[2021] UKFTT 0361 (TC)

TC08295

EXCISE DUTIES – HMRC decision not to release seized vehicles – vehicles had large amounts of rebated fuel in tanks when seized – was third occasion on which vehicles used by appellant had been seized for holding rebated fuel – HMRC policy was not to release when two prior instances of using rebated fuel, unless situation merited exception to policy – held: policy was reasonable – decision that circumstances did not merit exception from policy also reasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/07672

BETWEEN

ASJED RAFIQ **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON
MR LESLIE HOWARD

The hearing on 12-13 May 2021 was adjourned part-heard because it came to light that the Respondents had not complied in full with direction 1 of the Tribunal's directions dated 2 October 2019. Further to directions issued by the Tribunal on 14 May 2021, ordering compliance in full by the Respondents with that direction, the Respondents disclosed further documentation on 5 July 2021. A continuation hearing was held on 9 September 2021. We heard Ms N Alam for the Appellant and Miss K Bond and Ms C Brown, counsel, instructed by HM Revenue and Customs' Solicitor's Office, for the Respondents (respectively at the first and second hearings).

The form of the hearings was V (video) on the Video Hearing Service platform. A face to face hearing was not held due to the pandemic. The evidence before the Tribunal is summarised in the main body of this decision.

Prior notice of the hearings had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearings were held in public.

DECISION

1. The issue in this appeal was whether HMRC's review decision, upholding their earlier refusal to restore two seized vehicles, was not one they could reasonably have arrived at.

THE APPEAL

2. On 21 September 2017 HMRC sent the appellant a "review conclusion letter", upholding their earlier decision not to restore two vehicles seized by them on 6 July 2017.

3. The appellant notified his appeal on 17 October 2017.

EVIDENCE

4. At the May 2021 hearing, we had witness statements, and heard oral evidence, from the appellant and from HMRC officers Robert Taylor (who was involved in the July 2017 detection and seizure) and Jordan Danks (who made the review decision in the letter dated 21 September 2017).

5. The hearing bundles before us at the May 2021 hearing included Tribunal documents, correspondence between the parties, and also:

(1) 26 fuel purchase receipts for purchases between September 2016 and July 2017;

(2) results of analysis by LGC Forensics of testing of samples from the fuel in the two vehicles in question on 6 July 2017;

(3) information about fuel additives.

6. HMRC disclosed the following documents on 5 July 2021, in late compliance with direction 1 of the Tribunal's directions dated 2 October 2019 (the text of which is set out in the appendix to this decision):

(1) restoration agreement, disclaimer and warning letters of 1 March 2012 and 24 May 2016

(2) pages from several HMRC officers' notebooks from 24 May 2016, 6 July 2017, 11 July 2017, 12 July 2017 and 24 July 2017

(3) HMRC detection report re: 24 May 2016 detection

(4) HMRC test note re: 24 May 2016 detection

(5) seizure information notice 24 May 2016

(6) HMRC internal emails of 25-16 May 2016, 12 July 2017

(7) licence details

(8) 18 fuel purchase receipts for purchases between October 2015 and June 2017

(9) witness statement of an HMRC officer dated 20 October 2017

(10) HMRC's one-page published restoration policy

7. We have considered whether to allow HMRC to rely on the above documents, given that they were disclosed nearly 20 months late, and only after it came to light in the May 2021 hearing that there had not been full compliance by HMRC with direction 1 of the Tribunal's directions dated 2 October 2019. In our view, in these circumstances, it would not be fair and just to allow HMRC to rely on these documents. We have, however, taken account of documents (1) in the list above in our factual findings, as they clarified information that was before the Tribunal at the May 2021 hearing.

FINDINGS OF FACT

8. We make the following factual findings based on the evidence (as summarised above) and the ordinary civil standard of proof (balance of probabilities). We make a further factual findings in the Discussion section at [35(1)] below.

The July 2017 detection and seizure

9. On 6 July 2017, rebated kerosene (see [18] below for an explanation of "rebated" hydrocarbon oil) was detected in the fuel in two commercial road vehicles (a van and a lorry) (the "Vehicles") operated by the appellant and owned by him or companies he controlled. The Vehicles were seized.

10. Chemical analysis showed that the fuel from one Vehicle contained 28-31% rebated kerosene; and the fuel from the other Vehicle contained 44-47% rebated kerosene. Based on the information about the fuel tank capacity of the Vehicles given by the appellant in an interview with HMRC on 24 July 2017, and on HMRC's record of how full the Vehicles' tanks were (both of which we take to be accurate), this means that the amount of "rebated" kerosene in the fuel tank of one Vehicle was 16.8 - 18.6 litres; and 22 - 23.5 litres in the other Vehicle. Traces of red (i.e. marked) diesel (see [18] below for an explanation of "marked" hydrocarbon oil) were also detected in the fuel tanks of both Vehicles.

11. No notice claiming the Vehicles were not liable to forfeiture was given within the time limit in paragraph 3 Schedule 3 Customs & Excise Management Act 1979 (within one month of the date of the notice of seizure or, where no such notice has been served, within one month of the date of the seizure).

12. There was no rebated kerosene stored on the appellant's premises at the time of the detection and seizure. Nor was there rebated fuel in the appellant's personal car at that time.

13. Around this time,

(1) it was the appellant who put fuel into the Vehicles; he purchased fuel for the Vehicles at petrol stations; when doing so, he usually did not fill the fuel tank completely.

(2) the appellant was putting commercially available fuel additives into the fuel tanks of the Vehicles: he put in about 2 litres of such additives to each Vehicle, every three months or so.

The previous detections and seizures

14. On 24 May 2016, the appellant was detected using red diesel in one of the Vehicles. The situation was that he was running low on petrol late at night some distance from his home; he decided to put red diesel, which he was carrying in the Vehicle (as it was used in the generators provided by his business), into the fuel tank, to help complete the journey; he was stopped by police and the red diesel was detected; the Vehicle was seized and then restored on payment of a sum. The restoration agreement contained a warning that "on any future occasion that this vehicle or any other vehicle driven or owned by you is detected misusing rebated fuels, HM Revenue & Customs may enforce tougher sanctions including non-restoration of the vehicle".

15. On 28 February 2012, the appellant was detected using rebated fuel in two road vehicles (including one of the Vehicles). He had been using such fuel for about three months: it came from generators imported from Dubai by the appellant or companies he controlled. The fuel in question was white in colour (rather than red) – for this reason, the appellant assumed it was not rebated fuel. The two vehicles were seized and then restored on payment of a sum. The restoration agreement was with Mr Mohammed Rafiq (the appellant's father) trading as Aziz Furniture; it contained a warning that "on any future occasion that this vehicle or any other

vehicle driven or owned by you is detected misusing rebated fuels, HM Revenue & Customs may enforce tougher sanctions including non-restoration of the vehicle".

16. In 2009, a client on the premises of the appellant (or one of the companies he controlled), was detected using rebated fuel.

The 21 September 2017 decision by HMRC

17. The key part of HMRC's review conclusion letter dated 21 September 2017 read as follows:

> "The Commissioners do not normally restore vehicles for repeat offences of using rebated fuel as road fuel. This is intended as a deterrent for persistent offenders who continue to use rebated fuel in their road vehicles. However, I have considered whether an exception to this could be made in this case.
>
> You have confirmed that at the time of the seizure, you were the legal owner and operator of the [Vehicles].
>
> The tests performed on 6 July 2017 showed traces of kerosene for both vehicles. The positive indicator of kerosene means that the rebated fuel was being misused as road fuel, the vehicles were subsequently seized.
>
> You claim there was a very minimal amount of kerosene detected, however any trace means that kerosene is present and rebated fuel is being used in a road vehicle. This is a contravention and led to the seizure of the vehicles.
>
> You also claim that the irregularity must have originated from the BP fuelling station that you use to fill up, Officer Wilson tested the pumps at the relevant fuelling station and the results were negative.
>
> You have also stated that no additional kerosene was found on your site by the visiting officers, this does not detract from the fact that kerosene was found in the running tank of 2 of your vehicles, kerosene can be sourced from numerous sources and does not necessarily need to be kept on site.
>
> You go on to explain the circumstances around the previous incidents, I have examined your representations and still consider you to be a persistent offender, who despite written warnings continues to misuse rebated fuel as road fuel.
>
> HMRC policy is not to offer restoration for persistent offenders of misusing rebated fuels and Officer Wilson has followed this guidance by issuing her non-restoration decision.
>
> I have considered whether an exception should be made in this case. However, I have not been provided with any information which would allow me to make an exception to the Commissioners' usual position not to restore vehicles which are seized in connection with a fourth offence of misusing rebated fuel.
>
> As detailed above, [the Vehicles] were detected running on Kerosene.
>
> Considering the previous incidents of misusing rebated fuel, I believe that the decision to refuse the restoration of [the Vehicles] was proportionate to the severity of the offence and your history of previous detections.
>
> **Review Conclusion**
>
> You have sought restoration of the vehicle, and the general policy is not to offer terms for the return of vehicles found to be misusing rebated fuel as road fuel on the third offence or thereafter. This is the third time in the past six years that your vehicles have been detected misusing rebated fuel. I have

> carefully considered the details of the case and your representations when coming to my conclusion.
>
> …
>
> After careful consideration of the evidence presented, I conclude that Officer Wilson's decision not to restore [the Vehicles] is legally and technically correct.
>
> ln deciding whether to deviate from the Commissioners' policy I am required to decide if non-restoration is proportionate or if any exceptional issues are applicable.
>
> Having examined the information available to me I cannot find any exceptional circumstance or reasonable excuse which would result in the restoration of the vehicle in this instance. I also find the decision to be proportionate, given the multiple previous detections of misuse of rebated fuel in your vehicles."

THE LAW

18. The Hydrocarbon Oil Duties Act 1979 provides as follows:

(1) excise duty is chargeable on hydrocarbon oil: s6(1). "Hydrocarbon oil" encompasses a wide range of fuel oils, including kerosene (s1).

(2) excise duty on heavy oil (such as kerosene) is "rebated" where it is "delivered for home use". In the case of kerosene the rebate is 100% of the excise duty: s11(1).

(3) the presence of a prescribed marker in oil (making that oil "marked" oil) is conclusive evidence that the oil is rebated: s24(3).

(4) it is unlawful

(a) to use rebated oil as fuel for a road vehicle or take rebated oil into a road vehicle as fuel without first paying the rebated duty to HMRC: s12(2).

(b) to use marked oil as fuel for a road vehicle: s24A(1).

(5) the following are liable to forfeiture:

(a) any rebated heavy oil (which includes kerosene) taken into a road vehicle as fuel: s13(6)(a).

(b) any marked oil which is in a road vehicle as part of its fuel supply for the engine which propels it: s24A(7).

19. The Vehicles were seized in July 2017 under s139(1) Customs & Excise Management Act 1979 as being liable to forfeiture under s141(1) because they were used for the "carriage, handling, deposit or concealment" of things liable to forfeiture. As no notice claiming the Vehicles were not liable to forfeiture was given within the time limit in paragraph 3 Schedule 3 Customs & Excise Management Act 1979 (see [11] above), the Vehicles were "deemed to have been duly condemned as forfeited" under paragraph 5 Schedule 3 Customs & Excise Management Act 1979.

20. Following the Court of Appeal's judgement in *HMRC v Jones & Jones* [2011] EWCA Civ 824, when considering the question of reasonableness the Tribunal must take as a "deemed fact" that the Vehicles were "duly" and therefore lawfully condemned as forfeit under the provisions of the Customs & Excise Management Act 1979 cited immediately above.

21. The Tribunal's powers are limited to considering whether the decision in question – the review decision of HMRC confirming, under s15(1) Finance Act 1994, their earlier decision

not to restore the Vehicles using their powers under s152 Customs & Excise Management Act 1979 - could not reasonably have been arrived at (s16(4) Finance Act 1994). It is for the appellant to show that the grounds on which his appeal is brought have been established (s16(6)).

22. The Court of Appeal in *Customs & Excise Commissioners v JH Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by HMRC under s152 Customs & Excise Management Act 1979 (and confirmed by them under s15 Finance Act 1994) and in doing so should answer the following questions:

(1) Did HMRC reach a decision which no reasonable commissioners of revenue and customs could have reached?

(2) Does the decision betray an error of law material to the decision?

(3) Did HMRC take into account all relevant considerations?

(4) Did HMRC leave out of account all irrelevant considerations?

23. *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941 is authority for the proposition that, if HMRC's decision failed to take into account relevant considerations, the Tribunal may nevertheless dismiss the appeal if satisfied that, even if HMRC had taken into account those considerations, their decision would "inevitably" have been the same.

24. In *Balbir Singh Gora v Customs & Excise Commissioners* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable.

25. In ascertaining the reasonableness and lawfulness of HMRC's decision, it is necessary to consider whether the decision not to restore the Vehicles was proportionate. In *Lindsay v Commissioners of Customs & Excise* [2002] STC 588, a case about a refusal to restore a vehicle used to smuggle excise goods (cigarettes and tobacco), the major issue was whether the policy of the Commissioners so fettered their discretion in reviewing restoration decisions as to prevent them from considering proportionality "and thus to render their decisions unlawful" (see at [45]). The Court of Appeal in that case explained the principle of proportionality thus (at [52]):

> "The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued …"

THE PARTIES' POSITIONS IN BRIEF

26. The appellant's evidence was that he did not knowingly put rebated kerosene into the fuel tanks of the Vehicles around the time of the July 2017 detection; it must therefore have got in to the fuel tanks because it was present in fuel from the petrol stations he was buying from, or in the fuel additives he was using. He said that the following supported his case:

(1) (as found at [12] above) no kerosene was found on his premises or in his personal vehicle at the time of the July 2017 detection

(2) logically, he would not risk his own safety and damage to his vehicles (by using kerosene as fuel) because on a long-term basis he knew that kerosene was not good for his vehicles.

27. The appellant's evidence was also that HMRC had been satisfied when conducting two unannounced visits prior to the July 2017 detection.

28. The appellant argued that the detections and seizures in 2012 and 2016 were the result of "accident", and not "deliberate" misuse. He argued that it would be unjust for previous offences to be used against him in order to discredit him.

29. HMRC argued that their decision (to uphold their refusal to restore the Vehicles) was a reasonable one and that the Tribunal therefore had no power to interfere with it (even if the Tribunal itself would have reached a different decision).

DISCUSSION

30. The Tribunal has a supervisory jurisdiction in this appeal i.e. what we have to decide is whether HMRC's decision (upholding the refusal to restore the Vehicles to the appellant) is one which they could not reasonably have arrived at – and if it is, our powers are limited to setting the decision decide and requiring HMRC to remake it.

31. The decision here is contained in HMRC's review decision letter of 21 September 2017. The framework for the decision, as described in the letter, is a general policy of not restoring road vehicles seized for containing rebated fuel, where the person who owned or operated them has a record of unlawfully using rebated fuel as road fuel on two or more previous occasions – and individual circumstances do not justify making an exception to that general approach.

32. We find that this is a framework for decision-making that could be adopted by a reasonable body of commissioners. Its logic is fairly self-evident: if someone has been detected on at least two previous occasions unlawfully using rebated fuel as road fuel, that person is effectively "on notice" that such conduct is unlawful and subject to sanction by the authorities; and so will be given less lenient treatment on future occasions of infringement.

33. We find that HMRC's decision letter took into account all matters relevant to making a decision within this framework. In particular, it took into account the circumstances of the July 2017 detection , as well as those of the three prior detections involving the appellant. We do not find that HMRC's decision letter took into account matters irrelevant to a decision within this framework.

34. The core of this dispute is that HMRC

(1) did not consider the circumstances of the July 2017 detection justified making an exception from their general policy - whereas the appellant argued they did; and

(2) "counted" the 2016 and 2012 detections as past infringements - whereas the appellant argued that they should not be so counted, as they were, in themselves, exceptional due to extenuating circumstances.

35. Looking at these points in turn:

(1) It is a deemed fact in this appeal that there was rebated kerosene in the fuel tank of the Vehicles on 6 July 2017: this is the effect of the law, as explained at [19-20] above, and the fact found at [11] above (the appellant said that he was not aware of the statutory time limit referred to at [11] above; this, however, does not affect the operation of the law). Moreover, we have found as a fact that the amount of kerosene in the fuel was very considerable: see [10] above.

Given these facts, the only way to make sense of the appellant's own evidence - that he was not using rebated kerosene as fuel in the Vehicles around July 2017 - is to posit that that rebated kerosene (in large amounts) found its way into the fuel unbeknownst to the appellant; and given that he was the person putting fuel in the Vehicles at that time, his evidence can only mean that large concentrations of rebated kerosene were present in the fuel he purchased from petrol stations or in the commercially available fuel "additives" he used.

