TC03966

Appeal number: TC/2013/05447

EXCISE DUTY – Seizure of 18,000 litres of 'white diesel' and 6,000 litres of 'red diesel' – Whether decision not to restore reasonable and proportionate on facts – Yes – Whether decision not to restore road fuel tankers also seized reasonable and proportionate – No – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEHZAD FUELS (UK) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MRS SHAMEEM AKHTAR

Sitting in public at 45 Bedford Square, London WC1 on 4 & 5 August 2014

Oliver Powell, counsel instructed by Hafiz & Haque Solicitors, for the Appellant

Will Hays, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal, by Behzad Fuels (UK) Limited ("Behzad"), is against the decision of HM Revenue and Customs ("HMRC"), contained in a letter dated 15 July 2013 which notified Behzad that, after conducting a further review, the decision taken on 3 April 2013 by HMRC not to restore four road tankers, 18,000 litres of fuel ("white diesel") and 6,000 litres of gas oil or rebated diesel ("red diesel"), seized on 5 March 2013 by HMRC, as "liable to forfeiture" under s 139 of the Customs and Excise Management Act 1979 ("CEMA"), would be upheld.

Law

2. Under the Hydrocarbon Oil Duties Act 1979 ("HODA") different rates of excise duty are payable in respect of different types of fuel. Currently white diesel is charged at £0.5795 per litre whether or not it is blended with bio-diesel (see s 6 and s 6A HODA) and red diesel and kerosene are charged with zero-duty (see s 11 HODA).

3. In order to ensure the integrity of red diesel and kerosene the Hydrocarbon Oil (Marking) Regulations 2002 requires the following "markers" to be present:

Fuel Type	**UK Markers**	**EU Markers**
White Diesel	None	None
Red Diesel	Quinizarin, solvent red 24	Solvent Yellow 124
Kerosene	Coumarin	Solvent Yellow 124

4. Insofar as it applies to the present appeal s 12(2) HODA provides:

> No heavy oil [red diesel], on whose delivery for home use rebate has been allowed …….. 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 …

5. Section 13(6) HODA states:

> Any heavy oil–
>
> (a) taken into a road vehicle as mentioned in section 12(2) above …; or
>
> (b) …
>
> shall be liable to forfeiture.

6. Section 139(1) CEMA provides that:

> Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…

7. Section 141(1) CEMA provides:

> …where any thing has become liable to forfeiture under the customs and excise Acts -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the things so liable,
>
> shall also be liable to forfeiture.

8. Section 152 CEMA provides:

> The Commissioners may, as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts."

9. Paragraphs 3 and 5 schedule 3 CEMA state:

> 3. 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. 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, …, the thing in question shall be deemed to have been duly condemned as forfeited.

10. Section 14(2) of the Finance Act 1994 provides:

> Any person who is –
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to whom, or on whose application, such a decision has been made, or
>
> (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
>
> may by notice in writing to the Commissioners require them to review that decision.

11. Insofar as it applies to the present appeal s 15 Finance Act 1994 provides:

> (1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

(2) Where–

(a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 or 14A above to review any decision; and

(b) they do not within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination of the review,

They shall be assumed for the purposes of section 14 or 14A to have confirmed the decision.

12. Section 16(4) to (6) Finance Act 1994 set out the powers of the Tribunal on an appeal against a decision as follows:

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

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

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

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

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

(6) On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under

> section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).
>
> shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established

13. Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) provides that an "ancillary matter" is:

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

14. The jurisdiction of the Tribunal under s 16 Finance Act 1994 was helpfully described as follows by Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) (which, although it concerned the restoration of a car, is equally applicable in relation to any seizure under s 139 or s 141 CEMA):

