[2021] UKFTT 0455 (TC)

TC 08339A/V

EXCISE DUTY and PENALTY – rebated fuel in road vehicles – ss 12(2) and 13(1A) Hydrocarbon Oil Duties Act 1979 – Schedule 41 FA 2008 – separate proceedings for excise goods seized and forfeited including red diesel in Intermediate Bulk Container – conviction of offences under s 170(2)(a) CEMA for fraudulent evasion of duty – Compensation Order in satisfaction of an excise duty assessment – whether 'double taxation' – whether ownership of vehicles a relevant legal test for liability – whether double jeopardy – ***appeal dismissed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/01207

BETWEEN

HENRY MCLAUGHLIN
T/A BLUE DEVIL LOFTS **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
CELINE CORRIGAN

The hearing took place on 8-9 February 2021 on Tribunal Video Platform

A face-to-face hearing was not held because of the coronavirus pandemic. Prior notice of the hearing 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. The hearing was therefore held in public.

Mr Danny McNamee, Solicitor Advocate of McNamee McDonnell Solicitors, instructed by the Appellant for the Appellant

Ms Charlotte Brown, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Mr Henry McLaughlin, trading as Blue Devil Lofts ('the appellant') appeals against a Review Decision dated 25 January 2017 by the respondents ('HMRC'), which upheld the following assessments and penalty notice:

   (1) An Excise Duty Assessment EXA/887/2016 dated 17 November 2016 in the sum of £5,464 for the period 18 November 2012 to 22 October 2015, and revised to £4,981 on 9 July 2019; ('Assessment-887')

   (2) An Excise Duty Assessment EXA/888/2016 dated 17 November 2019 for the period 2 February 2014 to 22 October 2015 in the sum of £1,125; ('Assessment-888')

   (3) An Excise Wrongdoing Penalty notice dated 14 November 2019 in the sum of £3,824.80, and revised to £3,486.70 on 9 July 2019.

2. The assessments under appeal relate to the use of rebated fuel in commercial vehicles and were raised pursuant to s 13(1A) of the Hydrocarbon Oil Duties Act 1979 ('HODA'). The penalty was issued pursuant to Schedule 41 of the Finance Act 2008 for deliberate behaviour.

3. The issue for determination in this appeal is whether the Excise Duty Assessments and the Wrongdoing Penalty have been issued in accordance with the relevant legislation.

WITNESS EVIDENCE

4. We heard first the evidence of the appellant; he provided a witness statement and was cross-examined by Ms Brown. We do not find Mr Laughlin a reliable witness. We accept his evidence only to the limited extent where it can be corroborated by documentary evidence.

5. Officer Darrell Beatty is an assurance officer for HMRC based in Belfast, and was the officer with oversight of the matters that led to the issuance of the duty and penalty assessments. Officer Beatty provided a witness statement, and was extensively cross-examined by Ms McNamee. We find Officer Beatty to be a credible and reliable witness, and accept his evidence as to matters of fact, which in the main is the substance of the correspondence between HMRC and the appellant leading up to the duty and penalty assessments.

LEGISLATIVE FRAMEWORK

The Excise Duty Assessments

6. In relation to duty on hydrocarbon oil, the relevant provisions in HODA are as follows.

   (1) Section 1 of HODA defines 'Hydrocarbon oil' as petroleum oil.

   (2) Section 6 is headed 'Excise duty on hydrocarbon oil' and states:

   > '(1) …. there shall be on hydrocarbon oil –
   >
   > (a) imported into the United Kingdom; or
   >
   > (b) produced in the United Kingdom and delivered for home use from a refinery or from other premises used for the production of hydrocarbon oil, or any bonded storage for hydrocarbon oil not being hydrocarbon oil chargeable with duty under paragraph (a) above
   >
   > a duty of excise at the rates specified in subsection (1A) below.'

   (3) Section 11 HODA allows a rebate against duty charged under s 6, and so far as relevant, s 6 states as follows.

'… where heavy oil charged with the excise duty on hydrocarbon oil is delivered for home use, there shall be allowed on the oil at the same time of delivery a rebate of duty at a rate [as set out in the legislation].'

(4) Section 12 HODA provides that the rebate does not apply to fuel which is used or be used in road vehicles, and so re-imposes duty at the full rate. Section 12 states:

'**12 Rebate not allowed on fuel for road vehicles**

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

(2) No heavy oil on whose delivery for home use rebate has been allowed whether under Section 11 above or 13AA below, shall –

(a) be used as fuel for a road vehicle; or

(b) be taken into a road vehicle as fuel

unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under Section 24(1) below for the purposes of this section.'

(5) Section 13(1A) permits HMRC to assess for arrears of duty where rebated oil ('red diesel') is used in a road vehicle in contravention of section 12(2). The section provides:

'**13 penalties for contravention of section 12**

(1) Where a person –

(a) uses heavy oil in contravention of section 12(2) above; or
(b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection,

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

(1A) Where oil is used, or taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may –

(a) assess an amount equal to the rebate on like oil at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle, and
(b) notify him or his representative accordingly.'

7. The provisions relevant to this appeal from the Customs and Excise Management Act 1979 ('CEMA') are the following:

(1) Section 49 provides that goods imported without payment of duty are liable to forfeiture.

(2) Section 139 provides that: 'Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.'

(3) Section 170 entitled 'Penalty for fraudulent evasion of duty' provides, *inter alia*:

'(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –

(a) of any duty chargeable on the goods;

[…]

he shall be guilty of an offence under this section and may be arrested.'

