interpretation by HMRC of PRS' letters of 15 and 19 March 2012 and stated that the Johnston Oils contaminated delivery provided no direct evidence that contamination had happened with the delivery by Brogan Fuels and that if the occurrence had been so prevalent it would have happened before a 12 month period had elapsed.

47. LB confirmed that she had only seen the evidence provided by the Road Fuel Testing Unit ("RFTU") who had not checked the paperwork for the previous deliveries by Brogans on 29 February 2012. LB stated that she could find no evidence that Brogans had carried out a "botched delivery" or contaminated the fuel by having failed to clear the delivery line.

48. LB confirmed that in her three years of experience in looking at fuel contamination cases which amounted to 40, she had only come across two cases where contaminated lines had been claimed, neither of which had been allowed.

49. LB stated that in looking at such cases she was aware of setting a precedent which might be followed by all taxpayers who were stopped and found to have contaminated fuel.

50. In carrying out her review LB said she had considered whether the fuel was contaminated by the driver of the vehicle that had delivered the fuel because he discharged the fuel delivery from the wrong tank or the lines were dirty from the previous delivery.

51. LB considered (1) PRS's contention that the driver would not have reported this to his company and the delivery company were unlikely to admit to an error it was presumed they knew nothing about; (2) that PRS had received advice before withdrawing the appeal against the legality of the seizure; and (3) the issue of fuel contamination by Johnson's delivery driver on 8 February 2013 but did not consider that this was evidence for the contamination alleged to have happened a year previously with fuel that was delivered by a different supplier.

52. In LB's opinion PRS had no evidence to support the alleged fuel contamination under appeal.

53. In consideration of the review, LB stated "I have considered the decision afresh; including the circumstances of the events surrounding the seizure and the related evidence so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the Commissioners both before and after the time of the decision. I am guided by the Commissioners' policy but I consider every case on its individual merits". LB in her conclusion stated "I have considered whether you have supplied anything that can be regarded as a reasonable excuse. The mitigation provided does not relate to the incident that your client has requested by review so I therefore do not accept your client has provided any reasonable excuse for the fuel found in his vehicles and would draw your attention to Section 10(3) (b) of the Finance Act 1994. In view of this I consider the seizure and restoration terms applied to your clients were correct. I am satisfied that the strict calculations of the Commissioners' policy in this case are proportionate. To overturn the restoration fee in your clients case would be treating your client more leniently than others in similar circumstances. I can find no reason to vary the Commissioners policy in this case. If you have any fresh information that you would like me to consider then please write to me: however please note that I will not enter into further correspondence about evidence you have already provided".

Submissions by PRS

54. PRS accepted that the fuel in each of the five vehicles tested positive with contaminated fuel, although the contamination was very low.

55. PRS, by their letters of 15 and 19 March 2012, hoped that a more senior person at HMRC would look into the matter rather than set out a challenge to the legality of the seizure.

56. As a result of the subsequent condemnation proceedings in the Sheriff Court, PRS say the remedy at Section 16(4)(a) of the Finance Act 1994 is not available to PRS which it would have been had a review taken place timeously (within 45 days of their letters of 15 and 19 March 2012).

57. PRS say that although the HMRC review took place belatedly, some months later, the review decision took no account of the subsequent HMRC Audit and was not 'closed' in terms of Section 16(4) (a) of the Finance Act 1994.

58. PRS say that the fuel in the five vehicles had been accidentally contaminated at delivery by the delivery driver of the fuel distributor, Brogan Fuels, and that there is a whole raft of supporting evidence for this.

59. More specifically, PRS say that the Review Officer and all those making the decisions in relation to this case, did not take account or give sufficient or appropriate weight to the assumption that the fuel test was accidentally contaminated as had been outlined by Mr Spence and by PJ's oral evidence which included that the fuel supply was part of a regular weekly delivery of 1,000 litres of DERV at a cost of approximately £1,473 made on 29 February, two days before the seizure, that the fuel as normal was separately stored in a Cube and no irregularity was seen at the time of the delivery. PJ subsequently fuelled all five seized vehicles from this stock of fuel, including four of the vehicles on the yard site awaiting use for future uplift or delivery. PJ was in sole charge of this function within the business.

60. PRS say that the actings of PJ and TRM once the vehicle had been seized at Broxburn on 2 March 2012, were consistent with their having no knowledge of any other fuel irregularity and, at the interview on 15 March 2012, TRM denied all knowledge of the presence of any kerosene in the fuel which he bought, duty paid, two days before the seizure.

61. TRM says that he only paid the 2 March 2012 £820 seizure restoration amount so that the driver could return home and pallets could be delivered to a customer.

62. PRS say that the samples taken which tested positively had a very low percentage of contamination and there were some vehicles that had not been fuelled from, what they say, was the contaminated Cube and which had been found to be 'clean'.

63. PRS say that there was no kerosene on the premises, with the last purchase having been made in December 2011 and removed to TRM's farm at Symington.