> "4. We must explain at the outset that the role of this tribunal in an appeal of this nature is unusual and is limited. There are two aspects to this.
>
> 5. First, in relation to the question of whether or not a car should be returned, we are not given authority by Parliament to make a decision that it should or should not be restored. The decision as to whether or not to restore the car is left in the hands of the UKBA: only they have the power or duty to restore it. Instead we are required to consider whether any decision they have made is reasonable. If it is not reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and UKBA make a new decision, then the taxpayer may appeal against that decision and the same process follows.
>
> 6. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside.
>
> 7. The second limitation in our role follows from the fact that Parliament has decreed that it is for the magistrate's court or the High Court to decide upon whether or not goods are legally forfeit. The Customs and Excise Management Act 1979 ("CEMA") sets out the required procedure: if the subject disputes the legality of the seizure he can require UKBA to bring proceedings (unhappily they are called condemnation proceedings) in the magistrate's court to determine the legality of the seizure. If the magistrate's court decides that the goods are properly forfeit then the tribunal cannot overturn that decision or take a different view. Further we must proceed on the basis that any finding of fact which was necessary for the magistrate's court to have

come to this decision is to be taken as having been determined by the magistrates and, before us, is therefore to be treated as proved.

8. If the subject does not require condemnation proceedings to be taken in the magistrate's court, he can effectively concede the legality of the seizure. That is because Schedule 3 CEMA provides:

> "5. If on the expiration of the [one month period for giving notice that something is asserted not to be liable to forfeiture] no such notice has been given to the commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeit."

9. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: "Deeming something to be the case carries with it any fact that forms part of that conclusion").

10. ...

11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses."

Evidence

15. Jayakrishnan Krishna Menon, the Director of Behzad and vice chairman of Behzad Corporation, Suresh Kumaran, Behzad's Finance Manager and Eldho James, its Transport Manager, gave oral evidence on behalf of Behzad. In addition the witness statements of Manohar David John, a consultant for Behzad Corporation, who was present at Behzad's premises on 4 March 2013 when it was visited by HMRC officers and Jacob Mukkatu, a manager with the Behzad Corporation and former employee of Behzad were not challenged and their evidence was admitted.

16. In addition Kane Dempster, one of the HMRC officers who visited Behzad on 4 March 2013 and Louse Bines, the officer who undertook the review which upheld the decision not to restore the fuel and vehicles gave oral evidence on behalf of HMRC.

17. We also had the benefit of the expert evidence of Dr Horace Calvert Stinton who was instructed by Behzad, and Mark Rafferty, a Lead Scientist at LGC Limited,

the Laboratory of the Government Chemist. Dr Stinton produced two reports the second of which was in response to the report of Mr Rafferty. We were also provided with a bundle of documentary evidence which included the experts' reports and correspondence between the parties.

18. It is on the basis of this evidence that we make our findings of fact.

Facts

Background

19. Behzad was incorporated in 2008 and began trading in 2009. It operates from a site comprising of yard and office premises on an Industrial Estate in Rainham, Essex where there is also a caravan for use as a rest room for drivers.

20. The company was established by Behzad Corporation, a Doha based business conglomerate, as part of its global expansion plans to supply both white diesel and red diesel, with emphasis on white diesel to British haulage companies. However, from around 2011 it moved away from selling white diesel and concentrated its efforts on the industrial and agricultural fuel market selling red diesel and kerosene. Although white and red diesel was stored in bulk storage tanks at its site kerosene was not. If kerosene was ordered it would be delivered directly to the customer after being collected by a tanker from Behzad's suppliers.

21. Shortly after Behzad commenced trading, when it was managed by Jacob Makkatu, it received enquiries from companies interested in buying road fuel containing a blend of bio-diesel and white diesel. However, after supplying this product it was discovered, after complaints from customers, that poor quality bio-diesel had been used and although sales ceased some 10,000 to 13,000 litres of the product which had already been purchased remained as stock. Mr Makkatu therefore decided, without authorisation from or knowledge of Behzad or Behzad Corporation to carry out experiments to purify the bio-blended diesel. Following the recommendation of a driver of one of the vehicles Mr Makkatu purchased several bags of bleaching agent out of his own money to conduct experiments. However, these were not successful.

22. In 2009 Behzad informed HMRC of suspicious activity at a supplier's premises as a result of which fuel the running tanks of its vehicles was found to be contaminated and Behzad was issued with a £500 penalty notice. In 2011 HMRC visited Behzad's premises and carried out tests and found that there was no contaminated fuel present.