(3) Subject to subsection 4,4A, … below, a person guilty of an offence under this section shall be liable –

(a) on summary conviction, to a penalty of the prescribed sum £2,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or

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

[…]

(6) Where any person is guilty of an offence under this section, the goods in respect of which the offence was committed shall be liable to forfeiture.'

(4) Schedule 3 to CEMA provides that any goods seized are deemed to have been duly condemned as forfeited pursuant to paras 3 and 5, which state:

'**3 Notice of claim**

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 at any office of customs and excise.'

'**5 Condemnation**

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 compiled with, the thing in question shall be deemed to have been duly forfeited.'

Excise Wrongdoing Penalty

8. The wrongdoing penalty was imposed pursuant to Sch 41 FA 2008 entitled: 'Penalties: Failure to Notify and Certain VAT and Excise Wrongdoing'. The relevant paragraphs are:

(1) Paragraph 3 defines the 'product', the use of which subject the user to Sch 41:

'**3 Putting product to use that attracts higher duty**

(1) A penalty is payable by a person ("P") where P does an act which enables HMRC to assess an amount as duty due from P under any of the provisions in the Table below (a "relevant excise provision").'

[Section 13(1A) HODA 1979 is listed in the table.]'

(2) Paragraph 4 defines the 'person' liable under Sch 41 in terms of:

'**4 Handling goods subject to unpaid excise duty**

(1) A penalty is payable by a person (P) where –

(a) after the excise duty point for any goods which are chargeable with a duty of exercise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(3) Paragraph 5 defines the 'Degrees of culpability' for the purposes of setting the penalty range, whereby the doing of P of an act is '"deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it': para 5(3)(b).

(4) Paragraph 16 relates to 'Assessment', of which the relevant sub-paras state:

'(1) Where P becomes liable for a penalty under any of the paragraphs 1 to 4 HMRC shall –

(a) assess the penalty,
(b) notify P, and
(c) state in the notice the period in respect of which the penalty is assessed.'

'(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with –

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.'

(5) Paragraph 23 headed 'Double jeopardy' states as follows:

'P is not liable to a penalty under any of paragraphs 1 to 4 in respect of a failure or action in respect of which P has been convicted of an offence.'

THE FACTS

Background

9. The appellant trades as Blue Devil Lofts, which a business that sells supplies for the activity of keeping pigeons, such as pigeon food, medications, vitamins and loft supplies.

10. On 23 October 2015, HMRC officers (Taylor and Boyle) visited the appellant's business premises, at 47A Derryvaren Road, Coalisland, Dungannon. The inspection visit led to two separate appeal proceedings in front of this Tribunal:

(1) TC/2017/01207 relates to the duty assessments and penalty notice which are the subject matter of the present appeal.

(2) TC/2017/01215 was in relation to the respondents' decision to raise an excise duty assessment in the sum of £12,084, following a seizure of alcohol, cigarettes and tobacco from the appellant's premises.

11. The second appeal (TC/2017/01215) was subsequently closed following the conclusion of criminal proceedings at Magistrates' Courts in Northern Ireland.

Visit to business premises

12. On 23 October 2015 when the Road Fuel Testing Unit ('RFTU') visited the appellant's premises, Mr McLaughlin was not present, but his wife, Mrs Siobhan McLauglin was. Fuel tests were carried out on the running tanks of 4 vehicles on the premises, with registration numbers being V761 LHP (Ford Transit), WLZ 1429 (VW Crafter), RHZ 7386 (Mercedes Sprinter) and KJI 1600 (Citroen Berlingo).

13. The Ford Transit van V761 LHP was found to contain 2 Intermediate Bulk Containers ('IBC'), one of which held 500 litres of diesel. Fuel samples taken from the diesel in the IBC showed the presence of coloured marker used to indicate UK rebated fuel. The Ford Transit van, together with items found in the van: the 2 IBCs, 500 litres of diesel, a meter pump, hosing and nozzle, and 8 bags of 15kg each of bleached Earth, were seized under s 139(6) CEMA.

14. On 26 October 2015, and in relation to the Ford Transit V761 LHP seized, the appellant was sent a Notice of Seizure, and he did not challenge the seizure. The vehicle and goods were duly condemned as forfeited to the Crown in accordance with Schedule 3 of the CEMA 1979.

15. The following facts are in relation to the Mercedes Sprinter RHZ 7386, the running tank of which tested positive for Euromarker, an indicator for ROI rebated fuel. Mrs McLaughlin was interviewed under caution in relation to this vehicle. She confirmed that:

(1) she was the owner of the vehicle and had owned it for about one and a half year;

(2) the vehicle was for 'business use';

(3) she bought her diesel in Southern Ireland; no fuel receipts or records maintained.

(4) she knew the difference between 'red' and 'white' diesel, and that it was an offence to have red diesel in the running tank of the vehicle.

(5) all vehicles on site were registered in her name, and she was not involved in any other business.

16. Mrs McLaughlin accepted responsibility of the red diesel being present in the running tank of Mercedes Sprinter. The vehicle was seized and restored to Mrs McLaughlin for a fee of £540. She was issued with ENF156-seizure information notice, schedule, warning letter and a receipt for the payment of £540.

