[2016] UKFTT 0111 (TC)

TC 04890

Appeal number: TC/2013/01160

EXCISE DUTY – assessment in respect of diesel fuel (s 12 FA 1994) – challenge to legal validity of assessment – challenge to calculation of vehicle's mileage upon which assessment based – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW SCULLION **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR TONY HENNESSEY FCA

Sitting in public at Belfast on 6 November 2015

Mr D McNamee of McNamee McDonnell Duffy, solicitors, for the Appellant

Mrs Newstead Taylor, counsel, for the Respondents

DECISION

Introduction

1. The Appellant appeals against an assessment to excise duty dated 11 December 2012, upheld in a review decision dated 18 January 2013, but subsequently reduced by HMRC following the production of further evidence by the Appellant after these appeal proceedings were commenced.

2. The appeal was heard in Belfast on 6 November 2015. At the hearing, the Tribunal gave its oral decision, allowing the appeal in part. HMRC subsequently requested full written reasons for the decision, which are now provided.

Background

3. The Appellant is the sole proprietor of Shore Road Logistics ("SRL"), which is in the business of freight transport by road. SRL has three commercial vehicles, which are referred to below for convenience as vehicles A, B and C.

4. On 19 April 2012, vehicle A was stopped by HMRC's Road Fuel Testing Unit. A fuel sample were taken from the vehicle's running tank and was found to be Republic of Ireland green diesel. The vehicle was seized and restored for a fee, and the matter was then referred to HMRC's post-detection unit.

5. In July 2012, HMRC Officer Connell requested the Appellant to provide information and/or records relating to the three vehicles, and certain material was provided in response. Officer Connell subsequently made further requests for documents and information, and the Appellant or his representatives provided certain further material in response. Officer Connell considered the documents provided by the Appellant to be inadequate, while the Appellant maintained that he felt harassed by HMRC. In a letter dated 24 October 2012, the Appellant's representatives advised HMRC that the Appellant stated that he had no more information at his disposal, and that he had already forwarded what he had to HMRC.

6. Officer Connell then made certain efforts to obtain further information herself from service stations from which fuel had been purchased by the Appellant, who provided some additional information.

7. On the basis of the information available, HMRC conducted a road fuel audit calculating the fuel needed to run the business against the receipts provided by the Appellant for fuel purchases.

8. By a letter dated 23 November 2012, HMRC advised the Appellant of their intention to assess him for excise duty, setting out the amount of the proposed assessment and details of how it was calculated, and inviting him to send any further information that he would want HMRC to consider.

9. On 11 December 2012, Officer Connell issued the assessment against which the Appellant now appeals, in the original sum of £66,386. The assessment was calculated on the following basis.

(1) The period to which the assessment related was 1 October 2010 (the date on which the Appellant became proprietor of SRL) to 18 April 2012 (the "audit period").

(2) Vehicle A was driven 2,069 miles per week. Vehicle B was driven 1,916 miles per week. Vehicle C was driven 1,097 miles per week.

(3) The fuel consumption was 7.9 miles per gallon for each of the three vehicles.

(4) On the basis of (2) and (3) above, the total fuel consumed by all three vehicles in the audit period was thus 236,881.66 litres.

(5) The Appellant had produced fuel invoices for purchases in the audit period of 122,681.58 litres.

(6) There was thus a shortfall of 114,210.08 litres for which the Appellant had produced no fuel purchase invoices.

(7) The Appellant was therefore assessed to excise duty at the rates applicable during the audit period on 114,210.08 litres of fuel.

10. On 18 December 2012, the Appellant's representatives requested a review of the assessment.

11. In a review decision dated 18 January 2013, HMRC upheld the assessment. The review decision stated that the assessment had been issued "under Section 12(1)(a) of the Finance Act 1994".

12. On 7 February 2012, the Appellant brought the present appeal before the Tribunal. His ground of appeal is that:

> I have always purchased fully tax paid road fuel. I have produced invoices showing this to HMRC. The assessment has been raised in error.

13. It seems that the appeal was first listed for hearing in October 2013, but that that hearing did not proceed due to the absence of any representative for the Appellant. The appeal was again listed for hearing in April 2014, but did not proceed to a substantive hearing due to the late production of additional evidence by the Appellant. This resulted in a wasted costs order being made by the Tribunal.