23. By 2013 Behzad had a fleet of five road fuel tankers, one articulated tanker and four rigid tankers undertaking, on average 20 daily deliveries amounting to approximately 700,000 litres of white diesel, 8.2 million litres of red diesel and a million litres of kerosene each year.

Seizure

24. On Monday 4 March 2013 HMRC Officers Dempster, Baker and Flaherty visited Behzad's business premises where its finance and transport managers, Suresh Kumaran and Eldho James, were present together with Rajiv Mabhaven, a friend of Mr Kumaran who had visited him over the weekend and was waiting for a lift to the station.

25. HMRC's Road Fuel Testing Officers ("RFTU") tested the bulk storage tanks on site, the running tanks of the tankers and the fuel pots of the tankers. These indicated the presence of red diesel in the white bulk storage tank and running tanks of the vehicles on site. A 'Seizure Information Notice was issued by the Officers in respect of:

(1) 18,000 litres of white diesel (stored in the white bulk storage tank)

(2) 6,000 litres red diesel (stored in the red bulk) which, although not contaminated was considered by HMRC to have been misused;

(3) A white DAF fuel tanker, vehicle registration number BX05 RYT;

(4) A blue DAF fuel tanker, vehicle registration number V407 ECY;

(5) A white DAF fuel tanker, vehicle registration number MX54 EEU; and

(6) A white Volvo fuel tanker, vehicle registration number PK51 BNO.

All of which were seized by HMRC on 5 March 2013. Additionally two 25 kg bags which were labelled "bleaching agent" or "bleaching earth" were found on the site. One in the "shell" of a disused washing machine and the other in an intermediate bulk container found inside a locked container belonging to the owner of the site, Behzad's landlord.

26. On Thursday 7 March Mr Kumaran and Mr Menon, who had been in Qatar at the time of HMRC's visit but had flown from Doha to be interviewed, attended an interview with HMRC which was held under caution in accordance with the Police and Criminal Evidence Act 1984. Also present were Behzad's consultant Jeff Livesey and Manohar David John a Behzad Corporation consultant.

27. During the interviews it was explained that any bleaching agent found at the site was likely to have been left over from Mr Makkatu's bio-diesel experiments. Also paperwork was produced to show that Behzad had erroneously delivered kerosene instead of red diesel to a company on 27 February 2013. On Friday 1 March 2013 the customer telephoned as and as a tanker, registration number DX05 MBY was in the area it was arranged for the red diesel to be delivered and kerosene collected. It was agreed that the customer's entire stock of kerosene would be collected notwithstanding that it contained up to 250 litres of red diesel. As the tanker returned to Behzad's premises after 5pm on Friday Mr Kumaran did not let anybody else know what had happened and intended to report the incident to HMRC on Monday 4 March 2013 but did not do so before the arrival of the HMRC officers.

28. However, Eldho James, Behzad's transport manager, had on Sunday 3 March 2013 instructed one of the drivers to transfer the oil from that tanker into tanker MX54 EEU not knowing that the tanker DX05 MBY had been used to collect the contaminated kerosene from a customer, so that DX05 MBY (which was not seized by HMRC) would be available for collection and delivery early Monday morning. In fact he was not aware of what had happened until the afternoon of Monday 4 March.

29. It was also explained that pot 3 of tanker PK51 DNO had been damaged in an arson attack, which had been reported to the police, and had not been in use for a few months.

Review

30. Having obtained an "Analytical Report" from SGS Oil Gas & Chemicals, which stated that the white diesel seized by HMRC was not contaminated, on 22 March 2013 Hafiz & Haque solicitors wrote to HMRC, on behalf of Behzad, requesting restoration of the fuel and vehicles.