64. PRS say that the seizing officer, Mr Abercrombie, of HMRC, agreed to check the paperwork for the delivery by Brogans but this was not done; that the very low percentage of contamination does not make sense if PRS wished to deliberately act to contaminate fuel; that contamination by an unclean line can happen easily and often as evidenced by the Johnston Oils incident that happened in 2013; and that the decision of HMRC to warn fuel suppliers of the dangers of not cleaning lines is further evidence of the likely incidence of such a type of contamination.

65. PRS say the review should have looked at the issue in the round from the point of view of both the taxpayer and HMRC and that LB's review was not balanced; that there was low contamination; that two diesel cars were not contaminated; that the audit evidence proved that the amount of fuel purchased was used and that the issue of not relying on third parties as regards reasonable excuse is not meant to apply to parties such as deliverers of fuel but instead to solicitors and accountants.

66. PRS say LB did not look at the facts so the conclusions that were reached were not reasonable, primarily because HMRC did not investigate Brogans sufficiently and

that HMRC, although saying that they look at each case on its merits, were concerned that they would set a precedent.

67. PRS say that HMRC have a considerable amount of leniency under Section 152(b) of the CEMA and could have reduced the penalty if they wished to; that HMRC could not reasonably have arrived at the decision confirmed on 11 July 2013; and that the Appeal should be allowed.

Submissions by HMRC

68. HMRC say that a restoration decision or a review of a restoration decision is an ancillary matter in terms of Schedule 5(2)(1)(r) of the Finance Act 1994 being a decision under Section 152(b) of CEMA as to whether anything forfeited or seized under the Customs and Excise Act is to be restored to any person or the conditions subject to which any such thing is restored.

69. HMRC say that they do not decide on the legality of vehicles to be restored and this is a purely legislative function. When a vehicle is seized and a tax payer wishes to challenge it, the matter must go to the Magistrate Courts or the Sherriff Courts and that the contamination of fuel is an absolute offence.

70. HMRC say that the Tribunal, in relation to ancillary matters such as this, is restricted and cannot quash or vary or substitute its own decision for any decision.

71. HMRC say the Tribunal has a supervisory jurisdiction set out at Section 16 of the Finance Act 1994, including at Section 16(4)(c), a radical power to declare that decisions have been unreasonable. Section 16(4)(a), gives the power to direct that decision, *so far as it remains in force*, (italics added for emphasis) is to cease to have effect from as such time as the Tribunal may direct.

72. HMRC say that the restoration decision in this case has been put fully in to effect, both as to payment and as to restoration, and so no longer remains in force.

73. HMRC say that the review letter of 11 July 2013 requested fresh information to be supplied but none was forthcoming and say no new or reliable evidence has been submitted to the Tribunal.

74. HMRC say, as a consequence, a further review of the decision would be no different to that of 11 July 2013.

75. HMRC say that the proven and accepted case of the Johnston Oils contamination does no more than suggest that the possibility exists that there is a likelihood of dirty lines contaminating fuel. This does not provide any evidence that this was the case on 29 February 2012.

76. HMRC say that the review looked at this issue afresh; that the circumstances and events surrounding the seizure and evidence were taken into account; and that the evidence before LB was primarily the letter written by Mr Spence on 6 March 2013

but, other than supposition and speculation, there is no evidence to support PRS's claims.

77. As regards the weekly deliveries to PRS that were put into one Cube, HMRC say that PRS cannot say that it is more or less probable that what went in to one Cube was contaminated fuel because to receive 1,000 litres, it must have been empty. HMRC say there is some inconsistency with the fact that although 1,000 litres was delivered, 300 litres were left contaminated. HMRC say that the assertions relating to this are purely speculative without any objective proof.

78. HMRC say that the decision was reasonably arrived at, primarily because the letter of 6 March from Mr Spence set out the most favourable case from PRS's view point and that there was no evidence from Brogans other than that received by the RFTU which tested their tanks and found them to be uncontaminated.

79. HMRC say that the burden of proof is on PRS and that they have failed to discharge it and that the decision was reasonably arrived at on the basis of the evidence.

80. HMRC say that when looking at the question of the proportionality of the duty element, it should be based upon the degree to which the fuel is contaminated in the individual vehicle, so as to no longer qualify as legally held paid duty fuel, is wholly proportionate to the scale of the contravention. Accordingly, the level of contamination at only 2%, should be seen against a usual level of contamination of 6% to 7% which means that 2% is one-third and is clearly well beyond the concept of trace contamination as PRS suggests.

81. HMRC say that the precise amount of rebated fuel found in vehicles is not relevant to the restoration once it has been accepted that their seizure and condemnation was legal and which was accepted by both parties and that part of the restoration payment that reflected an estimate of the duty owed in relation to fuel in a tank of the size carried by the vehicle, is a work of estimation and was justified by the presence of any amount of contamination and cite *Corneill v HMRC* in support.

82. HMRC say, similarly, that the penalty element being £250 per contravention, one for taking in contaminated fuel and one for driving with contaminated fuel, per vehicle, are inherently proportionate to the type and scale of the contravention.

83. HMRC say that the whole restoration amount of £3,292 should be seen in the context of vehicles worth in excess of £80,000; that PRJ and TRM were aware of their responsibilities and that TRM had had a dispute with HMRC about red diesel previously and so was not an unwitting party.

