[2015] UKFTT 0592 (TC)

TC04739

Appeal number: TC/2014/01674

EXCISE DUTY - Registered dealer in controlled oil -* CEMA 1979 s100G *- Hydrocarbon Oil (Registered Dealers in Controlled Oil Regulations) 2002 - Revenue Traders (Accounts & Records) Regulations 1992 - removal of approval - whether reasonable - yes - Appeal not allowed

FIRST-TIER TRIBUNAL

TAX CHAMBER

CLOUGHER VALLEY FUELS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID MOORE

Sitting in public at Bedford House, 16 - 22 Bedford Street, Belfast on 14 April 2015

The Appellant Company did not attend and was not represented

Mr Simon Charles, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal by Clougher Valley Fuels Limited ("the Appellant") against the decision of the Commissioners for Her Majesty's Revenue & Customs ("HMRC") to revoke the Appellant's licence to operate as a Registered Dealer in Controlled Oils ("RDCO"). The Appellant seeks restoration of its licence.

2. The Appellant was not represented at the appeal hearing. The Appellant's representatives informed the Tribunal and HMRC on the morning of the hearing that, due to the fact that they had not received instructions, they did not intend to appear or make representations to the Tribunal. The Tribunal was satisfied that the Appellant had been given notice of the date, time and venue of the appeal and that it was in the interests of justice to proceed with the hearing.

Background

3. The Appellant, a Private Limited Company, was incorporated on 3 January 2008 and trades in the wholesale of petroleum and petroleum products. The company operates from premises at 48 Altadaven Road Augher County Tyrone BT77 0HS Northern Ireland. The directors are Mr Stephen McMeel and Mrs Una McMeel. Companies House records the correct name of the Appellant company as Clogher Valley Fuels Limited, but throughout correspondence and other proceedings the Appellant is referred to as Clougher Valley Fuels Limited. We are satisfied that Clougher Valley Fuels Limited and Clogher Valley Fuels Limited are one and the same.

4. The Appellant was approved as a RDCO from 24 April 2008 under s 100G of the Customs & Excise Management Act 1979 and subject to the requirements of the Hydrocarbon Oils (Registered Dealers in Controlled Oils) Regulations 2002 (SI 2002 No. 3057) and Excise Notice 192.

5. A visit by an officer of HMRC to the Appellant in relation to its RDCO registration on 2 February 2009 established that the Appellant was not fully compliant with the requirements of the RDCO scheme. The officer identified poor compliance in a failure to record all necessary information relating to the sale of fuel and a failure to render returns on time. In particular:

i. The Appellant's RDCO returns for the periods October, November and December 2008 showed errors in respect of returned details of commercial supplies of rebated fuel. The officer asked for the returns to be re-submitted with a valid supply indicator and the code for the use to which the supplies were put. The Appellant was referred to paragraph 6 of Excise Notice 192 for further reference.

ii. The Appellant had incorrectly classified its yard sales/supplies to Republic of Ireland customers as "Domestic supplies". All such supplies had to be correctly identified [entered at Box 2 on the RDCO

return]. The Appellant was asked to check the details and re-submit the returns where appropriate.

iii. The Appellant had failed to record the correct level of information in respect of supplies of rebated fuel sold ex-yard from the business premises. They were referred to Excise Notice 192, paragraph 5.5 for further information. This confirms that the recording of the customer's vehicle registration number is mandatory information in cases where the sale of fuel exceeds 100 litres.

iv. As an approved RDCO the Appellant has a 'duty of care' to ensure that all customers have a legitimate entitlement to receive rebated fuel. The Appellant was referred to Excise Notice 192, paragraphs 5.2 and 5.3.

6. On 5 February 2009 the visit was followed up with a Warning letter, issued to the Appellant for failure to meet its duty of care in relation to sales and submitting incorrect information on its RDCO returns.

7. On 13 October 2009, a civil penalty was issued to the Appellant for the failure to submit the corrected returns requested on 5 February 2009 and for late submission of RDCO returns.

8. On 24 March 2011 Officer Patricia Connell visited the Appellant's business premises in respect of the RDCO scheme. She informed the proprietors of the necessary action to be implemented in order to comply with the conditions and obligations of RDCO approval. Upon examination of the Appellant's RDCO completed returns, she noted the following errors:

- March 2010. No postcode had been entered for the delivery made to a customer.
- November 2010. The VAT number entered against the sale to a customer was invalid.
- December 2010. An invalid RDCO number had been entered against one of the Appellant's sales. In addition, an invalid VAT number had also been entered against a sale to a customer.
- January 2011. An invalid VAT number had been entered against a sale to a customer.

