[2018] UKFTT 504 (TC)

TC06706

Appeal Number: TC/2016/04690

EXCISE DUTY – misuse of rebated fuel – assessment – penalty – whether deliberate misuse – quantum of assessment and penalty – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ITC (NE) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 11-13 April 2018

Mr Nigel Ginniff instructed by Alexander Whyatt Solicitors for the Appellant

Miss Kelly Bond instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents

DECISION

Background

1. The appellant operates a distribution and storage business. On 15 July 2014 HMRC's Road Fuel Testing Unit ("RFTU") stopped a vehicle owned by the appellant at a roadside checkpoint. According to the respondents the vehicle tested positive for kerosene, a rebated fuel. According to the respondents, further vehicles belonging to the appellant tested positive for kerosene at a visit to the appellant's premises later that day. The respondents subsequently carried out a fuel audit on the appellant's business vehicles which identified a shortfall in legitimate fuel purchases. On 29 May 2015 an assessment was issued to the appellant in relation to rebated fuel allegedly misused by the Appellant. The amount of excise duty assessed was £83,230 covering the period 1 June 2011 to 14 July 2014 ("the Assessment"). The Assessment was subsequently reduced to £36,875 which is the amount under appeal. On the same date the respondents assessed the appellant to a penalty under Schedule 41 Finance Act 2008 in the sum of £43,695 ("the Penalty"). The Penalty was subsequently reduced to £19,539 which is the amount under appeal.

2. By a Notice of Appeal dated 2 September 2016 the appellant appealed both the Assessment and the Penalty. The grounds of appeal identified issues relating to the roadside testing and the subsequent testing at the appellant's premises. The appellant maintained that legitimate fuel purchases accounted for all fuel used by the business.

3. The principal issues raised by the appellant on this appeal may be summarised as follows:

(1) Was kerosene used as fuel for the appellant's vehicles? In particular, do various "procedural errors" in the sampling and testing of the appellant's vehicles render the results unreliable?

(2) Did the assessing officer who carried out the fuel audit of the appellant's business use reliable estimates for the fuel consumption of the appellant's vehicles?

(3) Did the assessing officer properly take into account fuel usage by two vehicles which the appellant says were effectively hired out to sub-contractors in circumstances where it was not responsible for fuelling those vehicles?

(4) If kerosene was used in the appellant's vehicles, was it deliberately so used?

(5) Should there have been a greater reduction in the amount of the Penalty to reflect the quality of the appellant's disclosure.

4. There was no real issue between the parties in relation to the relevant law. It is well known that it is unlawful to use rebated fuel such as kerosene in the fuel tank of a road vehicle, save in respect of certain excepted vehicles. Where such fuel is used unlawfully, the respondents can assess an amount of excise duty equivalent to the amount of the rebate pursuant to section 13(1A) Hydrocarbon Oil Duties Act 1979 ("HODA 1979"). The respondents can also assess a penalty pursuant to Schedule 41

Finance Act 2008 ("FA 2008") up to a maximum of 100% of the potential lost revenue depending on the level of culpability.

5. The Penalty in the present case was assessed on the basis that the Appellant deliberately used rebated fuel in its vehicles although it did not seek to conceal that act. Credit was given for disclosure by the appellant in the respondents' enquiries and the penalty was calculated at 52.5% of the potential lost revenue.

6. The evidence necessary to support an assessment or to challenge an assessment will depend on the facts of the particular case. As Mann J stated at [31] in *Thomas Corneill v HM Revenue & Customs [2007] EWHC 715 (Ch)*:

> " 31. … There has to be a sufficient evidential linkage between rebated oil and use in a vehicle to give rise to an inference that oil in a provable quantity has been placed into a vehicle. Sometimes a great degree of particularity will be available, sometimes it will not. I can see no legislative purpose in defining some sharp cut-off line in a degree of particularity which is required. What is required is appropriate proof and evidence of the facts."

7. Thomas Corneill was a case where the only direct evidence of the use of rebated fuel in road vehicles was the one lorry which was actually tested, and which tested positive for red diesel. No other rebated fuel was found in tanks on the premises or in other road vehicles tested at the premises. However, there was sufficient indirect evidence in relation to supplies of red diesel and an absence of any evidence of supplies of legitimate duty paid diesel commonly known as "white diesel". It is clear that the evidence as to use of rebated fuel must be considered in the context of the particular case and the facts found by reference to the balance of probabilities.

8. It was common ground before me that there was no requirement on HMRC to make the Assessment to best judgment. However, it is clear that there must be some evidential basis for the Assessment and some exercise of judgment. In Thomas Corneill, Mann J stated as follows:

> 32. ⋯ It seems to me to be inevitable in the real world, and in many cases, unless a culprit is caught red-handed, that some element of judgment or assessment is going to be necessary to make the section work. I do not see why it should be confined to the red-handed. A recalcitrant haulier may mix red and white diesel from time to time in a manner which makes it impossible to say for certain that a specified quantity was used in a given lorry or lorries at a given time which would enable HMRC to show extremely clearly that over a period of time a given quantity of red diesel was used in unspecified lorries, even if none of them are caught with red diesel in the tanks. I can see no legislative purpose in excluding that situation from the operation of Section 13 and there is nothing in the working of the section which requires it. The reasons of Mr Gilmore in the present case contains a greater degree of assessment and estimation that might be required in my example, but I can see no reason why such a process should be excluded.
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> 33. I therefore consider that Mr Barlow is wrong in his submission that no element of estimation, or no significant element of estimation, is permitted under Section 13. What

is required under Section 13 is appropriate evidence. Inferences can be drawn from primary facts. That is a standard process in many walks of life and is appropriate to assessments under Section 13. Estimation in this context is merely one way of describing a process of inference. If it is said that HMRC have got the primary facts or the inference wrong, then an appeal mechanism exits."

9. Mr Ginniff who appeared for the appellant also referred me to a decision of the F-tT in *Ainsworth v HM Revenue & Customs [2017] UKFTT 0850 (TC)* for the uncontroversial proposition that the role of the Tribunal is to concentrate on identifying the amount of duty properly due, based on the evidence before the Tribunal.

10. The principal issue I must determine in relation to the Assessment is the correct quantum. The burden is on the appellant to satisfy me that it is excessive. The principal issue in relation to the Penalty is whether and to what extent the Appellant deliberately put kerosene into the fuel tanks of road vehicles. The burden is on the respondents to satisfy me that the appellant acted deliberately. Thereafter the burden is on the appellant to satisfy me that the quantum of the Penalty is excessive for any reason.

Background Facts

11. I find the following background facts which are not in dispute.

12. The appellant was incorporated in October 2002 and Mr Colin Welsh has been its sole director since incorporation. The business of the appellant is distribution and storage. It has premises at Units 7 and 8, Elswick Way Industrial Estate, South Shields ("the Premises"). There are a number of units in close proximity to the Premises. The appellant has a fleet of vehicles. It employs a number of drivers and also engages self-employed drivers to deliver goods on behalf of clients which include Fed Ex and UPS.

13. The RFTU carries out roadside checks in that region on a monthly basis together with the Environment Agency and Northumbria Police. The police determine the location of the checkpoint. A team of officers from the RFTU usually comprises a testing officer and an assistant testing officer. The assistant testing officer is generally responsible for drawing samples and testing the fuel for the presence of markers indicating that it contains rebated fuel. The markers for kerosene are Solvent yellow 124, otherwise known as Euromarker, and Coumarin. The testing officer is responsible for any subsequent interviews and investigation. Roadside checks usually start at about 9.00 and last up to 15.30 on the day depending on police resources.

14. Officers use a hose connected to a plastic bottle to obtain a sample of fuel from the fuel tanks of vehicles stopped. The hose is dipped into the tank and fuel is siphoned from the tank into a plastic bottle. Part of the sample is transferred to a test-tube which is tested and if it tests positive for any markers the remaining fuel is transferred into three sample tins which are sealed and marked. The sample tins are kept in the RFTU vehicle in a separate section used for storing samples. The RFTU vehicle has a long wheelbase and it liveried to show that it is an RFTU vehicle.

15. It is convenient to record at this stage that the procedure for taking samples is set out in Schedule 5 HODA 1979. I was not specifically referred to Schedule 5 but it is relevant and provides as follows:

> " (1) The person taking a sample—
>
> (a) if he takes it from a motor vehicle, shall if practicable do so in the presence of a person appearing to him to be the owner or person for the time being in charge of the vehicle;
>
> (b) …
>
> 2(2) The person taking a sample must at the time have divided it into three parts (including the part to be analysed), marked and sealed or fastened up each part, and—
>
> (a) delivered one part to the person in whose presence the sample was taken in accordance with paragraph 1 above, if he requires it; and
>
> (b) retained one part for future comparison.
>
> 2(3) Where it was not practicable to comply with the relevant requirements of paragraph 1 above, the person taking the sample must have served notice on the owner or person in charge of the vehicle or, as the case may be, the occupier of the premises informing him that the sample has been taken and that one part of it is available for delivery to him, if he requires it, at such time and place as may be specified in the notice."