Test results of samples

17. Fuel samples from the running tanks of the four vehicles, as well as the fuel from the IBC, were sent to the laboratory of the Government Chemist for testing. It was confirmed that the Ford Transit, the VW Crafter, and the Citroen Berlingo, (and the fuel drawn from the IBC) all tested positive for UK laundered rebated gas oil. The sample of fuel taken from the Mercedes Sprinter RHZ 7386 tested positive for UK and ROI rebated oil.

Correspondence prior to assessments

18. The chronology of correspondence charting the information request for a road fuel audit that resulted in the assessments to excise duty and penalty under appeal is as follows.

(1) On 11 January 2016, Office Beatty notified the appellant that the respondents intended to carry out a road fuel audit of the appellant's business and requested that information and records be supplied. The potential imposition of a penalty was also notified, and HMRC Factsheets 1d, 9 and 12 were enclosed. A response was requested by 8 February 2016.

(2) There was no response from the appellant. On 3 June 2016, Officer Beatty wrote to both the appellant and his wife, reiterating his request for information and documents for a road fuel audit, and a response by 3 July 2016.

(3) On 3 October 2016, HMRC issued their pre-assessment letter to the appellant, which advised that since there had been no response to the letter of 11 January 2016, an estimate of the excise duty had been made based on the information held by HMRC. An Excise Duty Schedule, Penalty Explanation Sheet, and Factsheet 12 were enclosed. It was requested that any relevant information be provided by 24 October 2016.

The Assessments

19. On 17 November 2016, with no response from the appellant and/or his wife, the Excise Duty Assessments were issued.

(1) Assessment EXA/00887/16 for £5,464 was raised for the following vehicles:

(a) V761 LHP Ford Transit for period 02/12/2014 to 22/10/2015; 324 days at 60km per day; total 1,613.52 litres (on the model running at 8.3litres/100km);

(b) WLZ 1429 VW Crafter for period 18/11/2012 to 22/10/2015; 1,068 days at 60km per day; total 6,472.08 litres (on model running at 10.1litres/100km);

(c) KJI 1600 Citroen Berlingo for period 18/11/2012 to 22/10/2015; 1,068 days at 60km per day; total 3,588.48 litres (on model running at 5.6litres/100km);

(d) Total number of litres required for the 3 vehicles is 11,674;

(e) Duty rate applicable (i.e. full duty rate less rebated rate for diesel) for the period is £0.4681 per litre, multiply by 11,674 litres to arrive at £5,464.

(2) Assessment EXA/00888/16 was issued for £1,125 in relation to the fourth vehicle:

(a) RHZ 7387 Mercedes Sprinter for period 02/07/2014 to 22/10/2015; 477 days at 60km per day; total 2,404.08 litres (on model running at 8.4litres/100km);

(b) Total number of litres required for the period is 2,404;

(c) Duty rate applicable is £0.4681 per litre, multiplied by 2,404 litres to arrive at £1,125.

20. On 22 November 2016, the appellant was issued an excise wrongdoing penalty notice in the sum of £3,824.80, accompanied by a penalty explanation and schedule. The letter advised that any further relevant information the appellant wished to be taken into consideration was to be provided by 19 December 2016.

Review and appeal

21. The appellant requested a review of the assessments by letter dated 13 December 2016. HMRC issued their Review Decision dated 25 January 2017, upholding the assessments.

22. On 30 January 2017, the appellant submitted a Notice of Appeal to the Tribunal.

Procedural history of the 'closed' appeal

23. As noted above, the visit by the RFTU at the appellant's premises on 23 October 2015 resulted in two appeals being lodged by the appellant. Apart from the duty assessments and penalty notice that form the subject matter of the present appeal, the appellant was also issued with an excise duty assessment in the sum of £12,084, following a seizure of alcohol, cigarettes, tobacco and the Intermediate Bulk Container ('IBC') containing 500 litres of 'red' diesel from the appellant's premises on 23 October 2016.

24. The appeal TC/2017/01215 was in relation to this excise duty assessment of £12,084.

Stay of appeal behind criminal proceedings

25. On application by the appellant, and with the consent of the respondents by notice dated 15 May 2017, those appeal proceedings were stayed pending the outcome of separate criminal proceedings involving the appellant in relation to the seized goods: alcohol, tobacco, cigarettes, and IBC containing 500 litres of rebated fuel found in the transit van.

26. The Bill of Indictment was issued to Mr McLaughlin on 6 April 2017 by the Magistrates' Court in Northern Ireland with seven counts of complaints made on 23 February 2017. The first 5 counts were in relation to the event on 23 October 2015:

> 'Whereas complaints were made on 23rd day of February 2017 that you
>
> 1. on the 23rd day of October 2015 were in relation to certain goods namely tobacco products. …

2. on the 23rd day of October 2015 were in relation to certain goods namely hydrocarbon fuel knowingly concerned in the fraudulent evasion of the duty chargeable on the said goods, contrary to Section 170(2)(a) of the Customs and Excise Management Act 1979. …

3. on the 23rd day of October 2015 were in relation to certain goods namely alcohol products. …

4. on the 23rd day of October 2015 had possession of criminal property, namely £11938.77 contrary to section 329(1)(c) of the Proceeds of Crime Act 2002.…

5. on the 23rd day of October 2015 had possession of criminal property, 6304.07 Euros contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. …'

27. The last two counts on the Bill of Indictment were in relation to a different incident of seizure of goods on 13 April 2016 with Mr McLaughlin being 'knowingly concerned in the fraudulent evasion of duty chargeable' on alcoholic (count 6) and tobacco (count 7) products.

28. On 27 June 2017, Mr McLaughlin was arraigned and pleaded not guilty to all 7 counts. On 9 October 2017, Mr McLaughlin was re-arraigned and pleaded guilty to all 7 counts.

29. Consequent on Mr McLaughlin's conviction on 9 October 2017, the Certificate of Order/Conviction was handed down by the Crown Court at Dungannon on 6 November 2017. A monetary penalty in the form of a Compensation Order was made in the sum of £13,703 to be paid by 4 December 2017.

30. Mr McLaughlin as Defendant in the criminal proceedings was granted continuing bail, and a criminal hearing on 14 November 2017 delivered the sentences, being: (i) 18-month imprisonment for Count 1, suspended for 3 years, (ii) 18-month imprisonment for Count 2 to 7 (inclusive), to be concurrent with Count 1, and suspended for 3 years.

New pleadings for the present appeal

31. On the expiry of the stay, HMRC applied for further and better particulars of the appellant's grounds of appeal, which were lodged on behalf of the appellant on 16 March 2018 stating as follows:

> 'The Appellant states that he is not liable for the present assessments given that the duty which arose in this matter was expressly made the subject of a Confiscation Order during the Crown Court proceedings which ran parallel with this assessment. HMRC had argued successfully before the Crown Court to have the duty which arose, and which is also the subject of these assessments, to be deemed the benefit of Mr McLaughlin's unlawful conduct.
>
> This Confiscation Order was satisfied on 6 November 2017 …
>
> Therefore, pursuit of these assessments by HMRC would constitute double recovery of the tax herein and would further be an abuse of process of this Tribunal.'

32. On 9 October 2018, the respondents replied to the appellant's Particulars as follows:

(1) The excise duty assessment (TC/2017/01215) in the sum of £12,084 was in relation to a seizure of alcohol, cigarettes and tobacco from the appellant's premises. The respondents conceded that the appellant has paid the due amount by way of the compensation order, and invited the appellant to withdraw his appeal to dispose of the proceedings.

(2) In relation to the matters under appeal TC/2017/01207, HMRC do not agree that the debt has been satisfied at the criminal hearing of 14 November 2017 for the reason:

> 'HMRC have assessed for the period of 18 November 2012 to 22 October 2015, and this period does not include the seizure date of 23 October 2015. HMRC contend that the amount of the assessment and penalty has not been satisfied and remains outstanding.'

Second notice of further and better particulars

33. By letter dated 4 March 2019, the Tribunal advised the closure of the appeal TC/2017/01215, following the parties' agreement that the excise duty assessment in dispute had been paid by way of compensation order, and that there was no other point in dispute.

34. As to the appeal TC/2017/01207, the Tribunal advised of the grant of hardship, and that the appellant, having confirmed his wish to proceed with this appeal, should provide within 21 days further and better particulars for his grounds of appeal, to be followed by the respondents' Statement of Case within 60 days afterwards.

35. On 21 May 2019, the appellant's representative as directed provided a 'Second Notice of Further and Better Particulars' (dated on the face of it 7 April 2019), which states as follows:

> 'The Appellant states that in relation to this assessment Vehicle Registration V761 LPH and Vehicle Registration WLZ 1429 were subject to statutory off road notices during the assessment period and were off the road. In relation to Vehicle KJI 1600 that the Appellant is not the owner of this vehicle.'

36. On 17 June 2019, the appellant's representative provided documentary evidence to show vehicle V761 LPH was off the road from 28 March 2015.

37. By letter dated 9 July 2019, HMRC responded to the Second Particulars and the Statutory Off-Road Notice ('SORN') as follows.

(1) Assessment-887 was amended from £5,464 to £4,981 to take account of the SORN for Vehicle V761 LPH for part of the audit period assessed.

(2) No amendment was made to Vehicle WLZ 1429 as no documentary evidence of SORN was provided.

(3) No amendment was made in relation to Vehicle KJI 1600 as HMRC are of the view that ownership of the vehicle is not a relevant consideration for imposing liability under s 13 HODA, as the person liable to pay the duty is a person who uses the oil.

38. On 15 July 2019, and in relation to the wrongdoing penalty, HMRC wrote to the appellant's representative advising of the intention to issue an excise wrongdoing penalty in the sum of £3,486.70, and invited any further information to be provided by 14 August 2019.

39. Following a stay, on 2 September 2019, the appellant provided DVLA documentation for the other vehicles, which shows:

(1) For Ford Transit V761 LHP – the appellant is shown as the registered keeper from 2 December 2014; (the assessment has been amended to reflect the period of SORN from 28 March 2015).

(2) For Citroen Berlingo KJI 1600 and VW Crafter WLZ 1429 – according to DVLA, the appellant has not been shown as the registered keeper of the vehicle to date, and it was asserted that the appellant had never used this vehicle since he was not the owner.

HMRC's written representations

40. On 30 September 2019, the Tribunal wrote to the respondents directing that they provide written representations in regard to the appellant's correspondence of 2 September 2019.

41. On 16 October 2019, HMRC lodged their Written Representations, itemising the SORN and DVLA documents in relation to the three vehicles that had been considered in turn. It is the respondents' view that 'all the vehicles were used in the Appellant's business therefore it is the Appellant who is liable for the debt' pursuant to s 13 of HODA.