31. This was refused HMRC in a letter dated 3 April 2013 as the white diesel in the storage tanks and in the running tanks of the vehicles seized by HMRC "reacted positive" to field tests and HMRC were "satisfied that it was set to be misused". The letter continued:

> "Following our enquiries, and subsequent results from testing at our laboratory, we are satisfied that this oil was intended for illegal use as a road fuel. It is the policy of HMRC not to offer terms for the return of duty free or rebated oil intended for misuse as road fuel, or any vehicles or equipment used to handle it."

32. The subsequent tests referred to in the letter were undertaken by Mr Rafferty of LGC whose conclusions are set out in the letter HMRC's letter of 15 July 2013 (see below). He found (and Dr Stinton the expert instructed of behalf of Behzad agrees) that pots 1, 2 and 3 of vehicle MX54 EEU were contaminated. It is also agreed that pots 1, 2, 4 and 5 of tanker PK51 DNO contained red diesel and were not contaminated by kerosene. No tests were undertaken on any of the pots of the fuel tanker V407 ECY.

33. A review of the decision not to restore the fuel and vehicles was requested by Hafiz & Haque in a letter to HMRC dated 24 April 2013, again referring to the SGS Report and raising questions in relation to the items seized. Following further correspondence between the parties a review was undertaken by HMRC Higher Officer Louise Bines who, in a letter dated 15 July 2013 to Hafiz & Haque, upheld the decision not to restore the fuel and vehicles.

34. After setting out the background to the seizure and explanations given on behalf of Behzad at the interview and subsequently (which we consider below) and stating that she was guided by HMRC's policy (which she did not quote in the letter) but not fettered by it, Ms Bines concluded (and we set out her conclusions in full):

In your letter dated 24 April 2013, you and your client have raised a number of questions concerning each of the items seized, that I shall endeavour to answer in turn. I have attached at Appendix 1, the test results from the Laboratory of the Government Chemist, to which I shall refer.

1 – the white stock tank containing 18,000ltr of white diesel

You have said that the independent results you received from SGS Oil Gas & Chemicals shows that there is no contamination, and that this should be grounds for restoration. The report shows the Coumarin content of the fuel as <0.2mg/l

You also say that if some contamination is found in the HMRC results, the traces of contamination might be due to slight errors by the operators in following the Wetline procedure in full.

The results for the fuel tank sample from LGC (sample #187225) show that the sample is consistent with containing UK Rebated Gas Oil [red diesel]; the percentage of red diesel based on the Quinizarin value was 4%. This is higher than would normally be expected for an accidental wetline contamination, and could indicate that, if caused by wetline, the procedures may not have been followed for some time, allowing the contamination to build up.

2 – the red stock tank containing 6,000 litres of red diesel

You have said that the 6,000 litres of red diesel was not contaminated and that HMRC has not confirmed any such contamination. No laundering and/or mixing and/or misuse and/or smuggling of fuel of any kind has taken place.

Your client mainly deals in Gas Oil [red diesel] which is evident from documentation checked by HMRC.

However, there is sufficient evidence, from the intensity of the contaminations of pot 3 of vehicle PK51 DNO, the white stock tank, in the running tanks of the four seized vehicles and in other equipment found on the site, eg the bags of bleaching earth, soil samples etc, that red diesel was being used or had been misused in the contaminated fuel. Therefore, the red diesel from the stock tank was seized.

3 – the running tanks of vehicles BX05 RYT, V407 ECY, MX54 EEU and PK51 DNO. You have said that independent results you received from SGS Oil Gas & Chemicals shows both the Coumarin and Quinizarin content of the fuel as negative; and that <0.2mg/l is equivalent to nil or negative. The Euromarker test returned positive.

You state that the absence of Coumarin and Quinizarin from the sample shows that your client was not misusing rebated fuel for its own purposes, and that as there was no Quinizarin, this was not laundered red diesel.

As an explanation for this result, you say that occasionally the drivers sometimes empty leftover diesel into the running tanks using the hose reel, rather than return it to the yard. When doing so there is the possibility that there may be a slight contamination it the driver hasn't followed the wetline procedures.