16. In 2014 Mrs Julie Ramsay was a RFTU officer of HMRC and had been working as such for some 7 or 8 years. On 15 July 2014 she was the testing officer at a road check on the A696 Capheaton Layby in Northumberland, northwest of Newcastle. Mrs Ramsay was accompanied by officer Harwood, an assistant testing officer, and officer Udberg, a trainee officer. One of the vehicles stopped was a white Ford Transit van registration VO59 ZTJ belonging to the appellant and a sample was taken and tested. There is a dispute as to the result of that test. The driver was questioned and Mrs Ramsay ascertained that the vehicle belonged to the appellant.

17. Mrs Ramsay then spoke to her senior officer Mr David Allinson by phone. They agreed that Mrs Ramsay and her team should leave the roadside checkpoint and visit the appellant's premises. The driver then telephoned Mr Welsh and Mrs Ramsay also spoke to Mr Welsh on the phone. Mr Welsh was advised that a sample had been taken and that she may need to follow up the result with a visit to the Premises. The vehicle and driver were allowed to proceed.

18. Mrs Ramsay visited the Premises later that day where she met Mr Welsh. It was common ground that the drive time between the roadside checkpoint and the Premises was about 1 hour 10 minutes depending on the traffic. Samples were taken from a number of vehicles at the Premises and Mr Welsh was interviewed by Mrs Ramsay. A number of vehicles owned by the appellant were seized and restored upon payment of a restoration fee of £2,000 by the appellant.

19. Subsequently Mr James Gilmartin, a Higher Officer of HMRC carried out a road fuel audit and on 29 May 2015 he notified the Assessment and the Penalty to the appellant.

20. On 30 July 2015 Mrs Ramsay returned to the Premises unannounced and carried out further fuel tests on vehicles at the premises. Those vehicles all tested negative for rebated fuel.

The Evidence – Sampling, Testing and Seizure of Vehicles

21. I heard evidence on behalf of the respondents from Mrs Ramsay, Mr Allinson and Mr Gilmartin. On behalf of the appellants I heard evidence from Mr Welsh and from Mr Douglas Key who was present at the Premises for part of the time when the appellant's vehicles were being tested on 15 July 2014. All witnesses provided witness statements and gave oral evidence.

22. There were various factual issues as to the circumstances in which fuel from the appellant's vehicles was tested at the roadside and subsequently at the Premises. Mrs Ramsay's evidence, based in part upon her contemporaneous notebook but also to a large extent upon her recollection was as follows:

(1) The appellant's vehicle was stopped at 10.48. This was a random check. Officer Udberg drew the fuel and on this occasion Mrs Ramsay tested it herself. The roadside test showed that the fuel tested positive for Euromarker and Coumarin, indicating the presence of kerosene. Mrs Ramsay's notebook shows that the sample was split between three sample tins and each was given a reference.

(2) Mrs Ramsay was told by the driver that the vehicle was owned by the appellant and was based at the Premises. The driver also stated that he had a Fast Fuel Card and re-fuelled at Morrisons. Mrs Ramsay also understood the driver to say that Mr Welsh of ITC often refuelled vehicles from stocks of fuel at the Premises. Mrs Ramsay's notebook entry simply states that "Mr Welsh often fuels the company vehicles from the depot". There is no specific record in Mrs Ramsay's notebook of there being any stocks of fuel at the Premises and the Premises are close to a Morrisons supermarket fuel station. Mrs Ramsay accepted that it was possible she had misunderstood what the driver had told her.

(3) Mrs Ramsay did not tell the driver that the fuel had tested positive for rebated fuel, but she did say that it had reacted to a routine test. The driver then spoke with Mr Welsh on the telephone and passed the phone to Mrs Ramsay who also spoke with Mr Welsh. She explained that the test result was "unusual" and that she may need to follow it up with a visit to the appellant's depot. She did not specifically say that the vehicle had tested positive for rebated fuel because she wanted to investigate further why the fuel had reacted as it had.

(4) Mrs Ramsay then spoke by telephone to her line manager, Mr Allinson. She suggested that she and her team of officers should go the Premises to test

fuel stocks at the Premises. Mr Allinson agreed that she should follow that course of action.

(5) Mrs Ramsay said in her evidence in chief that she decided not to seize the vehicle at the roadside because it had a Fed Ex logo. She thought the appellant must be a large company operating a franchise and that possibly the positive test was the fault of a fuel distributor or supplier. She did not give the driver a sample of the fuel taken because the driver was in a hurry to get to Scotland and she felt it more appropriate to speak with Mr Welsh, the company owner. She kept the samples in the RFTU van intending to give the sample to Mr Welsh. She did not give the driver any documentation or tell him that the vehicle was being seized.

(6) In the meantime, the police had stopped another vehicle unconnected with the appellant which tested positive for red diesel. Mrs Ramsay cautioned and interviewed the driver of that vehicle before leaving the roadside at about 12 noon. Her notebook indicates that the other vehicle had been stopped at 11.05 and the interview with the driver finished at 11.58.

(7) Mrs Ramsay arrived at the Premises at 13.40. She saw a number of vehicles with Fed Ex logos but she had some difficulty identifying which unit belonged to the appellant. When she identified one of the appellant's units she found two employees and produced her HMRC badge to them. She was directed towards Mr Welsh who had an office in unit 7. Mrs Ramsay introduced herself to Mr Welsh, saying that they had spoken earlier on the phone and stated that she was there to follow up their conversation. She produced her badge to Mr Welsh.

(8) Mrs Ramsay asked Mr Welsh where the stocks of fuel were kept. In fact there were no large stocks of road fuel or rebated fuel at the Premises, just a container holding 20 litres of red diesel and two containers holding liquid soap.

(9) Mrs Ramsay told Mr Welsh that she wished to test all the appellant's vehicles. Mr Welsh gave Mrs Ramsay a biscuit tin of vehicle keys each with a tag showing the registration number. Mrs Ramsay asked whether Mr Welsh had a list of vehicles and he gave her a list. Mrs Ramsay gave the list to the assistant testing officer and the trainee and suggested they "work through the list". Mrs Ramsay may have observed them sample and test the first two vehicles which Mr Welsh had told her were about to leave the Premises. Mrs Ramsay said that she asked Mr Welsh if he wanted to witness the testing and took Mr Welsh to the RFTU van to show him some of the samples being tested. She then returned with Mr Welsh to his office and her colleagues continued to sample and test the remaining vehicles.

(10) Whilst she was in the office Mrs Ramsay was having a "general chat" with Mr Welsh explaining the procedures. Her colleagues relayed to her by radio which vehicles they had taken samples from and Mrs Ramsay noted the registration numbers and a description of each vehicle tested in her notebook, identified with a tick. She wrote down what her officers told her they had tested and the results of those tests where positive. Mrs Ramsay's notebook stated: "13.40 Arrived at the premises of ITC Transport to test the fuel in all vehicles

owned by the company as follows:". Annex 1 to this decision shows the notes made by Mrs Ramsay in tabular form.

(11) Mrs Ramsay acknowledged in her evidence that there was a lot going on, vehicles were coming and going and there were a lot of distractions. She described it as "not the best situation".

(12) Five further vehicles tested positive for rebated fuel markers and Mrs Ramsay identified these vehicles with the narrative "Pos" next to the registration number in her notebook. For two of those vehicles the narrative showed "? Pos" to indicate that the test result was not as strong as the other three which were marked "+Pos".

(13) It is common ground that at least two errors were made in the registration numbers written down:

(a) BJ59 CNZ was incorrectly recorded as BJ59 CMZ.

(b) One of the vehicles noted down by Mrs Ramsay as being tested at the Premises was recorded as VO59 ZTJ, which Mrs Ramsay acknowledged was the vehicle tested earlier at the roadside and was not at the Premises. Mrs Ramsay accepted that this might have been her error.

(14) Mrs Ramsay gave the list back to Mr Welsh when the testing was completed and did not retain a copy.

(15) At 14.33 Mrs Ramsay interviewed Mr Welsh under caution. He provided certain details about the appellant's fuelling procedures. He had no explanation for the presence of rebated fuel in the appellant's vehicles but said that he was experiencing problems with some of his lads who had gambling problems.

(16) There was a discussion between Mrs Ramsay and Mr Welsh about seizure of vehicles. Mrs Ramsay initially intended to seize all 6 vehicles which had tested positive for rebated fuel, including the vehicle at the roadside test. She told Mr Welsh that the penalty (although I infer she meant the restoration fee) would be £3,000, being £500 per vehicle. Mr Welsh said that he could not afford that amount and Mrs Ramsay said that she would speak with a senior officer.

(17) Mrs Ramsay considered that two of the positive tests were not as strong as the other four positive tests. She phoned Mr Allinson and together they agreed that four vehicles would be seized and restored on payment of a fee of £2,000 which Mr Welsh paid by card.