9. On 4 August 2011 the Appellant was issued with a second Warning letter for submitting incorrect RDCO returns. This letter explained that due to its failure to comply with the requirements set out in Excise Notice 192 the Appellant had rendered itself liable to a £250 penalty under the Finance Act 1994. Confirmation was given that HMRC had exceptionally decided not to impose the penalty and emphasized the importance of complying with RDCO scheme requirements. Clarification was given that should the Appellant continue to fail to comply, a penalty would be issued and the Appellant's RDCO approval may be revoked.

10. On 22 November 2011, 7800 litres of contaminated derv was seized from the Appellant's premises. The proprietor of the Appellant was asked to provide records. He provided supply and sales invoices and stock records as requested. He was issued with a requirement to produce records under Regulation 48 of the Hydrocarbon Oils Regulations 1973 with a reminder on 29 November 2011. He failed to provide these records and failed to attend an interview.

11. On 16 January 2012, a tanker containing 4300 litres of unleaded petrol and 4442 litres of contaminated derv was seized from the Appellant's premises. The Appellant was issued with a Notice of Seizure.

12. On 11 February 2013, a Warning letter was issued for the late submission of the December RDCO. Again, the letter made clear that if another late return was submitted within a 12 month period the Appellant would be issued with a £250 penalty and possible revocation of its RDCO approval.

13. On 27 February 2012, a civil penalty was issued for destruction of primary records in relation to ex yard sales and failure to submit corrected RDCO H05 returns.

14. On 13 June 2013, a civil penalty was issued due to the late submission of the Appellant's March 2013 return.

15. On 1 August 2013, HMRC Officers carried out a joint VAT/RDCO visit to the Appellant's premises. The purpose of the visit was to inspect recording of cross border sales of rebated fuel. It was noted that the Appellant had not retained primary records for ex yard sales, as directed by the civil penalty issued on 27 February 2012. The proprietor produced dockets from his computer system showing details of some of his customers. However for sales in excess of 100 litres the mandatory information as set out in Excise Notice 192 had not been recorded.

16. On 20 August 2013, a further civil penalty was imposed on the Appellant for continuous failure to retain primary records. The letter again warned of the possible revocation of RDCO approval pending the outcome of verification checks in relation to the two earlier seizures and failure to adhere to conditions of the RDCO scheme.

17. The Appellant had challenged and appealed the legality of the two seizures made on 22 November 2011 and 16 January 2012 on 11 November 2013. The Magistrates Court granted an order condemning the Goods as liable to forfeiture and awarded costs to HMRC.

18. On 10 December 2013 HMRC received the results of the verification checks on the Appellant's ex yard sales, of which 81% were found to be either incorrect or not recorded.

19. Section 100G (5) of Customs and Excise Management Act 1979 provides:

> "The Commissioners may at any time, for reasonable cause, revoke or vary the terms of their approval or registration of any person under this section."

After careful consideration of all the facts, HMRC concluded that approval of the RDCO should be revoked due to the continued non-compliance of the Appellant in

submitting RDCO returns. The decision was notified to the Appellant on 13 January 2014.

20. On 23 January 2014, Tiernans Solicitors, on behalf of the Appellant requested a review of the decision to revoke the RDCO licence. A review was undertaken and having considered all the information before her, the Reviewing Officer upheld the original decision and notified the Appellant by way of letter dated 24 February 2014.

21. On 24 March 2014, the Appellant lodged a Notice of Appeal with the Tribunal.

Relevant law

22. The law relevant to this appeal is set out below:

Customs and Excise Management Act 1979

> Section 100G (1)
> "For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations")"
>
> Section 100G(2)
> "The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose."
>
> Section 100G(4)
> "The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe."
>
> Section 100G(5)
> "The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section."

The Hydrocarbon Oils (Registered Dealer in Controlled Oils) Regulations 2002

> Regulation 4 (1)
> "For the purposes of section 100G of the Management Act, the Commissioners may approve any person who intends to buy, sell, or deal in controlled oil and register him as a registered excise dealer and shipper in accordance with section 100G(2) of that Act."
>
> Regulation 5 (3)
> "The approval and registration of registered dealers in controlled oil shall, in addition to any conditions or restrictions imposed on them by the Commissioners under section 100G(4) of the Management Act, be subject to such conditions as the Commissioners may prescribe."
>
> Regulation 9(1)

"Registered dealers in controlled oil must make returns concerning their dealing in, buying and selling of controlled oil, at such time, in such form and manner, and containing such particulars as the Commissioners prescribe."