The LGC results in all 4 cases indicated that the fuel is consistent with containing Laundered UK Rebated Gas Oil at a level between 4% and 8% red diesel based on the Quinizarin value. This is higher than would normally be expected for an accidental wetline contamination, and could indicate that, if caused by wetline, the procedures may not have been followed for some time, allowing the contamination to build up, or that the fuel was taken directly from the contaminated white stock tank.

4 – pot 1-5 of vehicle PK51 DNO and the 18,900ltr of fuel therein.

You state that your client maintains that the fuel in pots 1, 2, 4 and 5 was not contaminated. Pot 3 had not been working since January 2013, but there may have been 200-300 litres of red diesel in that pot. Your client keeps pot 3 marked as empty as it doesn't work.

Your client's test from SGS Oil Gas & Chemicals for the fuel found in pot 3 shows the Coumarin content as 0.52mg/l, but they had no intention of selling this minimal amount of fuel as red diesel.

The LGC results for Pot 3 show the sample contained a mixture of UK Rebated Gas Oil and UK Rebated Kerosene, with a Kerosene level of 31% based on the Coumarin value and Red Diesel level of 81% based on the Quinizarin value. The Sulphur content of this fuel was 45.00 parts per million; which is higher than the BSEN 590 limit for that allowed in road fuels.

With regard to the red diesel contained in pots 1, 2, 4 and 5 of this vehicle, I cannot comment on this fuel as part of the review, as no decision on the matter of restoration has been made by the seizing team. I can only review the restoration decision of 3 April 2013, which did not mention the fuel within these pots.

The Department takes a zero-tolerance attitude to the presence of the statutory markers in road fuels. We will not allow fuel that has the presence of markers, which can be identified by the chemical field tests used by the RFTU, to be used or supplies as road fuel. The zero tolerance is in connection with removal of that contaminated fuel from the road fuel market, it must not be available for supply or use as a road fuel.

It is the policy of HM Revenue & Customs not to offer terms for the return of rebated oil intended for misuse as a road fuel, or any vehicles and equipment used to handle it.

5 – pots 1-4 of vehicle MX54 EEU

Your client has said due to a mistake in a delivery to a customer, a tanker had been dispatched to retrieve the fuel from the customer's premises. This fuel was then transferred into pots 2 and 3 of vehicle MX54 EEU by an employee who was unaware of the contaminated nature of the fuel. But, the rest of the pots, to your client's knowledge, should not be contaminated.

The results from the LGC testing show that there is a substantial contamination of fuel in all 4 pots of this tanker, and that the fuel contained UK Rebated Gas Oil and UK Rebated Kerosene. This is not

> consistent with your client's explanation about how a contamination may have occurred to the fuel in this vehicle.
>
> 6 – other equipment
>
> In your letter, you mentioned that there was no equipment or apparatus which might tend to suggest that an involvement in misusing, mixing, laundering or smuggling of fuels.
>
> In your client's interview with HMRC officers on 7 March 2013, the matter of the bleaching earth found in the yard was raised. Mr Livesey referred to the bleaching earth in the container in the yard, that Mr john advised hadn't been used since 2010; by a Mr Jacobs [ie Jacob Mukkatu] who carried out experiments with bio-diesel.
>
> HMRC officers on 4 March 2013 found a bag of bleaching earth in a washing machine in the yard before the container was opened, and LGC testing of this substance found that it was consistent with used Laundering Agent – a "bleached earth/fullers earth" material that has been used to remover or "launder" the markers from UK rebated Gas Oil.
>
> HMRC officers also found a liquid on the ground outside the container, which was also tested and found to contain Solvent Red 24. LGC have confirmed that Solvent Red 24 is a prescribed marker for rebated fuels, and experimenting with bio-diesel, as the company officers said the container was used for, should not lead to a rebated gas oil contamination of the soil next to the container.
>
> I am of the opinion that the application of the Commissioners Policy in this case treats you no more harshly or leniently than anyone else in similar circumstances, and I can find no reason to vary the Commissioners policy in this case.
>
> For the reasons set out above I have decided to uphold the original decision whereby your client's vehicles and the fuel will not be restored.