(18) Initially Mrs Ramsay said that she filled in a Seizure Information Notice ("the SIN") in front of Mr Welsh. The SIN includes a box with a handwritten description of each thing seized. There are 4 entries in Mrs Ramsay's handwriting as follows:

Quantity	Schedule of Things Seized Description	Condition
1	White Ford Transit Van Registration	As Seen
	VO59 ZTJ & fuel in tank	
1	White VW VanRV58 LOA	
1	PX54 DJO Iveco ~~Lorry~~ Eurocargo	
1	N111 XGW Ford Van	

(19) The SIN contains a line which Mrs Ramsay described as a "squiggle", which is broadly as indicated above. It is in the shape of a Z, starting in the left hand column just below the last entry, going up through the last two entries to the right hand column, back to the last but one row of the left hand column and ending on the last but one row of the right hand column. Mrs Ramsay's evidence was that she did this quickly to ensure that there could be no question of other vehicles being added after N111 XGW and because it had been agreed that 4 vehicles would be seized and restored.

(20) Mrs Ramsay also completed boxes in the SIN to show the name and address of the appellant and that the vehicles had been seized at Elswick Way Industrial Estate on 15 July 2014. There was an entry for the time of the document as 13.40. Mrs Ramsay said that she started filling in the SIN when she first arrived at the Premises. She said that the first vehicle on the form was the vehicle stopped at the roadside "because that was the only vehicle seized at that time", in other words the time she arrived at the Premises. She considered that it had been seized at the roadside but she could not fill out the paperwork at that time. She did not tell the driver that it had been seized but she said that she told Mr Welsh as soon as she arrived at the Premises.

(21) Mrs Ramsay then read her notebook back to Mr Welsh and he signed it, the signature being timed at 15.25. The SIN was then signed by Mrs Ramsay and Mr Welsh shortly afterwards.

(22) Mrs Ramsay's notebook then records the test results for each vehicle which tested positive, including the fact that they had tested positive for Euromarker and Coumarin. She also records the sample tin references for each vehicle. The notebook entry ends at 15.40.

(23) Mrs Ramsay then told Mr Welsh that the vehicles which tested positive would have to be flushed within 48 hours to prevent further contamination and that there would also be a fuel audit. There was no record of any advice about flushing the vehicle tanks but Mrs Ramsay maintained that she would give such advice whenever rebated fuel was found in a vehicle.

(24) Mrs Ramsay gave Mr Welsh a standard restoration and warning letter which contained an analysis of the restoration amount of £2,000. It showed £1,000 being an amount equal to the penalty for "using rebated heavy oil as a road fuel" and £1,000 being an amount equal to the penalty for "putting rebated fuel into a road vehicle".

23. Mr Allinson in his oral evidence recalled his first telephone conversation with Mrs Ramsay, when Mrs Ramsay was at the roadside. Mrs Ramsay's notebook indicates that the detection of rebated fuel in the appellant's van took place at 10.48. Mr Allinson recalled he was told that it was the 28th vehicle tested that morning, which he considered was consistent with a 9.00 or 9.30 start. He also recalled discussing with Mrs Ramsay what should be done with the vehicle and agreeing that it should be allowed to proceed. The reason it was allowed to proceed was because the full facts were not available. Mr Allinson was concerned that the presence of rebated fuel may have been caused by a line contamination. In most cases of a single vehicle detection the vehicle would not be seized.

24. Mr Allinson understood from Mrs Ramsay that there were fuelling arrangements at the Premises and he agreed that she and her team should go to the Premises. This was a significant change to the planned roadside checks and Mr Allinson agreed because of the indication that fuel stocks were kept at the Premises and he considered that there should be further investigations.

25. Mr Allinson's evidence was that when he received the second call from Mrs Ramsay, she told him that in addition to the roadside vehicle which had tested positive for rebated fuel, there were 5 further vehicles at the Premises which had tested positive. The tests for four of the vehicles including the roadside vehicle were stronger than the other two vehicles. She also told him that she had found no stocks of fuel at the Premises. In the circumstance he thought it reasonable to seek a restoration fee of £500 per vehicle for the four vehicles where the test results were stronger. The restoration fee was based on what the penalties would be for each vehicle, namely £250 for taking rebated fuel into the running tank and £250 for using the vehicle on a road with rebated fuel in its running tank. Mr Allinson had no recollection of any discussion that the number of vehicles seized would be reduced from 4 to 2.

26. Mr Allinson was responsible for sending samples for testing by the Laboratory of the Government Chemist. In August 2014 he decided to send two samples for testing, one sample which indicated a high concentration of kerosene and another which indicated a lower concentration of kerosene. Once there was an appeal against the Assessment it would have been standard practice to have all samples sent to the laboratory but through oversight that was not done in this case. In 2017, during preparations for this appeal Mr Allinson sent the remaining four samples for testing by the laboratory. It was not suggested that the delay in sending these later samples for testing would affect the reliability of the results, and there was no evidence to that effect. The results from the laboratory for the two samples originally sent and the subsequent four samples were as follows:

Vehicle	Kerosene
VO59 ZTJ	32%
C9 LNW	2%
PX54 DJO	7%
N111 XGW	30%
YM13 GEJ	5%
RV58 LOA	2%

27. Mr Welsh disputes large parts of Mrs Ramsay's evidence and parts of Mr Allinson's evidence. Mr Welsh's evidence as to events on 15 July 2014 was as follows:

(1) Mr Welsh received a phone call from his driver who had been stopped at the roadside at approximately 9.30am. He then spoke to Mrs Ramsay by phone and she told him that the fuel tested was "darker than normal" but that she could not find anything wrong with it. Mrs Ramsay told Mr Welsh that she would visit the appellant's premises at some time in the future to discuss it.

(2) Mr Welsh suggested in his evidence that Mrs Ramsay had possibly made up the reason she gave for visiting the Appellant's premises. He considered that the driver would not have given her to understand that fuel was kept at the Premises. He did not believe that the appellant's vehicle had been stopped randomly.

(3) Mr Welsh was convinced that Mrs Ramsay had arrived at the Premises not at 13.40, but at 11.00. He says that he saw the RFTU vehicle arrive on his CCTV system and that the CCTV system showed the time of arrival as 11.40 or 11.48. Further, the vehicle stopped at the roadside was travelling to Hexham and he would not have expected it to be stopped at that location at 10.48.

(4) About 15 minutes after the RFTU vehicle arrived a person who he now knows to be Mrs Ramsay came to his office door and asked if he was Colin Welsh. He confirmed he was. She asked if she could look inside Unit 8 and he confirmed she could. Mr Welsh maintains that he was not shown any identification from Mrs Ramsay and assumed she and her colleagues were Immigration enforcement officers. Mr Welsh accompanied Mrs Ramsay to Unit 8, and unlocked the door. Mrs Ramsay then stated that she was looking for a couple of tanks of kerosene. The unit was empty apart from two containers of liquid soap and 20 litres of gas oil used to power a steam cleaner. Mrs Ramsay immediately pointed to the soap containers and said "that's the Kerosene" but on closer inspection accepted that it was liquid soap.

(5) Mrs Ramsay then asked Mr Welsh for keys to the appellant's vehicles because she wanted to look at the vehicles. He handed her a box containing the keys and advised her he would be in the office in Unit 7 if she needed further assistance. Mr Welsh maintained that he did not give Mrs Ramsay a list of the

vehicles, although in cross-examination he was more equivocal and said that he could not recall giving Mrs Ramsay a list and accepted that he might have done so.

(6) Mr Welsh maintains that at 13.40 Mrs Ramsay came to the office and said she had found rebated fuel in some of the vehicle tanks. He was not aware that the vehicles were being tested and declined the offer of re-tests because he maintained the earlier testing may have contaminated the fuel tanks.

(7) Mr Welsh was then handed the SIN and says that it was only then that he learned the officer was called Ramsay. In his witness statement, Mr Welsh states that Mrs Ramsay then left his office and came back about an hour later saying that she had to call her boss. She then made a call from Mr Welsh's office and afterwards proceeded to ask him questions about how rebated fuel could have got into the vehicles and about the procedures for fuelling the vehicles. Mr Welsh explained that all the drivers had fuel cards apart from one driver where because of "personal circumstances" the card company would not issue one to him. That driver was reimbursed cash for fuel based on receipts provided.

(8) Mr Welsh maintained that Mrs Ramsay initially asked for a restoration fee of £4,000 for four vehicles which she intended to seize. Mr Welsh said that he could not afford that sum and when asked how much he could afford he suggested £2,000. She agreed to remove two vehicles from the list of vehicles being seized and then phoned her boss again. In that conversation Mr Welsh overheard Mrs Ramsay describe him as being "straight as a die". In the event Mrs Ramsay agreed to a restoration fee of £2,000 without giving any reason. Mrs Ramsay then lent across Mr Welsh and crossed out two of the vehicles on the SIN.

(9) Mrs Ramsay then left the office and returned 20 minutes later with the restoration and warning letter. He maintained that there was no mention of flushing the fuel tanks of vehicles which had tested positive for rebated fuel. Mrs Ramsay handed Mr Welsh fuel samples taken from the roadside vehicle and from the other vehicles tested at the Premises. She then left the premises at approximately 16.15.

(10) Mr Welsh relies on the circumstances in which the testing was carried out and his contention that proper procedures were not complied with in support of the appellant's case that there was no kerosene in any of the appellant's vehicles. He maintains that the results of the sample testing are not reliable.