Revenue Traders (Accounts & Records) Regulation 1992

Regulation 6
"A revenue trader shall keep and preserve such records as the Commissioners may specify for any case or cases, in a notice published by them and not withdrawn by a further notice."

Public Notice 192

Paragraph 4.8 of notice 192 states:

"We are likely to cancel your approval if:

- it is considered necessary for the protection of the revenue because, for example, we have evidence that you have been involved in the misuse of controlled oil or excise fraud. In such cases, we may also prosecute you.

- in light of any new information that comes to our attention, or that you notify to us, we are no longer satisfied that you are fit and proper to hold an RDCO approval as per paragraph 4.3, and

- you persistently fail to meet the requirements of the scheme, for example, fail to exercise your obligations or fail to submit H05 returns on time. However, this is likely to be the final step following a series of warning letters and civil penalties - see paragraph 6.5 and section 8."

Paragraph 5.5 states that:

"Where ex-yard sales are made in excess of the 100-litre threshold there is a mandatory level of customer information which must be recorded, i.e. the customer's name, address, quantity & type of oil supplied, customer stated use, vehicle registration number & VAT number if applicable should be recorded."

Paragraph 8.5

"This situation is likely to arise where we are not satisfied, or are no longer satisfied, that you are a suitable person to be approved - see paragraph 4.3. Any decision to revoke an approval will not be taken lightly and will be fully supported by written evidence. In such cases, we will set out our reasons for refusing or revoking your approval in a letter."

The Appellant's case

23. The Appellant's stated grounds of appeal in its Notice of Appeal were:

"HMRC Officers Corcoran and Sayers incorrectly considered the outcome of the appellant company's Magistrates Court Appeal against condemnation. We submit that it is inappropriate of them to do so.

In the alternative if the Tribunal finds that it is appropriate to consider the condemnation proceedings little or no weight should be given to the outcome of these proceedings. Officers Sayers and Corcoran gave inappropriate and undue weight to the outcome of these proceedings. The officers failed to distinguish between HMRC's zero tolerance approach as provided for under statute.

In invoking section 100(G)(5) of The Customs & Excise Management Act (CEMA) 1979 the Commissioners are statutorily bound to apply a reasonableness test rather than zero tolerance. The Appellant will contend that the circumstances giving rise to this property being condemned does not evidence the Appellant's misuse of controlled oils. The Appellant never conceded in the Magistrates Court that the company was involved in the misuse of controlled oils.

The Appellant should not be punished by the accuracy or inaccuracy of information provided by Third Parties. It is noted that Officer Corcoran cites Excise Public Notice 192 Registered Dealer in Controlled Oils in her review decision and specifically quotes in page 2,

"We are likely to cancel your approval if it is considered necessary for the protection of the revenue because, for example, we have evidence that you have been involved in the misuse of controlled oil or excise fraud. In such cases, we may also prosecute you."

It is noted that there is no evidence that the Appellant has been prosecuted for misuse of controlled oils or excise fraud. It is further noted that there is no evidence that the Appellant has been involved in the misuse of controlled oils or excise fraud. – In the circumstances, the Appellant contends that this appeal should be allowed and his licence restored."

24. The salient points of the Appellant's appeal are therefore:

- HMRC Officers Corcoran and Sayers incorrectly considered the outcome of the Appellant company's Magistrates' Court Appeal against condemnation. It was inappropriate of them to do so. HMRC's decision is based solely on the outcome of the hearing on 11 November 2013 to determine the seizures.

- The Officers failed to distinguish between HMRC's zero tolerance approach and as provided for under statute, having failed to apply the reasonableness test as provided for under s 100(g)(5) of CEMA 1979.

HMRC's Case

25. The Appellant has received repeated warning notices and penalties advising of the possible revocation of its RDCO approval in the event of continued non-compliance. As is clearly demonstrated by the chronology of events, there has been a history of non-compliance and over a prolonged period of time the Appellant has not heeded the many warnings given by HMRC in respect of keeping appropriate records and making timely returns.

26. Despite these warnings the Appellant has continued to submit incorrect and late returns. Civil Penalties for these errors were imposed but seemingly failed to impress

upon the Appellant the necessity of organising the business to satisfy statutory requirements.

27. The Appellant's grounds of appeal focuses on the outcome of the condemnation proceedings. There has been no challenge to the weight of evidence demonstrating the Appellant's poor history of non-compliance. The Appellant has not offered any explanation as to the repeated occasions where it has failed to comply with the regulations.