It seems to us inherently very unlikely that fuel purchased at a petrol station, or commercially available additives, contained such large amounts of rebated kerosene – and no persuasive evidence was put forward by the appellant to support either of these theories. It seems to us, on the balance of probabilities, that, contrary to his evidence, the appellant himself knowingly put considerable amounts of rebated kerosene into the Vehicles' fuel tanks, as:

(a) this is the only plausible explanation for the large amounts of rebated kerosene found in the fuel on 6 July 2017;

(b) the appellant had used rebated oil in the Vehicles before;

(c) the finding is consistent with the fact that the appellant was partly-filling the fuel tanks of the Vehicles from petrol stations at the time; and

(d) the facts that there was no rebated kerosene on his premises, or in his private car, at that time, are not inconsistent with this finding.

(For completeness, we mention here that we do not accept, on the balance of probabilities, the appellant's evidence that HMRC had made two visits prior to the July 2017 detection and been "satisfied", as this is not supported by documentary evidence put forward by either party (and some documentary record of these visits would be expected); however, even if we had accepted that these visits had taken place, it would not have displaced the finding we have just made).

Accordingly, we find that HMRC's decision not to treat the July 2017 detection as deserving exception from their general policy was one very much open to a reasonable body of commissioners.

(2) As to the 2016 and 2012 detections and seizures, we find that

(a) a reasonable body of commissioners could take the view that questions of whether such past infringements by the person involved were deliberate, reckless, careless or entirely inadvertent, are not relevant in the context of their decision-making framework: all that matters is that, due to such past incidents, the person concerned was "on notice" of the authorities' approach to those who unlawfully use rebated fuel as road fuel, and so can reasonably expect "harsher" treatment on a further infringement; and

(b) equally, a reasonable body of commissioners could pay heed to the degree of "fault" on the part of the person in question in the prior incidents – but find on the facts here that the appellant's conduct in those incidents is such that they should "count" as prior infringements in applying HMRC's decision-making policy, since:

(i) as regards the 2016 detection, it is undisputed that the appellant knowingly used rebated fuel in a Vehicle; he made a deliberate choice to do this rather than, for example, park up the vehicle and seek assistance or obtain legal fuel himself; given that the appellant had such options but chose to use rebated fuel, it does not seem to us outside the realms of reasonableness for HMRC to "count" this as a previous occasion of infringement; and

(ii) as regards the 2012 detection, the provenance of the rebated fuel used by the appellant in the run-up to this detection was generators imported from Dubai; despite this out-of-the-ordinary provenance, the appellant took no steps to find out if the fuel was rebated or not, but rather assumed, on the basis of its colour, that it was not; in such circumstances, where the appellant has in our view acted with a degree of recklessness as to whether the fuel he

used was rebated or not, it again does not seem to us outside the realms of reasonableness for HMRC to "count" this, too, as a previous occasion of infringement.

36. We therefore find that HMRC's decision not to make an exception, in the appellant's case, to their general policy not to release seized vehicles associated with "repeat" users of unlawful rebated fuel, was one which could be made by a reasonable body of commissioners.

37. It follows that HMRC's decision upholding refusal to restore the Vehicles was not one that they could not reasonably have arrived at.

38. For much the same reasons, we also find that HMRC's decision was proportionate: the ratcheting up of consequences for being detected unlawfully using rebated fuel in a road vehicle, such that on the third occasion the consequence was seizure of the Vehicles without restoration, seems to us reasonably proportionate as between the means employed and the policy pursued.

CONCLUSION

39. For the reasons set out above, the appeal must be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

ZACHARY CITRON
TRIBUNAL JUDGE
Release date:

APPENDIX
Direction 1 of the Tribunal's directions dated 2 October 2019

"Not later than **13 November 2019**:

(1) the Respondents shall conduct a search as if CPR 31.7 applied and send or deliver to the Appellant and the Tribunal a list of documents in their possession or control

(a) on which they intend to rely in connection with the appeal; or

(b) which adversely affect their own case; or

(c) which support the Appellant's case

For the avoidance of doubt the Respondents' documents list need not include any document which is not relied on and which is entirely adverse to the Appellant's case.

(2) the Appellant shall send or deliver to the Respondents and the Tribunal a list of documents in its possession or control on which it intends to rely in connection with the appeal; and

(3) each party shall send or deliver to the other party copies of any documents on that party's above-mentioned documents list which have not already been provided to the other party and confirm to the Tribunal that that has been done."