28. In addition to the conflicting versions of events described above, there is also a dispute as to Mrs Ramsay's record of her interview with Mr Welsh. Mr Welsh takes issue with the following matters in particular:

(1) Mrs Ramsay's notebook says that the appellant has fuelled its vehicles from the Premises in the past but it did not do so at the time of the visit. Mr Welsh denies that he has ever fuelled vehicles from the Premises.

(2) Mrs Ramsay's notebook records Mr Welsh as saying that he kept about 150 litres of red diesel and kerosene at the Premises. He gets red diesel from

"Auto Glynn" and kerosene "from anyone". Mr Welsh denies this and says that he told her the appellant kept only 20 litres of red diesel for a steam cleaner.

(3) Mrs Ramsay's notebook records Mr Welsh saying that he had been advised by a Mercedes Garage not to use kerosene or biofuel in his vehicles. Mr Welsh denies this and says that he told Mrs Ramsay that he had received a notice from Mercedes and had made enquiries about running a Mercedes Van on bio-diesel but was told it could run only on City Diesel.

(4) Mrs Ramsay's notebook records Mr Welsh as saying that he had had bother with some of his staff who had gambling problems and as a result one employee had been refused a fuel card. Mr Welsh denies this, and says that one employee did not have a fuel card because of personal circumstances.

29. Mr Welsh stated in evidence that he was not given Mrs Ramsay's notebook to read and was not offered the opportunity to read it. Mrs Ramsay simply pointed where she wished him to sign. Later in his evidence he accepted that Mrs Ramsay had read the notebook to him, but he did not accept that she made reference to the matters identified above with which he now takes issue.

30. Mr Welsh maintains that three vehicles recorded by Mrs Ramsay as having been tested did not belong to the appellant, and five vehicles were not at the Premises that day and could not have been tested. In addition the roadside vehicle is recorded in Mrs Ramsay's notebook but it was not at the Premises.

31. Mrs Ramsay accepted that three vehicles tested by her did not at the time belong to the appellant. One was at the premises and was only purchased subsequently, one belonged to Mr Welsh and one belonged to a third party.

32. The five vehicles which the appellant maintains were not at the Premises and could not have been tested were as follows:

YX05 CYG
N111 GXW
YR10 FSP
BJ59 CNZ
D1 JLS

33. Mr Welsh's evidence was that YX05 CYG was broken down at the roadside at the time of the visit and was not present at the Premises. There was nothing to support Mr Welsh's evidence but Mrs Ramsay accepted that the vehicle was not at the Premises and that the entry in her notebook was an error.

34. N111 GXW was included in Mrs Ramsay's notebook but it was not ticked to indicate that it had been tested. It is convenient to record at this stage, in the light of all the evidence, that it seems likely and I find that this vehicle appeared on a list provided by Mr Welsh and the absence of a tick demonstrates that there was no recording error in relation to this vehicle.

35. In relation to the last three of those vehicles the appellant says that there is "blackbox" evidence to confirm that the vehicles were elsewhere at the time Mrs Ramsay allegedly tested the vehicles. I assume this is a reference to tachograph records, although they were not described as such during the hearing. The evidence comprised detailed journey records for various days including 15 July 2014 and the time the vehicle is recorded as being at various waypoints including the Premises. The evidence can be summarised as follows:

Vehicle	Evidence
YR10 FSP	Mr Welsh said that he thought there was a blackbox record which showed the vehicle was not at the Premises. There was no reference to this vehicle not being present at the Premises in the fuel audit correspondence between the parties and I was not taken to any blackbox material.
BJ59 CNZ	The blackbox record indicates that this vehicle was moving during the early hours of 15 July 2014. At the material times the record indicates that the vehicle left the Premises at 07.10 and did not return until 18.28. Between 08.06 and 16.56 the vehicle is shown as being at Peel Gardens, Jarrow which Mr Welsh said was the home address of one of his drivers and during that time he considered the vehicle was "on call" for Fed Ex. An email from Fed Ex supports the appellant's case that the vehicle was working for Fed Ex on that date but does not confirm where or when. Mrs Ramsay accepted that this vehicle was not present and the entry in her notebook was an error which she put down to the pressure of the situation.
D1 JLS	The blackbox record indicates that this vehicle left the Premises at 09.29 and did not return until 18.10. Mrs Ramsay initially had no explanation for this but subsequently accepted that the entry in her notebook was an error.

36. In support of the Appellant's case as to the timing of Mrs Ramsay's visit to the Premises and that the sample test results were not reliable the appellant relies on the evidence of Mr Douglas Key. Mr Key was a transport manager with a company called Thermofuels Ltd in Jarrow until his retirement in 1997. His duties whilst there included responsibility for sampling fuel from vehicle fuel tanks and customer storage tanks.

37. On 15 July 2014 Mr Key was at the Premises for a meeting with Mr Welsh in connection with the appellant's operator's licence. In evidence Mr Key stated that he was with Mr Welsh in Unit 7 at the Premises at 11.30 when he heard a female voice requesting keys to vehicles and observed Mr Welsh handing a box of keys to the person. Mr Welsh asked Mr Key if he could return later in the day, so he left the area and returned at about 1pm at which time he sat in his car which was parked outside

Unit 6. He observed two men walk from Unit 8 to a VW Caddy vehicle NJ59 NKW parked opposite and in front of his own vehicle some 20 feet away. His evidence was that one of the officers was dragging fuel testing equipment along the ground. When a fuel sample was drawn from the fuel tank the hose was connected to a plastic bottle which he could clearly see contained a small volume of liquid which appeared to be "off white" although the bottle was not clear plastic. At that point Mr Welsh came to the car and advised Mr Key that he would be tied up for several hours and suggested they meet at another time. Mr Key then left the Premises.

Findings of Fact – The Sampling, Testing and Seizure of Vehicles

38. There is clearly a significant dispute between the evidence of Mrs Ramsay and the evidence of Mr Welsh as to the circumstances in which Mrs Ramsay came to test, seize and restore vehicles to the appellant. The appellant contends that these issues establish that the test results relied upon by HMRC and which led to Mr Gilmartin's fuel audit are not reliable. The principal areas of dispute are as follows:

(1) The timings for Mrs Ramsay's roadside check and for her visit to the Premises later that day.

(2) What Mrs Ramsay told Mr Welsh in her telephone call from the roadside.

(3) What prompted Mrs Ramsay to visit the Premises.

(4) When did Mrs Ramsay first reveal to Mr Welsh at the Premises the purpose of her visit and that she was a RFTU officer.

(5) Whether Mr Welsh gave Mrs Ramsay a list of the appellant's vehicles.

(6) Whether Mr Welsh was aware that fuel in the appellant's vehicles was being tested prior to the sampling taking place, and whether he had an opportunity to be present.

(7) Whether the samples were properly taken without risk of contamination.

(8) Whether Mrs Ramsay correctly recorded in her notebook the vehicles from which samples were taken.

(9) Whether Mrs Ramsay correctly recorded what Mr Welsh told her in interview under caution.

(10) The circumstances in which Mr Welsh signed Mrs Ramsay's notebook.

(11) How the restoration fee of £2,000 was arrived at, and whether two or four of the appellant's vehicles were seized.

(12) Whether Mr Welsh was advised to flush the tanks of vehicles which had tested positive for kerosene.

39. My findings of fact in relation to these issues are as follows.

40. On the face of it, the timings are clear from Mrs Ramsay's notebook. The appellant's vehicle was stopped at the roadside checkpoint at 10.48 and the driver was questioned. Mr Allinson's evidence that he was told this was the 28th vehicle stopped and the first vehicle to test positive supports that time. The driver was allowed to

proceed and Mrs Ramsay then dealt with the driver of another vehicle who was stopped at 11.05. The interview with that driver continued until 11.58, at which stage Mrs Ramsay and her team left the roadside and drove to the appellant's premises. It was common ground that the journey would take about 1 hour 10 minutes. Mrs Ramsay then arrived at the Premises at 13.40 which is consistent with Mrs Ramsay's evidence that she started to complete the SIN when she arrived at the Premises and that was the time she entered on the SIN.

41. Mr Welsh was originally adamant that he received the phone call from his driver at about 9.30am and that Mrs Ramsay arrived at the Premises about 11.00. The evidence of Mr Key also supported these timings. In the light of Mrs Ramsay's evidence including the notebook timings and her evidence as to the timing on the SIN Mr Welsh became less sure of the timings. He said that he had relied on the CCTV record although no evidence has been adduced from the CCTV system because, Mr Welsh said, recordings from the system were only stored for 14 days. He stated that he had last looked at the CCTV recording on the day of the visit but it seems unlikely that he would recollect timings from 15 July 2014. The timing issue first seems to have arisen in a witness statement of Mr Welsh dated 17 January 2016. Further, it was only during the cross-examination of Mrs Ramsay that it became apparent that the time she entered on the SIN was her time of arrival at the Premises, rather than when she had finished testing samples from the vehicles. It seems likely and I find that Mr Welsh was working back from 13.40 on the SIN and that as a result he assumed the vehicles had already been tested at that time. Mr Welsh's evidence in relation to the timings is a factor which causes me to be cautious generally about his evidence.

42. Mr Key did not accept that he was wrong about the timing of events on 15 July 2014. I am satisfied that Mr Key was doing his best to recall events, however, I find that he was wrong about the timings.

43. I am satisfied that Mrs Ramsay correctly recorded the timings in her notebook and that she arrived at the Premises at about 13.40. That was when she started to complete the SIN because she had already decided to seize the roadside vehicle.

44. That timing does give rise to a troubling conclusion in relation to seizure of the roadside vehicle. It is common ground that the driver was allowed to proceed with the roadside vehicle and continue his journey. It is common ground that Mrs Ramsay did not at that stage give any intimation that she was seizing or intended to seize the roadside vehicle. Indeed, Mrs Ramsay's initial evidence was that she did not seize the vehicle because it had a Fed Ex logo and because she thought it possible the positive test was the fault of a fuel distributor or supplier. Later in her evidence she stated that she completed the SIN on arrival at the Premises and at that time the only vehicle on the SIN was the roadside vehicle. She said that she considered the roadside vehicle had been seized at the roadside.

45. The parties made no submissions as to whether a vehicle could be seized in this way, without any communication either to the owner of the vehicle or the person in charge of the vehicle. However, there is no doubt that a SIN was given to the appellant in due course which included the roadside vehicle as the first entry. Mr

Welsh signed the SIN to acknowledge receipt and that the description of things seized was correct. It was not suggested by the appellant that the roadside vehicle had not in fact been seized. I therefore proceed on the same basis as the parties that the roadside vehicle was seized.

46. There is no record of Mrs Ramsay's telephone call to Mr Welsh from the roadside. Mrs Ramsay's evidence is that the vehicle fuel had tested positive for kerosene but that she did not tell the driver or Mr Welsh at that stage. Mrs Ramsay said that she told Mr Welsh that the test result was unusual, whereas Mr Welsh says that he was told the sample was darker than normal but that Mrs Ramsay said she could not find anything wrong with it. It may be that Mrs Ramsay was being deliberately vague about the result because she intended to carry out further investigations. In any event, I do not consider this issue is significant for the purposes of this appeal.

47. The appellant contends that Mrs Ramsay's failure to record her telephone conversation with Mr Welsh in her notebook or in her witness statement is significant and calls into question the reliability of her notebook and of her evidence generally. I accept it would have been desirable for Mrs Ramsay to have made a brief note that she had spoken to Mr Welsh but I do not consider that her failure to do so reflects on the reliability of her notebook or of her evidence generally.

48. I am satisfied from the evidence of Mrs Ramsay and Mr Allinson that the appellant's vehicle was the subject of a random roadside check. There is no evidence to suggest otherwise. Mr Welsh suggested that Mrs Ramsay might be seeking to conceal that this was a targeted enquiry. There is no foundation for that suggestion and is another factor which causes me to be cautious about Mr Welsh's evidence generally.

49. In my view it is inconceivable that Mrs Ramsay did not reveal that she was a RFTU officer until after the vehicles had been tested at the Premises. I am satisfied that she would have introduced herself as such when first meeting Mr Welsh and would have shown her badge. Further, she was driving a long wheelbase van marked RFTU. Mr Welsh said that he saw the van arrive on CCTV. He can have been in no doubt as to the purpose of Mrs Ramsay's visit. Even if he had been unsure, I am satisfied that he would have made a point of ascertaining who Mrs Ramsay was and the purpose of her visit. I do not accept Mr Welsh's evidence that he gave a box of vehicle keys to an unidentified person without realising that this was a RFTU visit. I find that Mr Welsh has sought to portray Mrs Ramsay and her team as unscrupulous and incompetent. I make findings below about the sampling and recording procedures adopted by Mrs Ramsay and her team and I do consider that in some respects there was a lack of care. Mr Welsh however has gone well beyond what may be described as fair criticism. Again, that is another factor which causes me to be cautious about his evidence generally.

50. Mrs Ramsay was convinced that Mr Welsh gave her a list of the appellant's vehicles. The list was not in evidence. In the end, Mr Welsh was unsure as to whether he gave Mrs Ramsay a list of vehicles. I am satisfied that Mr Welsh did provide a list

of the appellant's vehicles to Mrs Ramsay. Whether it was complete or not I cannot say and it is unfortunate that Mrs Ramsay did not ask for a copy of the list to retain.

51. Mr Welsh claims that he did not know that the fuel tanks of the appellant's vehicles were being sampled and tested. He had given the box of keys to Mrs Ramsay. It is simply not credible that Mr Welsh was not aware that a large number of the appellant's vehicles in the vicinity of the Premises were being sampled and tested. Having heard and seen Mr Welsh give evidence it does not strike me that he would simply have given an unidentified officer a box of keys and let her get on with whatever it was she wanted to do.

52. I find that Mr Welsh was aware of the purpose of Mrs Ramsay's visit and that her officers were taking samples and testing the fuel. He could clearly have insisted on being present when the samples were drawn. The statutory provisions go further. Paragraph 1 Schedule 5 HODA 1979 provides that the sample "shall if practicable" be taken in the presence of the owner or the person in charge of the vehicle. Mrs Ramsay did not suggest that it was impracticable for Mr Welsh to be present, or that Mr Welsh refused to observe. This point was not pursued by either party but it seems to me that Mrs Ramsay could and should have ensured that Mr Welsh or another representative of the appellant was present or should have noted the position if he refused for any reason to be present. The fact that Mr Welsh was not present when samples were taken meant that he had no opportunity at that time to raise any issues in connection with the taking of samples.

53. Mr Welsh criticises the fact that Mrs Ramsay held on to the sample from the roadside test until much later in the day when she gave it to him. He says she ought to have given it to the driver at the roadside and the delay gives rise to the possibility that the reliability of the samples from that vehicle may somehow have been compromised, either by tampering or accidental contamination. There is no specific evidence that is the case. Taking into account the evidence as a whole, including justified criticisms of the recording procedures at the Premises, I am satisfied that the sample taken from the roadside vehicle and the Government Laboratory test results of that sample are reliable.

54. The appellant also criticises the sampling procedure for vehicles at the Premises. I am satisfied from Mrs Ramsay's evidence that officer Harwood was an experienced testing officer and he was overseeing Officer Udberg. The Respondents did not put forward evidence from those officers. In light of the issues, that is an unfortunate omission. However, given the passage of time I do not consider that I can rely on Mr Key's evidence as to possible contamination of the fuel testing equipment at the Premises. I am not satisfied that the fuel testing bottle used by Mrs Ramsay's colleagues already contained any product incorporating markers for kerosene or rebated fuel prior to testing of the VW Caddy. Indeed, the VW Caddy did not test positive for kerosene or rebated fuel.

55. Mrs Ramsay was also asked about how the sampling equipment was cleaned. She said that the hose and bottle would be cleaned using white spirit. Mr Key gave evidence that fuel testing equipment should not be washed out with white spirit

because that was a kerosene based product. He said that it should be washed out with soap and water. Mr Key did not have experience in testing for the markers associated with rebated fuel. As to whether it is right to clean fuel testing equipment with white spirit, it was not put to Mrs Ramsay that white spirit was a kerosene based product and should not be used to clean fuel testing equipment. There was no evidence that the presence of white spirit might affect testing for rebated fuel markers.

56. I do not consider that there is any reliable evidence to call into question the sampling and testing process in relation to vehicles at the Premises.

57. HMRC rely on the presence of kerosene in the fuel tanks of the four seized vehicles. I refer below to the effect of "statutory deeming" in relation to those vehicles. HMRC also rely on the presence of kerosene in two vehicles which were not seized. I set out below my findings as to whether there was kerosene in the six vehicles and if so the proportion of kerosene in those vehicles.

58. Mrs Ramsay fairly acknowledged the difficulties she and her colleagues had during the visit to the Premises. She did not identify any particular or unusual difficulties which experienced officers should not be expected to cope with. I must conclude on the evidence, including the admissions fairly made by Mrs Ramsay, that the approach of Mrs Ramsay to recording the results of the testing in her notebook was less than careful. Mrs Ramsay accepted that her notebook contained significant errors. Those errors go beyond what might be termed transcription errors, such as incorrectly noting the registration number BJ59 CNZ.

59. Vehicles YX05 CYG, BJ59 CNZ, D1 JLS and VO59 ZTJ were ticked as having been tested. Mrs Ramsay accepted that these vehicles were not at the Premises, although VO59 ZTJ had obviously been tested earlier that day. Notwithstanding Mrs Ramsay's acceptance, Ms Bond invited me to find that the vehicles were at the Premises, and in relation to vehicles BJ59 CNZ and D1 JLS to disregard the blackbox evidence. She submitted that there is no evidence as to how the blackbox works and whether it can be switched off or tampered with. In the light of all the evidence, including the blackbox evidence, I am satisfied that these vehicles were not at the Premises and could not have been tested at the Premises.

60. Whatever the circumstances which contributed to these errors, it is very troubling that the procedures adopted did not eliminate the risk of the errors occurring. I cannot help but think that if Mr Welsh had been present whilst the samples being drawn and Mrs Ramsay had been present rather than relying on radio contact then the errors would not have occurred.

61. Mrs Ramsay's notebook does not purport to be a verbatim record of what was said and done during the roadside testing or her visit to the Premises. She would note what on the day she thought was important. However, she stated and I accept that she would try to record verbatim what was said by Mr Welsh whilst under caution.

62. There is one matter in the interview which Mrs Ramsay may not have correctly recorded. If Mr Welsh had volunteered that he had been advised by a Mercedes

garage not to put kerosene into his vehicle that would have been a very odd statement to have made. No-one in the position of Mr Welsh would openly suggest putting kerosene into a road vehicle and it is difficult to conceive that Mr Welsh would discuss the matter with a Mercedes garage and then volunteer the advice to Mrs Ramsay during the interview. It is more likely that the discussion was about use of bio diesel and that Mrs Ramsay's note is incorrect in referring to kerosene in this context.

63. Apart from that matter, I do not accept that Mrs Ramsay incorrectly noted what Mr Welsh said under caution. The alleged errors are so specific and detailed that they cannot be explained by carelessness on the part of Mrs Ramsay, and there is no basis whatsoever to suggest that Mrs Ramsay deliberately recorded incorrect information. I am satisfied that Mr Welsh did say as follows:

(1) That the appellant had fuelled its vehicles from the Premises in the past but it did not do so at the time of the visit.

(2) That the appellant kept about 150 litres of red diesel and kerosene at the Premises. He gets red diesel from "Auto Glynn" and kerosene "from anyone".

(3) That he had had bother with some of his staff who had gambling problems and as a result one employee had been refused a fuel card.

64. I make these findings taking into account that Mr Welsh signed Mrs Ramsay's notebook. I am satisfied that he did so having been given an opportunity to read the notebook but preferring Mrs Ramsay to read it back to him. I am satisfied that Mrs Ramsay read it over to him in the form it was written, and that Mr Welsh did not challenge any aspect of what had been recorded.

65. I am satisfied that the SIN and the restoration fee of £2,000 were intended to refer to the four vehicles identified on the SIN. The evidence of Mrs Ramsay was that in the years she had worked in the RFTU it was always a restoration fee of £500 per vehicle. That was also Mr Allinson's evidence. The £500 amounts to what the total penalties would be for taking rebated fuel into the vehicle running tank and using rebated fuel to power a road vehicle. Those penalties are £250 for each offence for each vehicle. It is also consistent with the restoration and warning letter given to the appellant at the time.

66. I find that Mrs Ramsay was considering seizing 6 vehicles but when Mr Welsh said that the appellant could not afford the £3,000 restoration fee she decided, together with Mr Allinson, to seize only four vehicles. Those are the four vehicles identified on the SIN. If Mrs Ramsay had been removing two of those vehicles from the SIN then she would have done so with a clean line though each vehicle, or she would have used a new form. Her "squiggle" on the SIN was intended to indicate that nothing beyond the four vehicles were being seized.

67. I consider it likely that Mr Welsh has tried to take advantage of an element of uncertainty on the face of the SIN to suggest that only two vehicles were seized and restored.

68. I accept that Mrs Ramsay, as an experienced officer, would habitually inform vehicle drivers and owners to flush the fuel tanks of vehicles which tested positive for rebated fuel. It is likely that she did so in this case. In any event, for the following reasons the issue has no real significance for this appeal.

69. It is not disputed that Mrs Ramsay returned to the Premises unannounced on 30 July 2015 and carried out further fuel tests on vehicles at the Premises. Those vehicles all tested negative for rebated fuel. Two of the vehicles which HMRC say tested positive in 2014 were tested again in 2015, namely C9 LNW and RV58 LOA. Mr Welsh says that the fuel tanks of those vehicles were not flushed following the visit on 15 July 2014.

70. Mr Welsh maintained that if those vehicles had kerosene in their fuel tanks in July 2014 then one would expect to find a trace of kerosene in July 2015. There is no reliable evidence to support what Mr Welsh says. I infer that much would depend on how much kerosene was in the fuel tanks on 2014 and how the vehicle had been used in following period of one year, in particular the mileage driven and the volume of legitimate fuel passing through the fuel system in the following year.

71. Mr Welsh maintains that there was no kerosene in the fuel tanks of any of the appellant's vehicles. I cannot accept that evidence. For the reasons given above I am satisfied that Mrs Ramsay seized all four of the vehicles identified on the SIN, and those vehicles were restored upon payment of a restoration fee of £2,000.

72. It was open to the appellant to challenge the legality of that seizure but it did not do so. *Paragraph 1 Schedule 3 Customs & Excise Management Act 1979 ("CEMA 1979")* provides for notice of the seizure to be given in certain circumstances. *Paragraph 3 Schedule 3 CEMA 1979* then states:

> "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 …"

73. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the magistrate's court. Where no notice of claim is given, *Paragraph 5 Schedule 3 CEMA 1979* 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."

74. *Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824* and *Revenue and Customs Commissioners v Race* make clear the effect of the deeming provision as a matter of law. Any factual matter which was a necessary

requirement to justify the seizure is deemed to be the case. The tribunal cannot go behind that statutory deeming and make any finding of fact inconsistent with it. As Barling J stated in the Upper Tribunal decision in *Shaw v Revenue & Customs Commissioners [2016] UKUT 4 (TCC)* at [27], the effect of the deeming provision:

> " … necessarily precludes the FTT from considering and deciding whether facts, which are implicitly and necessarily treated as established where a seizure has been deemed legal, do actually exist."

75. It is also clear from Shaw v Revenue & Customs that the tribunal may be required to find facts which are not implicitly and necessarily treated as established. In the present circumstances, I must treat as established that there was kerosene in the fuel tanks of all the vehicles seized. The seizure would be legal if there was only a trace of kerosene in the tanks. The extent of what is deemed to be established is therefore that there was a trace of kerosene in the fuel tanks of four vehicles at the time of seizure. The respondents in the present case seek to establish that more than trace levels of kerosene were in the fuel tanks, relying on the findings of the Government Chemist. They also seek to establish use of kerosene throughout the period of the Assessment.

76. Mr Ginniff submitted that the test results were unreliable. In my view he is entitled to make that submission but only with a view to inviting me to find that there was nothing more than a trace of kerosene in the four vehicles which were seized and no kerosene in the two vehicles which were not seized but where samples were analysed by the Government Chemist.

77. The evidence as to the quantity of kerosene in the four vehicles that were seized is the analysis received from the Government Chemist. That analysis depends on the reliability of the sampling procedure.

78. I am not satisfied that the test result for the roadside vehicle is unreliable. The appellant has adduced no evidence from any person present at the roadside check which calls into question the reliability of that sample. I am satisfied that the roadside vehicle fuel tank contained 32% kerosene.

79. There are justified criticisms as to certain matters recorded by Mrs Ramsay in her notebook at the Premises. However, none of the criticisms I have found to be justified relate to vehicles which tested positive for rebated fuel. Further, the errors go to identification of vehicles rather than the sampling process itself. The assistant testing officer was an experienced officer. It is unfortunate that the respondents did not call him to give evidence. However, I cannot be satisfied on the basis of the evidence before me that the samples sent for testing in relation to the seized vehicles were in some way unreliable. I am satisfied that the three other vehicles seized had kerosene levels of 7%, 30% and 2 % respectively. Similarly, I am satisfied that the two vehicles which tested positive for kerosene but which were not seized had kerosene levels of 2% and 5% respectively.

Findings of Fact – The Assessment and the Penalty

80. The Assessment was made by Mr Gilmartin, a Higher Officer of HMRC working in Oils Assurance. Mr Gilmartin carried out what is known as a post detection audit of fuel usage by the appellant. Effectively, this is a paper audit in which Mr Gilmartin was seeking to identify what fuel the appellant would have needed to run its fleet of vehicles during the audit period and what legitimate fuel the appellant had purchased over that period. If the evidence leads to a conclusion that any shortfall in legitimate fuel was because the trader was using rebated fuel then an assessment for the amount of the rebate will be issued.

81. There was correspondence between Mr Gilmartin, the appellant and its then advisors commencing in October 2014. An initial assessment was made by Mr Gilmartin on 29 May 2015 for excise duty of £83,230 with a penalty of £43,695. Further correspondence followed between Mr Gilmartin, the appellant and its new advisors. In due course on 26 October 2015 a revised assessment and a revised penalty were issued in the sums of £36,875 and £19,539 respectively.

82. This is an appeal against the Assessment and the Penalty in their final, revised figures. I shall therefore concentrate on how those figures were calculated, the assumptions and inferences drawn by Mr Gilmartin to justify those figures and the criticisms made by the appellant. It is not necessary for present purposes for me to set out the reasons why the figures were revised.

83. Mr Gilmartin identified 25 vehicles owned by the appellant during the period 1 June 2011 to 14 July 2014, including 5 vehicles which tested positive for the presence of rebated fuel. The three vehicles tested by Mrs Ramsay which did not belong to the appellant were not included in the assessment.

84. One of the vehicles which tested positive for rebated fuel was a Ford Transit van, registration YM13 GEJ. Mr Welsh stated that this vehicle was not owned by the appellant, although it was at the Premises. He said that it was a new vehicle owned by First Class Commercials. It was delivered on a transporter by Ford and was stored at the Premises on the understanding that the appellant was going to purchase it. It had only delivery mileage on the clock. The appellant did not purchase the vehicle until some time after the visit. In the circumstances it did not form part of the Assessment or the Penalty.