Wrongdoing penalty notice

42. On 14 November 2019, HMRC issued the wrongdoing penalty notice in the sum of £3,486.70, revised according to the new Potential Lost Revenue ('PLR') on Assessment-887.

43. The Penalty Explanation provides the relevant details in relation to the quantum:

(1) The behaviour was 'deliberate' as a result of four vehicles and one fuel container tested and found to contain laundered rebated fuels.

(2) The disclosure was 'prompted' on account of the fuel inspection visit.

(3) The relevant penalty range set by the statute is 35% to 70%.

(4) No response to information requests to notify HMRC of any mitigating factors.

(5) The penalty percentage is therefore set at 70%.

The appellant's evidence

44. We make no finding of fact from Mr McLaughlin's evidence, given that we do not find him a reliable or credible witness. His evidence is summarised below for record purposes only.

(1) That he had provided proofs that vehicle V761LHP was subject to SORN 'during the assessment period and was not using fuel of any type during this period'.

(2) He was never the registered keeper of vehicle WLZ1429, which was parked on his premises on 23 October 2015, but not a vehicle used in his business.

(3) He was never the registered keeper of vehicle KJI1600.

(4) Any attempt to portray that I did not respond to HMRC's correspondence should be viewed in the context that the legal advice he received was not to engage with the enquiries until the criminal proceedings were concluded.

(5) All of the offences on 23 October 2015 and 13 April 2016 were fully paid under the terms of the compensation order.

THE APPELLANT'S CASE

45. Mr McNamee's submissions for the appellant are on the following grounds:

(1) 'on a very general basis, the compensation order covers everything';

(2) the penalty cannot be raised due to 'statutory exclusion' under para 23 Sch 41;

(3) that the vehicles V761LPH and WLZ1429 were off the road, and the appellant is not the owner of vehicles KJI 1600 and WLZ 1429.

46. In relation to the first ground, Mr McNamee avers that the appellant was charged with the offence at Count 2 on the Bill of Indictment in relation to 'hydrocarbon fuel' under s170(2)(a) of CEMA, and that the compensation order was in relation to the 'entirety of his offending'. Mr McNamee submits that 'this subsisting assessment and penalty in relation hydrocarbon oil was encompassed within the charges faced by the appellant and which duty assessments were covered by the compensation order', and:

> 'For the sake of clarity, the Appellants [sic] position is that the compensation order … related to all the Appellants [sic] wrongdoing as set out in the certificate of conviction…'

47. Secondly, and without prejudice to the first ground of appeal, Mr McNamee submits that the appellant cannot be liable for the assessments and penalty for the following reasons:

(1) The presence of the vehicles on the appellant's premises does not indicate that he was using the vehicles for the purpose of his business. The charges faced by the appellant were premised on his having supplied 'laundered fuel' to individuals who attended his premises for this purpose. The presence of these vehicles containing laundered fuel was consistent with his having supplied the fuel for such vehicles, and not consistent with his having used these vehicles for business purpose.

(2) The appellant's case in this regard is supported by the fact that almost without exception these vehicles were not registered to the appellant or his business.

(3) The penalty is not lawfully raised due to double jeopardy under para 23 Sch 41 FA 2008. The wrongdoing to misuse of hydrocarbon oil was dealt with by criminal charge in relation to the items found on 23 October 2015, and this penalty constitutes double jeopardy, and the appellant cannot be liable for the penalty.

HMRC'S CASE

48. HMRC do not dispute that the appellant did request to pay an amount proffered £13,703 at the hearing of the criminal matters on 14 November 2017. However, the order was made by way of a Compensation Order and not a confiscation order. This amount was offered by the appellant as payment for the duty evaded for the goods seized from the appellant's premises on 23 October 2015. HMRC submit therefore that there was no 'double taxation'.

49. As regards the DVLA documentation, HMRC submit that the only relevant SORN document has been taken into account to reduce the duty assessment, and ownership of a vehicle is not relevant to the legal test as to whether a s 13(1A) assessment can be raised.

50. In relation to the penalty assessment, Ms Brown submits that the penalty is calculated as a percentage based on the PLR, which was in turn based on information held by HMRC as the appellant did not provide any relevant information in response to the respondents' letter of 11 January 2016, such as mileage readings, or documentation to suggest that legitimate fuel was purchased. When information was produced in June 2019, the penalty was reduced in line with the amended assessment. The respondents submit that the underlying calculations are correct.

51. The behaviour associated with the penalty is 'deliberate' with a 'prompted' disclosure. The reasoning is set out in the Penalty Explanation and the Review Conclusion. In summary, the rebated fuel was in the running tanks of the vehicles that were used in the business. Mrs McLaughlin confirmed her awareness of the difference between 'red' and 'white' diesel and there was red diesel in the tank of vehicle RHZ 7386. Consequently, it is submitted that on the balance of probabilities, the appellant was aware that the tanks contained rebated fuel and that this was an offence. The disclosure was prompted following an unprompted visit from the RFTU, and not as a result of any contact from the appellant.

52. The behaviour was deliberate, and there is no need to consider whether there was a reasonable excuse. Further, no special circumstances have been put forward and, in any event, the respondents do not consider that any are applicable.

53. No mitigation has been applied as the appellant failed to respond to requests for information. The appellant asserts in his witness statement that this was due to the ongoing criminal proceedings and legal advice not to engage with the civil proceedings stayed behind

the criminal proceedings. However, it is HMRC's view that the criminal proceedings were unrelated to the matters currently under appeal, and there was no reason why the appellant did not co-operate with the respondents.