28. The Magistrates Court found that the goods seized should be condemned. It is clear from both the Decision letter (and the subsequent review of the Decision) that the entire history of the Appellant's conduct was taken into account in deciding to revoke its licence. The Appellant's assertion that too much weight was placed upon the decision of the Magistrates Court is therefore misconceived.

29. When deciding whether to withdraw a trader's approval as a RDCO, HMRC do not adopt a policy of "zero tolerance". In this regard reference is made to paragraph 8.5 of Excise Notice 192 which reads:

> "Withdrawal of approval. This situation is likely to arise where we are not satisfied, or are no longer satisfied that you are a suitable person to be approved — see paragraph 4.3. Any decision to revoke an approval will not be taken lightly and will be fully supported by written evidence. In such cases, we will set out our reasons for refusing or revoking your approval in a letter."

30. The events in this case plainly show that HMRC did not adopt a "zero tolerance" approach, given that numerous breaches and instances of misconduct were tolerated before the Appellant's approval was finally revoked.

31. The decision to revoke the Appellant's approval was based on the seizures following non-compliance on numerous occasions over a prolonged period of time.

32. The Tribunal's powers are as set out in FA s 16(4) which reads:

a. The tribunal may only allow the appeal if it is satisfied that HMRC could not reasonably have made the decision.
b. If the Tribunal is so satisfied, it can only direct that the decision ceases to have effect from such time as it directs, or require HMRC to conduct a review of the original decision.

33. Thus the Tribunal can effectively quash a decision or direct reconsideration, but cannot declare that the Appellant is entitled to have an RDCO licence, or prevent HMRC subsequently revoking the licence if the decision is quashed.

34. The Appellant does not have grounds to successfully appeal the decision to revoke its RDCO licence.

35. Under FA s 16(6), burden of proof rests on the Appellant to show why HMRC were wrong in revoking its licence. It has not discharged that burden.

Conclusions

36. HMRC's decision to revoke the Appellant's licence was not founded purely on the seizures or the Magistrates Court condemnation orders but also on the Appellant's poor compliance record. There had been numerous warning letters, two seizures and three civil penalties.

37. As to the question of whether HMRC acted unreasonably or disproportionately, HMRC are simply required to take such action as is reasonable. It is difficult to see how HMRC could be regarded as acting unreasonably in revoking the Appellant's RDCO licence. There was clearly persistent and significant non-compliance. The Appellant did not comply with the provisions of Excise Notice 192 and did not heed the Warning letters sent to it. The Appellant was warned of the risks of non-compliance and the likelihood of revocation of its licence in the event of non-compliance. It is fair to say that the Appellant's attitude to compliance was reckless and necessarily presented a risk to the revenue.

38. HMRC's guidance on when it would *approve* the grant of an RDCO licence is also relevant to assessing reasonableness. It involves a published "fit and proper test" by which the applicant is measured. HMRC indicate in the Notice that they would be very unlikely to approve an applicant if it or anyone with an important role in the business had "had oils or vehicles or any other revenue goods seized from them".

39. HMRC had significant evidence which demonstrated a risk to the revenue if the Appellant's licence remained in place. With regard to revocation of a licence, HMRC guidance states —

> "This is appropriate where there is persistent and/or significant non-compliance. ……Withdrawal of approval should be the culmination of an escalating and fully recorded process of proportionate action including education, warning letters and penalties as well as a period of additional conditions if it is considered likely to resolve the issues causing concern."

40. In determining whether the decision was unreasonable we have to be satisfied that HMRC have acted in a way in which no reasonable panel of Commissioners could have acted; we have to be satisfied that the reviewing officer did not take into account some irrelevant matter or did not disregard something to which he or she should have given weight. In this regard we have to bear in mind that a decision will be unreasonable if it is disproportionate.

38. The Certificate of Approval for the Appellant states specifically that approval is granted subject to compliance with, first, the requirements of Excise Notice 192, second, the submission of correct returns and third, regular checks being made that customers were entitled to receive oil. The Appellant's returns exhibited poor

compliance in a failure to record all of the necessary information relating to the sale of fuel and a failure to render returns on time.

39. For the reasons identified above, in our view the Appellant has not shown that the review officer could not reasonably have come to the decision that she did and we dismiss the appeal.

40. HMRC reserved its right to apply for a costs order against the Appellant and its representatives Messrs Tiernans Solicitors on the basis that throughout the Appeal the Appellant and Messrs Tiernans had failed to engage with either the Tribunal or HMRC and, amongst other matters, the Appellant's wholesale failure to comply with the Tribunal's Directions. The Tribunal issued a direction that any application for costs has to be accompanied by written representations in order to afford the Appellant and its representatives the opportunity of replying.

41. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE
RELEASE DATE: