TC03558

Appeal number: TC/2013/04034

Hydrocarbons Oil Duty*; s.13(1)(A) Hydrocarbon Oils Duties Act 1979 (HODA); use of marked gas oil; application to strike out appeal out of time; whether evidence adduced was "prima facie cogent" or otherwise sufficient to allow appeal to proceed: no; appeal struck out*

FIRST-TIER TRIBUNAL
TAX CHAMBER

GERARD MCILROY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR DAVID MOORE

Sitting in Belfast on 30 April 2014

Mr Danny McNamee of McNamee McDonnell Duffy, Solicitors LLP for the Appellant

Ms Sharon Spence, Case Presentation Officer for the Respondents

DECISION

The Appeal

1. The Appellant opposes the Respondents' application dated 24 July 2013 to strike out the Appellant's appeal against a decision to assess duty payable by him in respect of the use of marked gas oil under the provisions of section 13 (1)(A) of the Hydrocarbons Oils Duty Act 1979 in the sum of £13,526.69. The date of the assessment was 6 January 2012. The appeal was notified to the tribunal in a Notice of Appeal dated 11 June 2013

The Respondents' case

2. Mr McIlroy was detected misusing marked gas oil on 8 February 2011 when a vehicle was seized as he was carrying out non exempt work on a public road. The vehicle was a tractor which bore the registration number EKZ 3422.

3. The Respondents wrote to Mr McIlroy on 18 April 2011 advising that a road fuel audit was to be undertaken in relation to Mr McIlroy's business. He was asked for information about his business and usage of gas oil to be provided by 27 April 2011. He was warned of the possibility of a liability to an assessment and penalty but there was no reply to this letter.

4. A further letter was sent to Mr McIlroy on 6 May 2011 asking for the requested information. Again there was no response.

5. Yet further letters were sent on 26 September 2011 and 13 October 2011, again with no response.

6. Notice of intention to assess for duty on fuel in the sum of £13,526.69 based on the Respondents' best judgement was sent to Mr McIlroy on 27 October 2011. A schedule of the calculations was provided.

7. Concerned at the complete absence of response by Mr McIlroy, a member of the Respondents' staff telephoned Mr McIlroy's home to speak directly with him. He was not available at that time but the staff member was able to speak with Mr McIlroy's Mother who said that she did some bookkeeping for her son and that she knew that he had seen the letters issued by HMRC. Mr McIlroy's Mother agreed to pass on to her son the message that he should contact HMRC to discuss the matter and provide information relating to the audit.

8. On 6 January 2012 the assessment was issued to Mr McIlroy.

9. Demands for payment followed on 7 February 2012 and 6 June 2012. There was no response to either. Further abortive attempts to contact Mr McIlroy by telephone were made on 7 February 2012 and 21 February 2012.

10. On 6 June 2013 contact was made by telephone with Mr McIlroy's Mother who gave out her son's mobile number.

11. Contact was finally made with Mr McIlroy on 11 June 2013 when he advised that an appeal had been made and the debt was not due.

12. Mr McIlroy's Notice of Appeal prepared and served by his solicitor is dated 11 June 2013. The grounds for the lateness of the appeal are stated thus:

> "The Appellant was unaware that he had a right to appeal until he received legal advice from this office. Upon this advice the Appellant instructed that we appeal the assessment"

13. On 24 July 2013 the Respondents made application to the tribunal to have the appeal struck out. The stated grounds for the application were as follows:

> "The grounds for this application are that a letter warning that an assessment would be issued was sent to the Appellant on 27 October 2011 but no review of the decision was requested by the Appellant within the time scale and the only time the Commissioners were made aware of any dispute against the decision is when they received notice of the appeal which was not lodged with the Tribunal until 11th June 2013"

The Appellant's case

14. On behalf of Mr McIlroy, Mr McNamee made a number of points.

15. The tribunal was first asked to look at 2 letters which appeared in the Appellant's bundle at pages 11 and 12.

16. The letter at page 11 was said to be from a Mr Graham Ross of a firm called G & G Ross mobile stone crushing. The substance of that letter which was undated and addressed "To Whom It May Concern" read as follows:

> " Gerard McIlroy on 8th of February 2011 was asked to sweep the Main entrance of the quarry at the above address [an address in Ballycastle, Co Antrim]
>
> There had been a high level of complaint from passersby and the DOE had officially requested immediate action.
>
> No contractor was available, so Mr McIlroy being the quarry's nearest neighbour was asked as a favour if he could brush the road. The DOE felt an accident was likely.

Under duress Mr McIlroy offered to clean the debris off the road as a one off procedure.