35. Ms Bines now acknowledges that there are two errors in her letter. The first in relation to vehicle MX54 EEU; although the letter states that "all 4 pots of this tanker" were contaminated this was not the case. The LGC results indicated that while pots 1, 2 and 3 were contaminated pot 4 was not. Secondly Ms Bines referred to LGC tests on a "bag of bleaching earth" found in "a washing machine", this was a reference to analysis of sludge like substance extracted from pot 1 of vehicle BX05 RYT not the "bleaching earth" found in the disused shell of a washing machine. The error appears to have arisen as the result of the LGC test which concluded that the "sludge":

> … is consistent in appearance to what is commonly termed "Bleaching Earth" the statutory makers found in UK Rebated Gasoil were detected in the sample … [which] is consistent with being a used laundering agent.

36. However, despite these errors Ms Bines stands by her decision not to restore the items to Behzad on the basis that the evidence suggested that laundering was taking place and that she had made an assumption that a bag labelled "bleaching earth" was likely to contain bleaching earth despite accepting, in the absence of a test, that she

could be sure that this was the case. During cross-examination Ms Bines confirmed that she had not consider the incident in 2009 that had been reported by Behzad nor had she considered the 2011 visit by HMRC but when re-examined said that these would have had a neutral effect on her decision.

37. Ms Bines accepted that the explanations given by Behzad for the presence of contaminated fuel had remained consistent with what was said at interview on 7 March 2013 and agreed, when put to her in cross-examination that she should have possibly given more consideration to the return of the vehicles in return for a fee and that this "may have appeared more proportionate" than outright non-restoration.

38. On 13 August 2013 Behzad submitted a Notice of Appeal to the Tribunal against this decision.

39. Although in their request for a review Hafiz & Haque had requested copies of all test reports only a narrative of the results obtained by LGC was appended to the review letter. Therefore, on 27 August 2013 a written request was made for the provision of the "test reports and enquiry reports, with explanations (if any) provided by LGC and/or any experts with which HMRC has taken a decision." A further request was made for this information on 18 September 2013. However, in the meantime Dr Stinton had been instructed and on 21 November 2013 he provided his first report to Behzad without seeing the final test reports and details of the test methods adopted by LGC.

40. On 25 September 2013 Ms Bines provided 12 test result notes from LGC to Hafiz & Haque and on 2 April 2014 Dr Stinton provided his second report. This took account of the information provided by HMRC and led to him revising his views as appropriate.

41. Despite the SGS Report stating otherwise Behzad now accepts that the 18,000 litres of white diesel contained in the white bulk storage tank was contaminated with red diesel at a level of about 4% and that a similar level of contamination was present in the running tanks of the seized vehicles which, in the opinion of Dr Stinton, is consistent with the tankers refuelling from the white diesel storage tank. Although Dr Stinton in his report concluded that the level of contamination in the white diesel storage tank is "more likely to have been caused by errors or poor practice than by a determined effort to launder rebated fuels in order to make a profit" he accepted during cross-examination that while "laundering is a possibility" it "may not be the only answer" as to the level of contamination in the white diesel.

42. When asked whether he considered whether Behzad had been laundering fuel Dr Stinton was of the opinion that its personnel did not possess the technical knowledge or were sufficiently organised to do so.

Discussion and Conclusion

43. We have referred to the limited jurisdiction of the Tribunal above. As such the issue for us to determine is not whether the vehicles and oil should be restored to

Behzad but whether, having regard to our findings of fact, the decision taken by HMRC not to restore these is one that could reasonably have been reached. It is not sufficient that we might ourselves have reached a different conclusion.

44. The VAT and Duties Tribunal in *Ware v Commissioners of Customs and Excise* [2004] UKVAT(Excise) E00735 said, at [18]

> "It is generally accepted that the test of reasonableness requires the Tribunal to ask:
>
> is this a decision which no reasonable panel of Commissioners could have come to?
>
> has some irrelevant matter been taken into account?
>
> has some matter which should have been taken into account been ignored?
>
> has there been some error of law?
>
> (see *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231; *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] IKB 223)."

Lord Phillips of Worth Maltravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters."

45. In considering whether HMRC reasonably arrived at the decision not to restore the seized items we have looked at the fuel and vehicles separately.

Fuel

46. It is not disputed that the white diesel in the storage tank and in the running vehicles was contaminated. It is also accepted that the red diesel stored at the premises was not.

47. For HMRC, Mr Hays submits that the zero-tolerance policy it adopts is reasonable as any contamination would undermine the ability of HMRC to detect fraud of laundered fuels and create difficulties in determining which part of the supply chain could legitimately claim to rely on any allowed tolerance. In the circumstances he contends that it was reasonable and proportionate for Ms Bines to apply the policy in this case.

48. Mr Powell, for Behzad, contends that the level of contamination in the storage tank (4%) is not consistent with a determined effort to launder red diesel but as Dr Stinton concluded, more likely to have been caused by errors or poor practice especially given Behzad's lack of technical knowledge or organisation and skill.

49. However, given that Dr Stinton accepted that laundering was a possibility for the contamination of the white diesel, we consider that there was evidence on which Ms Bines could reach such a conclusion. Not only was the fuel contaminated but there were present, on the site, bags labelled "bleaching earth". This was in addition to the analysis of the "sludge" extracted from pot 1 of vehicle BX05 RYT which contained statutory markers for red diesel.

50. In the circumstance we find that the decision of HMRC, in relation to both the white and red diesel was reasonable and proportionate.

51. In addition to the red and white diesel there was "mixed" fuel in pots 1, 2 and 3 of vehicle MX54 EEU and uncontaminated diesel in pots 1, 2, 4 and 5 of vehicle PK51 DNO. As no decision was made by Ms Bines in relation to this fuel the original decision not to restore was deemed to have been confirmed by s 15(2) Finance Act 1994. While we accept that it is reasonable and proportionate not to restore any "mixed" fuel we consider that the decision on restoration of the uncontaminated fuel in vehicle PK51 DNO should follow that of the vehicle, as set out below.

Vehicles

52. Mr Hays contends that given Ms Bines conclusion that red diesel was being used or misused it was, looking at the circumstances as a whole and in particular the presence on the site of laundered fuel, reasonable for her to conclude that the vehicles should not be restored.

53. As Mr Powell submits, there is no evidence that vehicles BX05 RYT or V407 ECY were being used for laundering or transporting contaminated fuels. Also it is accepted that four of the five pots of vehicle PK51 DNO were not contaminated and that the explanation for the contamination of pot 3 of that vehicle, the arson attack for which a police crime number was obtained, was perfectly plausible as was the explanation for the contamination of the pots in vehicle MX54 EEU, ie the erroneous delivery and transfer of fuel. He contends that that Ms Bines failed to acknowledge the explanations given at the interviews on 7 March 2013 or that she failed to give sufficient weight to them and as such her decision to uphold the decision not to restore the vehicles was unreasonable.

54. We agree with Mr Powell that the explanations given for the contamination of vehicle MX54 EEU, the wrong delivery, and PK51 DNO, the arson attack, are credible and plausible, especially given that these are supported by contemporaneous documentary evidence which does not appear to have been given due consideration by Ms Bines. It therefore follows that the decision not to restore the vehicles could not have been arrived at reasonably. Even if this were not the case we consider that a proportionate response would have been to consider restoration of the vehicles for a fee, indeed during cross-examination Ms Bines herself accepted that this "may have appeared more proportionate."

Decision and Directions

55. In the circumstances we direct that a further review be undertaken in respect of the vehicles seized taking account of our findings of fact in particular:

(1) The explanation of Jacob Mukkatu regarding the presence of bleaching agent at the site;

(2) The explanation for the presence of kerosene in vehicle MX54 EEU ie the delivery error and subsequent transfer from another vehicle;

(3) The damage to pot 3 of vehicle PK51 DNO following an arson attack; and

(4) Whether it would be proportionate in the circumstances to return any or all of the vehicles for a fee.

Right to Apply for Permission to Appeal

56. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 28 August 2014