84. HMRC say the theory of contamination is only that and that there is no objective fact or evidence but, instead, only speculation and that Brogans denied that there was any contamination and no contamination was found in their tanks and, even if the delivery line had been checked, which it was not, it had already been flushed through by the remainder of the delivery to PRS, let alone any subsequent deliveries that may or may not have taken place.

85. HMRC say that a finding of 2% in one delivery, if it derived from one Cube holding 1,000 litres, would have meant that 20 litres of contaminated fuel would need to have been added to the fuel supply.

86. Also, the fact that the contamination was at 2% in each of four vehicles seems extraordinary when it is claimed that the vehicles had been fuelled with different amounts to 'top up' their tanks whilst 300 litres remained in that Cube.

87. HMRC say that the Review Officer took into account all issues including that of a reasonable excuse and pointed specifically to Mr Spence's letter of 6 March 2013 where he specifically stated that PRS had a reasonable excuse "for the offence unwillingly committed".

88. HMRC concede that Section 10(3)(b), Finance Act 1994, the issue of a Third Party Defence, is not specifically excluded because this case is not strictly a penalty under Section 9 Finance Act 1994 but, as PRS argue, it cannot be unusual for the Review Officer to take account of it.

89. HMRC say that PRS were allowed a review late which they were not entitled to because it was outwith the 45 day period. When the review was carried out, all evidence was available, it left nothing out, did not disregard something to which it should have given weight or take into account some irrelevant matter and the Appeal should be refused.

Decision

90. The Tribunal considered that HMRC made a decision that was reasonably arrived at on the basis of the evidence.

91. All the witnesses before the Tribunal were credible but added no substantive or reliable evidence to that which had been provided and already put before the Review Officer.

92. PJ, referred to close circuit television which had not been mentioned before, which was surprising in itself, but no copies were made or produced and the testimony of PJ, was vague as to the time period in which recordings had been reviewed. This was insufficient to support the proposition that the close circuit television showed that there had been no one tampering with the Cube between the fuel deliveries.

93. Mr Spence made repeated assertions as to what HMRC could or should have done based on his experience as a former HMRC employee but the issues before the Tribunal were what HMRC had done and whether the Tribunal believed that the decision had been reasonably arrived at in light of that evidence.

94. It was acknowledged by the parties that contamination of fuel in terms of Sections 12 and 13 of HODA 1979 is an absolute offence and that in light of the evidence the Sheriff would have had no option and PRS could put up no viable

defence (other rather unjustified enrichment) in relation to the condemnation proceedings and the decision that the seizure was legal.

95. The issue in this case was that no review took place within 45 days because of the lack of clarity or understanding in the letters of 15 and 19 March 2012 by PRS to HMRC.

96. In considering whether a review that took place within 45 days, would produce a result any different to one that took place 11 months later, the Tribunal noted that in the interim period there were three major factors, (1) the internal audit (2) the documented evidence of contamination by Johnston Oils of fuel with red diesel and (3) HMRC's decision to warn fuel suppliers of the need to clean their lines and the regulatory requirements that applied in that regard.

97. The Parties agreed, that the internal audit proved an acceptable correlation between the amount of fuel purchased and the amount of fuel used, but the Tribunal did not accept this as conclusive proof that the fuel was or was not contaminated and whether this could have occurred by accident.

98. The Johnston Oils contamination incident was evidence that contamination could happen but the Tribunal did not accept that this meant the alleged delivery by Brogan Fuels on 29 February 2012 was also contaminated.

99. The Tribunal considered that the decision by HMRC, to warn fuel suppliers to clean their lines, was what HMRC should be doing in any event, particularly in light of the incident with Johnston Oils which had been brought to their attention.

100. The Tribunal did not accept that the Johnson Oils contamination, or the HMRC warning to clean lines, was evidence that the alleged contamination on 29 February by Brogan Fuels had taken place and held that the Review Officer had given sufficient and appropriate weight to the evidence before her and consequently that the decision was "reasonably arrived at" in terms of Section 16(4) of the Finance Act 1994.

101. The Tribunal is confined because this is a decision on an ancillary matter and the Tribunal can therefore only interfere with the decision if it is satisfied that the Commissioners or any other person making that decision could not reasonably have arrived at it. In such case the tribunal can do one or more of the following -

> (1) direct that the decision, in so far as it remains in force, cease to have effect from such time as the tribunal directs;
>
> (2) require HMRC to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
>
> (3) in the case of a decision which has already been acted on or taken effect and which cannot be remedied by a further review, declare the decision to have been unreasonable and give directions to HMRC as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

102. However, the Tribunal is satisfied that this is a decision that could reasonably be arrived at on the evidence before it.

103. The Tribunal considered the duty and penalty elements and, in accepting HMRC's submissions, held that they and the restoration terms were reasonable and proportionate.

104. The Appeal is dismissed.

105. 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.

W RUTHVEN GEMMELL
TRIBUNAL JUDGE

RELEASE DATE: 25 June 2014