Yours sincerely,"

17. The letter at page 2 was again addressed "TO WHOM IT MAY CONCERN"(sic). It was dated 28 February 2012 and was apparently from a company called Hunter Kane & Son, a firm of agricultural engineers, again in Ballycastle. The letter is headed "Re Sean and Gerard McIlroy" It reads as follows:

" We verify that we bought two tractors from the above customer on the following dates:

SAME SILVER 130A REGISTRATION NO MKZ 3675
31/08/04

£28,500 plus VAT

SAME IRON 150 REGISTRATIONS NO NKZ 2844
23/06/08

£21,000 plus VAT

Yours faithfully

[Signed: Anne Donnelly]

For Hunter Kane & Son"

18. The letter from Mr Ross, said Mr McNamee, provided prima facie cogent evidence supporting his client's case that he had been detected on the single occasion he had undertaken this work as a favour for a neighbour for the purpose of avoiding an accident due to debris on the road.

19. The second letter from Hunter Kane & Son was also, said Mr McNamee, very relevant as it indicated that at the time of the detection (8 February 2011) Mr McIlroy had disposed of two of the tractors which had been included in HMRC's assessment sought to be appealed. The assessment must necessarily overstate the Appellant's liability.

20. To ignore these letters would, said Mr McNamee, do an injustice to Mr McIlroy who would have to pay a substantial amount which he did not owe. As a result of the incident Mr McIlroy had been subject to a £500 penalty in order to secure the return

of his vehicle: he had thought that that was the end of the matter. That is why he did not respond to the letters and contacts made by HMRC.

21. Mr McNamee said that his client had in fact had some contact with HMRC after the incident and that he thought that the matter had been concluded. It was only when the HMRC letter of 6 June 2013 had been received that Mr McIlroy realised that he was being asked to pay duty for which he was not liable that he contacted Mr McNamee's office for advice.

22. In all the circumstances, said Mr McNamee, and in fairness to both Mr McIlroy and HMRC, where there appeared to be prima facie evidence questioning the circumstances of the charge to duty it would not be fair to refuse the Appellant his right of appeal.

Mr McIlroy's evidence

23. Mr McIlroy briefly gave sworn evidence to the tribunal.

24. Asked by Mr McNamee to explain why he had not lodged his appeal within the month of the assessment Mr McIlroy said

"I thought that it was a genuine favour that I had done. I had paid the fine. I just thought it would go away"

25. Mr McNamee produced a single sheet handwritten note written, we were told, by Mr McIlroy's girlfriend on which appeared details of the tractor Mr McIlroy says he was using at the time of the incident together with other information as to diesel usage. The note was undated. This note was, said Mr McIlroy, given by him to HMRC. He was however unable to say to whom or when the note was supplied although he thought that he might have something at home which could cast light on this. Asked by Ms Spence to where he had delivered the note, Mr McIlroy thought it was to an office in the docks area. Ms Spence said that the Customs House, which was the relevant office, was located in the city centre.

26. The tribunal asked Mr McIlroy about the letter from Hunter Kane & Son. This appeared to indicate that the vehicle Reg no: MKZ 3675, which HMRC had noted as having been purchased on 20 May 2004, was sold only just over 3 months later. The tribunal expressed some surprise that a vehicle would be sold so shortly after its purchase. Mr McIlroy said that he had bought the vehicle brand new but that it was faulty so he sold it.

27. Ms Spence stated that enquiries had been made of the vehicle licensing authority in Northern Ireland and there was no record of either vehicle having been transferred to another party. Mr McNamee suggested that this might well depend on how the records were interrogated. Ms Spence said that prints had been obtained in September 2011 which in the normal way would be expected to show any change in ownership of the vehicles concerned. No disposal date for either vehicle was recorded.

The tribunal's consideration of this application

28. It had been readily conceded by Mr McNamee that the appeal was late. Mr McIlroy had had 28 days from the date of the assessment (6 January 2012) in which to appeal. His Notice of Appeal dated 11 June 2013 was therefore almost 17 months late.

29. The reason given by Mr McIlroy as to why he was late in appealing was to the effect that he thought the matter had been dealt with after the £500 penalty had been imposed.

30. The tribunal cannot accept that this represents a reasonable explanation for the delay. The considerable number of letters and telephone calls made by HMRC to Mr McIlroy must have alerted him to the need to deal with the matter. Mr McIlroy cannot claim to be a novice in such matters. Although unrelated to the instant episode and the consequent assessment, Mr McIlroy had previously been found to be using marked gas oil in contravention of HODA in 2008.