54. In any event, no mention was made of the advice not to engage with the information request until the appellant's application to stay dated 20 April 2017, while the criminal proceedings were not initiated until 23 February 2017. HMRC submit that there is no valid reason why the appellant failed to engage and co-operate with the respondents prior to this date, and the mitigation at 0% is fair and reasonable.

DISCUSSION

The issues for determination

55. We determine the appeal in accordance with the grounds put forward for the appellant.

(1) In relation to the duty assessments, the issues for determination are:

(a) Whether the assessments represent 'double taxation';

(b) If not, then whether the appellant is liable for the assessments.

(2) In relation to the wrongdoing penalty, no issue was taken with the quantum of the penalty assessment in the two notices of further and better particulars, and no oral submissions have been made as concerns quantum. The challenge is against the legality of the penalty on the ground of double jeopardy. The issue for determination is therefore whether para 23 Sch 41 FA 2008 as concerns 'double jeopardy' is relevant.

Whether double taxation

56. The appellant contends that the £13,703 he paid following a Compensation Order of the Crown Court in relation to the criminal proceedings was payment of the assessments in dispute in the present appeal. This ground of appeal was first raised in the Further and Better Particulars filed on 16 March 2018, and the burden of proof in this respect rests with the appellant.

57. The facts that are relied upon by the appellant are: (a) the Bill of Indictment, and (b) the Certificate of Order and Conviction. In particular, the appellant relies on Count 2 of the Bill, stating the offence in relation to 'hydrocarbon fuel' to which the appellant had pleaded guilty. It is submitted that the Compensation Order was concerned with all counts of offences inclusive of Count 2. It is asserted that the misuse of rebated oil in road vehicles that gave rise to the Assessments under appeal was an offence that had been brought under Count 2.

58. In relation to the Compensation Order, we make the following findings.

(1) The Compensation Order was consequent on the proceedings following the seizure of excise goods which had evaded duty, and included tobacco, alcohol, and rebated fuel.

(2) As a matter of law, those proceedings were 'criminal' in nature, with the counts of indictment being the '*fraudulent evasion*' of duty under s 170(2)(a) CEMA.

(3) When Mr McLaughlin pleaded guilty on 9 October 2017, for each count of indictment he became '*guilty of an offence*' under s 170(3) CEMA.

(4) The sanction imposable on Mr McLaughlin was pursuant to s 170(3)(b), whereby '*on conviction on indictment*', the sanction imposable is either a momentary penalty, or imprisonment, or both. The Compensation Order was the monetary penalty, and his 18-month prison sentence was suspended for 3 years.

(5) As a matter of fact, the rebated fuel being concerned in the criminal proceedings was the 500l red diesel in the IBC that was removed from the appellant's premises on 23

October 2015. Insofar as the Compensation Order was concerned with the fraudulent evasion of duty in relation to rebated fuel, it was limited to the 500l red diesel.

(6) The 500l red diesel in the IBC was liable to forfeiture pursuant to s 170(6) CEMA.

(7) The Compensation Order was a criminal sanction, and *specific* to the items of goods that had been seized as particularised under each count of indictment.

59. Insofar as the Compensation Order was related to proceedings in front of this Tribunal, it was limited to the appeal TC/2017/01215 in relation to the excise duty assessment of £12,084. That duty assessment was raised specific to the same goods itemised under the Bill of Indictment, including the 500l red diesel seized on 23 October 2015. The duty assessment for £12,084 was treated by HMRC as having been satisfied by the Compensation Order, and the tribunal appeal proceedings in relation to the £12,084 assessment were disposed of.

60. The Excise Duty Assessments remain under appeal are pursuant to s 12(2) of HODA for misuse of rebated oil for road vehicles. These outstanding Assessments are unrelated to the criminal proceedings where the five counts of charges as concerns seized excise goods were under s 170(2)(a) CEMA; (two counts were under s 329(1)(c) of the Proceeds of Crime Act).

61. Section 170(2) CEMA specifically states that a charge under s170 CEMA for fraudulent evasion of duty is *'[w]ithout prejudice to any other provision of the Customs and Excise Acts 1979*', and s 1 of CEMA defines 'Customs and Excise Acts 1979' to include the Hydrocarbon Oil Duties Act 1979. The statute therefore provides that a charge under s 170(2) CEMA does not preclude any other provision of the Customs and Excise Acts 1979 to be operative.

62. The Assessments under appeal have been made pursuant to s 13(1A) of HODA based on HMRC's view that the appellant had been using rebated oil in road vehicles in contravention to s 12(2) of HODA. The appellant's right of appeal to this Tribunal is provided under s 16(1B) of the Finance Act 1994 ('FA 1994'), which sets out the Tribunal's jurisdiction in relation to an appeal against a 'relevant decision' as defined by s 13A FA 1994, which includes an assessment under s 13 HODA as specified under s13A(2)(c) of FA 1994.

63. As a matter of law, the Assessments under s 13(1A) HODA are not inhibited by Mr McLaughlin's payment of the Compensation Order following his conviction in the criminal proceedings. The very fact that Mr McLaughlin has the right of appeal under s 16(1B) FA 1994 against these Assessment to this Tribunal is another indication that the appeal proceedings in front of us are separate and distinct from those proceedings brought by the Bill of Indictment.