85. Mr Gilmartin sought to identify or estimate the mileage done by those 25 vehicles in that period whilst in the ownership of the appellant. Using estimates for fuel consumption he then sought to identify the likely volume of fuel those vehicles would have required. He deducted from that figure the total legitimate fuel purchased by the appellant in the period. This left a shortfall which he considered represented rebated fuel unlawfully used by the appellant in the period. It is the duty on that fuel which is the subject of the Assessment and on which the Penalty has been calculated.

86. The shortfall was calculated by reference to the 25 vehicles as follows:

Total Litres Required	254,226
Total Litres Purchased	190,593
Shortfall	63,633
Duty on the Shortfall	£36,875

87. The appellant says that Mr Gilmartin failed to take into account the errors in the sampling and testing procedure referred to above. As a result it is unreasonable to attribute the calculated shortfall to the use of rebated fuel. I have found that the 6 vehicles tested all contained kerosene as indicated above. It was not clear to what extent Mr Gilmartin took the test results into account, but for present purposes it is clear that I should do so.

88. Mr Welsh contends that the roadside vehicle VO59 ZTJ, a Ford Transit van, could not operate using kerosene as fuel. The engine management control system would put the engine into "limp mode". The only material to support that contention was a letter from a business known as Charlotte Street Garage addressed "To whom this may concern". The letter suggested that various faults "can occur" where a Ford Transit is run on diesel mixed with kerosene. The garage was unable to say how long it might take for the faults to occur, which would depend on the percentage of fuel mix. The vehicle was owned by the appellant in the period of 10 months prior to July 2014. The evidence before me does not establish that the vehicle could not operate using a mixture of diesel and kerosene over that period.

89. The appellant raises a number of issues in connection with the assumptions and estimates used by Mr Gilmartin. It contends that in the case of some vehicles Mr Gilmartin used fuel consumption figures which are too low. Further, it contends that vehicles BV57 XMZ and NJ57 LSY should be taken out of the calculation because the appellant had no responsibility for fuelling those vehicles.

90. Mr Gilmartin originally used fuel consumption figures from a handwritten schedule provided by Mr Welsh. He took Mr Welsh's estimates at face value. It was later suggested by the appellant's advisers that figures from a website known as "Honest John" for various vehicle manufacturers and models would be more reliable. Mr Gilmartin accepted that suggestion and reduced his calculation of the litres of fuel required accordingly. He took the combined average figures given by that website for the relevant make, model and sub-model and provided the relevant links to the appellant. Those links I understand are no longer available and unfortunately Mr Gilmartin did not print a hard copy of the information he relied on.

91. In relation to vehicles where fuel consumption figures are still in dispute, Annex 2 shows Mr Welsh's original estimates, the estimate used by Mr Gilmartin in his calculations and the estimate the appellant invites me to use in determining the proper quantum of the Assessment.

92. Mr Welsh gave evidence that the appellant's vehicles had a number of features which would improve fuel efficiency, such as speed limiters, 6 speed gearboxes,

overdrive and aerodynamic fittings such as wind deflectors. There was no reliable evidence that the vehicles had such features and more to the point no evidence as to what impact such features would have beyond a generalised submission that they would improve fuel efficiency.

93. Mr Welsh also stated that the vehicles do a lot of mileage on motorways and A road where fuel efficiency is better compared to town and city driving. He said that one of the appellant's largest contracts involved travel to and from East Midlands Airport. Again, there was no evidence as to what impact this would have beyond a generalised submission that it would improve fuel efficiency.

94. The evidence before me included an extract from the Honest John website and the appellant contends that the following entry was relevant to the Ford Transit models in Annex 2:

"2.2TDCi 32.5-42.2mpg"

95. There was no evidence before me that this extract from the website for Ford Transit models referred to the same models and sub-models owned by the appellant, other than the oral evidence of Mr Welsh which for the reasons given above I treat with caution. In the circumstances I am not satisfied that the fuel consumption figures used by Mr Gilmartin were wrong.

96. In relation to the Mercedes Sprinter vans, the appellant relied on literature from Mercedes Benz. Copies in the bundle were largely illegible. Mr Welsh complained that the figures used by Mr Gilmartin were so low as to be incredible. However it is notable that for one of those vehicles Mr Welsh originally gave an estimate of 24 mpg, whereas Mr Gilmartin's figures for all the Mercedes Sprinters were higher than that estimate. The appellant has produced no material which satisfies me that Mr Gilmartin's estimates are wrong.

97. For the VW Crafter van I was told that the Honest John website showed a range of 28.0 – 39.8 mpg. Mr Gilmartin's estimate is within the range, but it is not clear whether the Honest John website relates to the same sub-model. I am not satisfied that Mr Gilmartin's estimate is wrong.

98. For the LDV Maxus the appellant relied on a print from a different website showing average fuel consumption of 31 mpg. The reliability of the website was wholly unclear. Mr Gilmartin has used 25 mpg and I am not satisfied that figure is wrong.

99. I was not provided with any calculation showing what difference adopting the appellant's fuel consumption figures for the vehicles in Annex 2 would make to the Assessment. By my calculation with no other adjustments, using the appellant's fuel consumption figures the shortfall would reduce from 63,633 litres to 53,446 litres. The reduced figure is still some 28% of the total legitimate fuel purchased. The shortfall on any view is so significant that it demands an explanation.

100. There was no dispute as to Mr Gilmartin's figure for the volume of legitimate fuel purchased by the appellant. Mr Gilmartin identified that 40% of purchases were made using fuel cards and 60% were petrol station receipts. Those receipts were generally for £10 or £20. The appellant did not challenge this element of Mr Gilmartin's evidence. HMRC suggested that there was something suspicious in the volume of such small receipts, although the evidence did not deal with this issue in detail. Mr Welsh's explanation was that if drivers needed to get back to the depot and were unable to find a service station which accepted the fuel card then they would pay cash to put in enough fuel just to get them back. That explanation seems plausible, and I accept it.

101. There were two vehicles which Mr Welsh described as being "sub-contracted" to third parties where it was the third parties who fuelled the vehicles. One vehicle was a Mercedes Sprinter NJ57 LSY and the other was the LDV Maxus BV57 XMZ.

102. In correspondence the Mercedes Sprinter was said to have been used by JSG Worldwide Enterprises Ltd, a recruitment agency owned by Mr George Foster. JSG was said to have used the vehicle in the period March 2011 to October 2013, partly to perform one of the appellant's Fed Ex contracts. JSG would generally fuel the vehicle and it was driven by Mr Foster or one of JSG's drivers. The evidence included invoices from JSG to the appellant for use of JSG's drivers but Mr Welsh stated that these were not in relation to Fed Ex contracts. They had been provided simply to show that JSG existed. There was no evidence as to the nature of the arrangement from Mr Foster, who Mr Welsh said had gone bankrupt.

103. Mr Welsh's evidence was that the appellant remained responsible for cleaning and servicing the vehicle and that it came back each weekend for "weekend servicing". On these occasions it may have been fuelled by the appellant using its fuel cards. Mr Welsh maintained that JSG was responsible for fuelling it some 90% of the time. In cross examination Mr Welsh stated that mid-week fuel card transactions for this vehicle arose because the vehicle might have required parts and would be retained beyond the week-end, with JSG being provided with a replacement vehicle. However, the fuel card records in evidence show this vehicle being refuelled at Morrisons Cowgate in the period Monday 16 April 2012 to Friday 27 April 2012. The vehicle was refuelled on each weekday in that two week period between 7.45am and 8.43am.

104. For the whole period of the Assessment Mr Gilmartin estimated that this vehicle used 17,442 litres. Mr Welsh was prepared to accept that in the periods July 2010 to March 2011 and November 2013 to July 2014 this vehicle was used and fuelled by the appellant.

105. There were no invoices from JSG to the appellant in relation to work done by JSG for Fed Ex on behalf of the appellant, or from the appellant to JSG in relation to the supply of the vehicle. Mr Welsh stated that these were "rolled into the price for deliveries", but no such invoices were in evidence. There were invoices from the appellant to Fed Ex in 2013 which included daily sums payable by Fed Ex where the description was "(JSG) Multidrops (Route 30)". I am satisfied that JSG was carrying out Fed Ex deliveries on behalf of the appellant, but that says nothing about what the

arrangement was in relation to the vehicle and its refuelling. There was no evidence as to the terms of the agreement between the appellant and JSG, save Mr Welsh's oral evidence that JSG were responsible for fuelling the vehicle and the appellant was responsible for keeping the vehicle clean and serviced. I do not accept Mr Welsh's uncorroborated evidence on this issue.

106. Mr Welsh's evidence was that the LDV Maxus vehicle was sub-contracted to Mr Gordon Jackson in the period 7 January 2012 to 22 June 2014. Mr Jackson was an individual who ran two taxi businesses. The only evidence to suggest that Mr Jackson worked on Fed Ex contracts in this period was a Fed Ex incident report dated 10 February 2012 when a pallet fell from the tail lift of a vehicle whilst unloading. The incident report did not relate to this vehicle, which did not have a tail lift. Mr Welsh said that the appellant may have given Mr Jackson a 7 ½ ton vehicle with a tail lift but there was no supporting evidence to that effect.