31. Slightly more plausible might have been the claim that throughout the period Mr McIlroy was in touch with representatives from HMRC so that he might have considered the matter effectively dealt with by reason of this fact. That claim fails on two counts. First Ms Spence submitted that HMRC had had no contact from Mr McIlroy save only as indicated above. Nothing was known about the submission of the handwritten note claimed by Mr McIlroy to have been delivered to HMRC. Secondly Mr McIlroy himself was unable to provide any evidence as to whom the document was given or at which office it was deposited. He gave no indication of any further contact with HMRC other than to refer vaguely to some telephone contact but again no details were provided. We find that there was no effective contact with HMRC such as Mr McIlroy has claimed to be the case.

32. On the evidence before it the tribunal can only conclude that Mr McIlroy simply chose to ignore the assessment until proposed enforcement procedures made that course of action impossible. Then, and only then, did he take the matter seriously and approach his solicitor for advice.

33. There is power in the submission made by Mr McNamee that it would be unjust to refuse to allow an appeal out of time, even considerably out of time, if there was prima facie evidence which could be characterised as cogent and which indicated that the basis of the assessment was simply wrong. Mr McNamee contended quite forcefully that this was the case. The two letters, he said, provided a proper basis for the refusal of the Respondents' application to strike out the appeal. Mr McNamee further contended that even if the tribunal had concerns about the two letters which had been produced these were matters which could still be challenged at a substantive hearing of the appeal. If necessary, further investigations and enquiries could be made before a full hearing of the appeal as to the substance of the letters. What was important was that the letters provided a proper basis for rejecting the present

application as they constituted "prima facie and cogent" evidence of a possible injustice having been done to Mr McIlroy.

34. The tribunal rejects these arguments on the particular facts of this matter. It does not accept that the letters do constitute prima facie cogent evidence of such a nature as to suggest an injustice to Mr McIlroy.

35. The letter from Graham Ross says little more than that Mr McIlroy was asked to sweep the drive following complaints about the hazard and did so "under duress" as a "one off procedure". It may be that this was, as Mr Ross states, a "one off procedure" so far as he was concerned but without more he cannot say and does not state that Mr McIlroy had never used his tractor with marked gas oil on other occasions. This letter is not therefore probative of facts which might suggest that the basis of the assessment was incorrect.

36. The letter from Hunter Kane & Son addresses the important matter of ownership of the vehicles the subject of the assessment. The tribunal has considerable reservations concerning this letter. First its contents are rejected by HMRC on the basis of a search of the relevant records maintained by the proper authority dealing with vehicle registration and licensing in Northern Ireland. Apart from the somewhat adventurous suggestion by Mr McNamee that the system may not have been correctly interrogated there was no plausible explanation for this apparent conflict of evidence.

37. Mr McIlroy's explanation as to why one of the vehicles was disposed of only a few months after acquisition does not seem credible. If a newly purchased vehicle had developed faults it would no doubt be dealt with by the manufacturer or agent under warranty, not returned. The tribunal was not prepared to accept this explanation as credible.

38. The tribunal also noted that the letter was dated 28 February 2012. It was not explained how or why the document came into being. This lack of provenance did little to assuage our other concerns about the document.

39. Mr McNamee had suggested that whatever problems the tribunal might have with the letters, these could be investigated and dealt with at a full evidentiary hearing of the appeal. In this connection we note that Mr McNamee was at pains not to claim that the letters were what they purported to be. He had not himself made enquiries on the basis of which he had satisfied himself, so far as possible, that the documents did indeed constitute the prima facie and cogent evidence they appeared to suggest. This appears to be something which he expects HMRC to do. We do not agree. Mr McNamee was first consulted by Mr McIlroy in June 2013. There has been a period of 11 months within which Mr McNamee could have made the necessary enquiries. In fact he had failed to exercise any critical examination of his client's assertions which in our finding do not stand up to any close examination.

40. To expect HMRC to resurrect this assessment and to deal with the matters now sought to be argued by Mr McIlroy more than 3 years after the event when the

retrieval of evidence will most probably involve a considerable amount of work and the recollections of witnesses will have faded is to place on the Respondents an unreasonable burden. In our finding the delay is likely to prejudice the proper conduct of a substantive hearing.

41. On the basis of the little we have seen of the case which Mr McIlroy would intend to advance at a full hearing of his appeal we find that such an appeal would have little prospect of succeeding. For this reason and for the other reasons we have expressed in this decision we grant the Respondent's application to strike out Mr McIlroy's appeal.

42. 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.

CHRISTOPHER HACKING
TRIBUNAL JUDGE

RELEASE DATE: 9 May 2014