64. For the reasons stated, we conclude that the Compensation Order was *strictly* in relation to the Excise Duty Assessment raised in the sum of £12,084 under appeal TC/2017/01215. HMRC accepted the Order of £13,703 as 'alternative payment' in satisfaction of the Excise Duty Assessment under TC/2017/01215, and that appeal was closed. We find therefore that there is no 'double taxation' in relation to the Assessments raised under s 13(1A) of HODA which are the subject matter of the current appeal, and we dismiss this ground of appeal.

Assessments to excise duty under HODA

Charging provisions

65. The Assessments under appeal have been raised pursuant to s 13(1A) HODA, following detection of rebated fuel in four road vehicles located on the appellant's premises on 23 October 2015, which was in contravention to s 12(2) HODA[1] that no heavy oil (for home use rebate) shall: (a) be used as fuel for road vehicle; or (b) be taken into a road vehicle as fuel.

[1] It is unclear why HMRC's skeleton argument at paragraph 57 has referred to subsections 12(3)(a) and (b) of HODA 1979, since subsection 12(3) has been repealed by the Finance Act 2008, s 14, Sch 5, paras 1,8.

66. There is a prima facie case of contravention under s 12(2) HODA upon the detection of rebated fuel in the running tank of a vehicle. The appellant does not dispute that rebated fuel was found in the four vehicles with registration numbers V761 HP, WLZ 1429, RHZ 7386, and KJI 1600, all of which were on the appellant's premises.

67. Section 13(1A) permits HMRC to assess for duty arrears, where rebated oil is used in a road vehicle in contravention to s 12(2) HODA. The Assessments under appeal are raised as 'global' assessments, and cover a range of dates, and more than one accounting period. It is HMRC's practice to raise a global assessment when it is not possible to determine either the specific accounting period or duty point at which the liability to duty arose. In the present case, it was not possible to carry out a road fuel audit to determine the duty point at which the liability arose in the absence of information being provided by the appellant.

68. We address the contentions in relation to each vehicle as put forward by the appellant in relation to his liability to duty arrears under s 13(1A), namely:

(1) Vehicles V761 LPH and WLZ 1429 were SORN during the assessment period;

(2) Secondly, the appellant was not the registered owner of KJI 1600 and WLZ 1429.

Vehicle 1: V761 LHP Ford Transit

69. The relevant facts in relation to the Ford Transit van are the following:

(1) DVLA database shows Mr McLaughlin as the registered keeper from 2 December 2014.

(2) On 26 October 2015, Mr McLaughlin was sent a Notice of Seizure in relation to the vehicle, and the IBC found within the van which contained the rebated fuel.

(3) Mr McLaughlin did not challenge the seizure within the time limit of 30-day after the issue of the Notice of Seizure.

70. Where there is no timely challenge of the seizure, the deeming provision under paragraph 5 of Schedule 3 to CEMA automatically applies. The goods seized are deemed as held for commercial use, and duly condemned and forfeited. The duty assessment follows in consequence of the deemed forfeiture.

71. The deeming provision is final: *HMRC v Jones and Jones* [2011] EWCA Civ 824. Once the deeming provision applies, the Tribunal lacks jurisdiction to re-consider the duty assessment: *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) ('*Race'*) at [33].

> 'The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.'

72. Consequently, the Assessment in relation to this vehicle must stand.

73. It is accepted that the vehicle was SORN from 28 March 2015 per DVLA documentation, but that was not for the entire assessment period as asserted by the appellant. The assessment period for the Ford Transit van was from 2 December 2014 to 22 October 2015. HMRC subsequently amended the Assessment-887 to reflect the van being SORN from 28 March 2015 to 22 October 2015, leaving the period (of just less than 4 months) from 2 December 2015 to 27 March 2015 still assessable. HMRC have amended the Assessment by reducing the number of days assessable to excise duty arrears accordingly.

Vehicle 2: WLZ 1429 VW Crafter

74. The appellant asserts that this vehicle was also SORN, but no evidence has been produced to support this assertion. The appellant has not satisfied the burden of proof for any adjustment to be made to the assessment in relation to this vehicle.

75. It has also been asserted in the letter of 2 September 2019, and in the appellant's witness statement, that he was not the registered keeper of the vehicle and he had never used this vehicle. The Tribunal accepts that the vehicle was not registered in the appellant's name, and this is consistent with what Mrs McLaughlin stated when being interviewed under caution, that she was the registered keeper of all vehicles on site, (except for the Ford Transit van).

76. We accord more weight to what Mrs McLaughlin stated to the officers on the day of the inspection visit and field tests. We record that Mrs McLaughlin confirmed that the vehicles on site were being used by the business, (and that she was not involved in any other business). We conclude, that on the balance of probabilities, excise duty arrears are assessable in relation to this vehicle in accordance with what Mrs McLaughlin had stated.

77. Furthermore, s 12(2) HODA provides that *no* rebated fuel shall: (a) 'be used as fuel for a road vehicle', or (b) 'be taken into a road vehicle as fuel'. The provision under s 13(1) then fixes the liability for the arrears duty on a person who 'uses heavy oil in contravention of section 12(2)'. The relevant legal test for s 12(2) purposes concerns *usage* (or misuse) of heavy oil in a road vehicle. The legal test is not referable to the ownership of a vehicle. It is irrelevant for the purposes of this appeal that Mr McLaughlin was not the registered keeper of the vehicle.