107. The fuel estimated by Mr Gilmartin to have been used by this vehicle was 18,240 litres. Further, there were fuel card records which showed the vehicle being fuelled using the appellant's fuel card mid-week in the period October to December 2012.

108. The evidence adduced by the appellant does satisfy me that Mr Jackson was sub contracting this vehicle, still less that he was responsible for fuelling it.

109. The appellant contended the explanation for the fuel shortfall could not be the use of kerosene. Mr Welsh had not put kerosene into any vehicle tanks and he had never known his drivers do so. There was no incentive for the appellant or his drivers to do so. Mr Welsh said in cross examination that Fed Ex paid the appellant by reference to the miles driven, and later in his evidence he said for the first time that Fed Ex checked the appellant's fuel receipts. There was no corroborating evidence to this effect and I am not satisfied that it makes the mixing of kerosene with legitimate fuel in the appellant's vehicles any less likely. I also note that Mr Welsh did not question the detection of kerosene in any of the vehicles until a letter from his advisers dated 20 August 2015, more than a year after the detection.

110. The appellant also relied on the fact that the appellant had been in business for 15 years and there had been no previous detections of rebated fuel being used in its vehicles. He suggested that the appellant's vehicles were likely to have been stopped by the RFTU over that period. Mr Gilmartin accepted that it was likely the appellant's vehicles would have been stopped and tested over that period. However, there was no evidence as to when, or as to how many times. In particular there was no evidence that the appellant's vehicles had be stopped and tested at any other time during the period of the Assessment.

111. The appellant has not satisfied me that there is any innocent explanation for the significant shortfall in fuel purchases identified by Mr Gilmartin. Even if there had been only 4 vehicles which had tested positive for traces of kerosene there would still be no explanation. Taking all the evidence into account I am not satisfied that the Assessment is excessive.

The Penalty

112. The penalty in the present case was imposed pursuant to Schedule 41 FA 2008. Paragraph 3 Schedule 41 provides that a penalty is payable where someone does an act which enables HMRC to assess an amount as duty due from that person under various provisions, including section 13(1A) HODA 1979. Paragraph 5(3) then sets out varying degrees of culpability where the act may be described as "deliberate and concealed" or "deliberate but not concealed". In the present case HMRC contend that the appellant's act of using kerosene was deliberate but not concealed. They accept that the appellant did not make arrangements to conceal the use of kerosene.

113. The penalty payable pursuant to paragraph 3 Schedule 41 is 100% of the potential lost revenue ("PLR") for a deliberate and concealed act, 70% of the PLR for a deliberate but not concealed act and in any other case 30% of the PLR. Paragraph 9 provides that the PLR is the amount of duty which may be assessed as due.

114. Paragraphs 12 and 13 provide that if a person liable to a 70% penalty has made a disclosure then HMRC must reduce the percentage to one which reflects the quality of the disclosure. The reduction applies where the person discloses the relevant act, which in the present case is the act of using kerosene in the fuel tanks of the appellant's vehicles. A person discloses the relevant act by telling HMRC about it, giving HMRC reasonable help in quantifying the unpaid duty and allowing HMRC access to records for the purpose of checking how much duty has been unpaid.

115. A reduction for disclosure cannot reduce the penalty below certain minimum levels. The minimum penalty is 35% in the case of a "prompted disclosure" and 20% in the case of an unprompted disclosure. A prompted disclosure is one which is made at a time when the person making it has reason to believe that HMRC have discovered or are about to discover the relevant act.

116. There are also provisions to reduce a penalty in the case of special circumstances but it has not been suggested that there are any special circumstances in the present case.

117. Mr Gilmartin considered that the act of putting kerosene into the appellant's vehicles was deliberate. Further, the appellant's disclosure in the sense of telling HMRC about it, helping to quantify the unpaid duty and providing access to records for the purpose of checking the amount of unpaid duty was prompted.

118. There is no suggestion that the appellant's vehicles were run exclusively on kerosene. What is said is that kerosene has been mixed with legitimate road fuel to avoid excise duty. The large shortfall in purchases of legitimate diesel and the absence of any innocent explanation for that shortfall point strongly to deliberate use of kerosene by the appellant. I also take into account the high level of kerosene in two vehicles with smaller, but still significant levels in four other vehicles.

119. On the balance of probabilities I am satisfied that the explanation for the shortfall in fuel purchases over the period of the Assessment is deliberate use of kerosene as a road fuel by the appellant. Even if the evidence was limited to trace

levels of kerosene in four vehicles, that would still have been consistent with mixing of kerosene and legitimate road fuel. I would still have found that there had been deliberate use of kerosene mixed with legitimate fuel in the period of the Assessment.

120. The use of kerosene came to light at the roadside checkpoint and it is clear that subsequent disclosure was prompted for these purposes. The penalty range therefore is 35 – 70% of the potential lost revenue. The PLR is £36,875.

121. Mr Gilmartin gave a total reduction of 50% to reflect the quality of the appellant's disclosure, made up of 15% for telling, 20% for helping and 15% for giving access to records. The reduction of 50% was applied to the difference of 35% between the maximum penalty and the minimum penalty for a deliberate but not concealed act. The penalty was therefore calculated at 52.5% of the unpaid duty.

122. The appellant challenged the level of reduction for disclosure. In broad terms it was submitted on behalf of the appellant that Mr Welsh could not have told HMRC about the fact kerosene had been put in the fuel tanks because he was not aware of that fact. Further, Mr Welsh gave considerable help to HMRC in quantifying the amount of unpaid duty and provided access to records.

123. As far as the penalty is concerned, the burden is on the respondents to establish that the use of kerosene in the appellant's vehicles was deliberate. It is then for the appellant to establish that the amount of the penalty is excessive.

124. For the reasons given above I am satisfied that kerosene was deliberately used by the appellant as road fuel for its vehicles. I do not accept that Mr Welsh was not in a position to tell HMRC that fact.

125. The extent of the reduction for disclosure was not a ground of appeal and Ms Bond submitted that it was too late for the appellant to raise it. It was effectively raised for the first time during the cross examination of Mr Gilmartin. It is true that the grounds of appeal make no challenge to the reduction for disclosure given by Mr Gilmartin. However, Mr Gilmartin was cross-examined in relation to the reduction and I consider that it is in the interests of fairness and justice that I should permit this ground to be raised.

126. As far as the reduction for a prompted disclosure is concerned the amount of that reduction is a value judgment in the light of all the evidence. The appellant took a broad brush approach in its submissions and I shall do the same. In my view the level of reduction given by Mr Gilmartin was appropriate to reflect the quality of the appellant's disclosure. If anything that reduction was on the high side because it gave credit for the appellant telling HMRC about the act of fuelling with kerosene, whereas Mr Welsh has maintained throughout the appeal that there was no kerosene in any of the vehicles.

Conclusion

127. For the reasons given above the appellant has not satisfied me that the Assessment is excessive. Further, I am satisfied on the balance of probabilities that

the appellant deliberately caused kerosene to be used in the fuel tanks of its road vehicles. I am not satisfied that the Penalty is excessive, or that any further reduction for disclosure is justified.

128. In the circumstances I dismiss the appeal.

129. 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: 6 SEPTEMBER 2018

ANNEX 1

Registration	Vehicle	Notation
RV58 LOA	VW Van	✓+ Pos
C9 LNW	Merc Van	✓? Pos
X11 TCX	Ford Van	✓
PX54 DSO	Iveco Lorry	+ Pos
YX05 CYG	Iveco Lorry	✓
ND62 XHT	VW Toureg	✓
YM13 GEJ	Ford Van	✓ ? Pos
YR10 FSP	Ford Van	✓
N111 GXW	Ford Van	
N111 XGW	Ford Van	+ Pos
SG59 MXW	VW GolfCaddy	✓
VO59 ZTJ	Ford Van	✓
BJ59 CMZ	Ford Van	✓
D1 JLS	Ford Van	✓
NJ59 NKW	VW Caddy	✓

ANNEX 2

Registration	Vehicle Type	Model	Original Estimate	HMRC Estimate	Appellant's Estimate
VO59 ZTJ	Ford Transit	85T260M	23	34.9	36
LK52 CZO	Ford Transit	280LWBTD		34.9	36
LT08 OMJ	Ford Transit	85T260S	20	34.9	36
NJ62 LBP	Ford Transit	115T460		30.7	36
YR10 FSP	Ford Transit	85T260S	22	34.9	36
BJ59 CNZ	Ford Transit	85T280S	22	34.9	36
C9 LNW	Mercedes Sprinter	311CDI	24	29.1	36
NJ13 HXP	Mercedes Sprinter	313CDI		33.6	36
NJ57 LSY	Mercedes Sprinter	211CDI		31	36
NJ63 UYD	Mercedes Sprinter	316CDI		32	36
NK14 WCC	Mercedes Sprinter	313CDI		33.6	36
RV58 LOA	VW Crafter	CR35 136	24	32.8	35
BV57 XMZ	LDV Maxus	3.5T		25	30