78. Mr McLaughlin has not met the burden of proof, that on the balance of probabilities, there had not been misuse of rebated oil in this vehicle by his business, for us to override what Mrs McLaughlin had stated when interviewed. We dismiss this ground of appeal.

Vehicle 3: KJI 1600 Citroen Berlingo

79. Mrs McLaughlin confirmed in her interview under caution that she was the registered keeper of this vehicle, which was used in the appellant's business. The appellant's contention that he cannot be liable for the assessment of duty arrears because he was not the owner of the vehicle is dismissed for the same reasons as those applicable to the VW Crafter.

Vehicle 4: RHZ 7386 Mercedes Sprinter

80. The vehicle was seized and then restored to Mrs McLaughlin on the payment of £540, and the payment was unrelated to the duty arrears being assessed under s 13(1A) HODA. Similarly, Mrs McLaughlin confirmed in her interview under caution that she was the registered keeper of this vehicle, which was used in the appellant's business.

81. We dismiss the appellant's contention that he cannot be liable since he was not the owner of the vehicle for the same reasons as related above.

Wrongdoing Penalty

82. The appellant's right of appeal against the penalty is provided under para 17 of Sch 41 to FA 2008. Paragraph 18 of Sch 41 provides for that appeal to be treated in the same way as an appeal against an assessment to the tax concerned. Therefore, the Tribunal's powers on appeal against a Sch 41 penalty is under s16 FA 2004, as with Tribunal's powers against the Excise Duty Assessments.

The penalty assessment

83. The penalty was imposed under para 3 of Sch 41 FA 2008, which provides that a penalty is payable where someone 'does an act which enables HMRC to assess an amount as duty due' under various provisions, including s 13(1A) of HODA.

84. The penalty is determined by reference to a sliding scale of culpability (para 5(3)): 'deliberate and concealed acts' at 100%; 'deliberate and not concealed acts' at 70%, and all others at 30%. The appellant's behaviour was assessed to be 'deliberate but not concealed', with disclosure being 'prompted'. The amount of penalty is specified under para 6B of Sch 41 by reference to a percentage and the relevant PLR, which is the subject of the assessment under s 13(1A) of HODA. The penalty range is set by the statute, with the maximum penalty being 70% and the minimum being 35%. No mitigation was given for 'helping', 'telling' and 'giving'. The penalty percentage of 70% is applied to the Potential Lost Revenue ('PLR') of £5,464 to arrive at the penalty of £3,824.80.

85. It is noted that HMRC have assessed the penalty only with reference to the PLR arising from the Excise Duty Assessment-887, and not the combined PLR of the two assessments. The PLR could have been inclusive of the Assessment-888 of £1,125. The PLR was amended to £4,981 to take into account the period of SORN in relation to the Ford Transit van, and the penalty was reduced accordingly to £3,486.70.

86. We accept Ms Brown's submissions on the setting of the penalty percentage at 70% and why no mitigation has been given. The appellant does not dispute the quantification of the penalty; the appellant challenges the legality of the penalty.

Double jeopardy challenge

87. The appellant contends that the penalty is in breach of para 23 Sch 41, which provides that a person 'is not liable to a penalty under any of paragraphs 1 to 4 in respect of a failure or action in respect of which [the person] has been convicted of an offence'.

88. To a certain extent, the challenge of double jeopardy as concerns the penalty would seem to be staked on the 'double taxation' argument as regards the Excise Duty Assessments having been fully satisfied by the Compensation Order. For the same reasons as those we have stated in relation to the 'double taxation' argument, there is no connection between the penalty assessed under para 3 Sch 41 FA 2008 in the present appeal, and the conviction of Mr McLaughlin for offences under s 170(2)(a) of CEMA in the criminal proceedings.

89. The criminal proceedings were concerned with 'fraudulent evasion of duty' on those goods seized, of which the hydrocarbon oil was a reference to the 500 litres red diesel found in the IBC. The Sch 41 penalty is not in respect of a failure to declare duty on the 500 litres red diesel – it is not the same failure in respect of which Mr McLaughlin was convicted on Count 2 of the Bill of Indictment. The wrongdoing penalty is in relation to the misuse of the rebated oil in road vehicles, based on the PLR as concerns duty *arrears* pursuant to s 13(1A) of HODA. Consequently, para 23 of Sch 41 is not engaged in relation to the penalty under appeal of £3,486.70.

90. Nor can it be argued that the Compensation Order was the 'penalty' in satisfaction of all wrongdoing in relation to the evasion of duty, including the arrears duty prior 23 October 2015. There is no factual basis for such an assertion. We find as a fact that the Compensation Order represented the alternative payment in satisfaction of the excise duty assessment of £12,084 under appeal TC/2017/01215. We conclude therefore that double jeopardy is not in point in relation to the penalty of £3,486.70. The *time period* with which this penalty under appeal is concerned is different from the temporal point with which the criminal proceedings were concerned. The wrongdoing penalty is consequent upon the Assessment-887 pursuant to s13(1A) HODA for the assessable period *prior* to the inspection visit on 23 October 2015 for arrears duty on the misuse of rebated oil, and is not in any way connected with the offence under Count 2 upon the seizure of the 500 litres red diesel on 23 October 2015 for which Mr McLaughlin was convicted.

DISPOSITION

91. The appeal is accordingly dismissed. The Excise Duty Assessments for £4,981 and £1,125 are confirmed. The Wrongdoing Penalty in the sum of £3,486.70 is also confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

92. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 03 DECEMEBER 2021