14. HMRC proceeded to consider the new evidence supplied by the Appellant, which included certain fuel purchase invoices. HMRC accepted all but five of these fuel purchase invoices, resulting in a recalculation of the assessment by HMRC to £23,237. However, HMRC did not accept other new evidence produced by the Appellant in support of his contention that the mileage of vehicle C during the audit period was much lower that the figure of 1,097 miles per week used by HMRC in calculating the assessment.

15. The appeal was then heard before this Tribunal on 6 November 2015. The Appellant advanced two grounds of appeal. First, the Appellant challenged the legal validity of the assessment. Secondly, the Appellant challenged HMRC's calculation that vehicle C was driven 1,097 miles per week.

16. The Tribunal gave its decision orally at the hearing. It allowed the appeal in part as follows:

(1) The Appellant's legal challenge to the validity of the assessment was dismissed.

(2) The Tribunal found that the assessment should have been calculated on the basis that vehicle C was driven 243 miles per week during the audit period.

17. The Tribunal directed that the correct amount of the assessment, determined in accordance with the finding of the Tribunal, was to be agreed between the parties.

18. By a letter dated 11 November 2015, HMRC advised the Tribunal that HMRC had recalculated the amount of the assessment to £385. That letter noted that HMRC was still seeking to agree with the Appellant's representative the amount of the wasted costs in respect of the 8 April 2014 hearing.

19. In an e-mail to the Tribunal dated 16 November 2015, the Appellant's representatives advised that the Appellant took no issue with HMRC's calculation of the assessment.

Applicable legislation

20. Section 6 of the Hydrocarbon Oil and Duties Act 1979 imposes excise duty on hydrocarbon oil.

21. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "HMDP Regulations") relevantly provides as follows:

> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
>
> (a) by a person other than a private individual; or

(b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P. …

(5) For the purposes of the exception in paragraph (3)(b)—

(a) *"excise goods"* does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) *"own use"* includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

22. Section 12 of the Finance Act 1994 relevantly provides:

(1) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that there has been a default falling within subsection (2) below,

the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

(2) The defaults falling within this subsection are—

(a) any failure by any person to make, keep, preserve or produce as required or directed by or under any enactment any returns, accounts, books, records or other documents;

(b) any omission from or inaccuracy in any returns, accounts, books, records or other documents which any person is required or directed by or under any enactment to make, keep, preserve or produce;

(c) any failure by any person to take or permit to be taken any step which he is required under Schedule 3 to the Betting and Gaming Duties Act 1981 or Schedule 1 to the Finance Act 1997 or Part 1 of Schedule 24 to the Finance Act 2012 or Part 3 of the Finance Act 2014 to take or to permit to be taken;

(ca) any failure by any person to comply with a requirement to which he is made subject by or under Schedule 2A to the Alcoholic Liquor Duties Act 1979 (duty stamps);

(d) any unreasonable delay in performing any obligation the failure to perform which would be a default falling within this subsection.

23. Article 3 of the Travellers' Reliefs (Fuel and Lubricants) Order 1995 (the "Travellers' Reliefs Order") provides:

3 Relief for fuel and lubricants contained in a commercial vehicle

(1) Subject to the provisions of this Order, a person who has travelled from another member State shall on entering the United Kingdom be relieved from payment of excise duty on the fuel and lubricants contained in a commercial vehicle that he has with him.

(2) The reliefs afforded by this Order apply only to fuel that—

(a) is contained in the vehicle's standard tanks; and

(b) is being used or is intended for use by that vehicle.

(3) The reliefs afforded by this Order apply only to fuel on which—

(a) excise duty has been paid in the member State in which the fuel was acquired at a rate that is appropriate to the use to which that fuel is being or is intended to be put; and

(b) the excise duty paid on that fuel has not been remitted, repaid or drawn back.

(4) The reliefs afforded by this Order apply only to fuel and lubricants that were taken into the vehicle within the European Union and are of a type and quantity necessary for the normal operation of the vehicle during its journey.

24. Article 4 of the Travellers' Reliefs Order provides:

4 Conditions

(1) The reliefs afforded by this Order are subject to the following conditions; and if any condition is not complied with the fuel and lubricants shall, unless that non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

(2) The fuel and lubricants are used only in the vehicle and are not removed from the vehicle except—

(a) temporarily, to facilitate repair; or

(b) permanently, to be destroyed.

(3) The fuel and lubricants are used only for purposes appropriate to the rate of excise duty paid in the member State in which the fuel was acquired.

(4) The excise duty paid on the fuel and lubricants is not remitted, repaid or drawn back.

The Appellant's case

25. For the earlier 8 April 2014 hearing, Mr McNamee produced a written outline of case, in which it is contended that vehicle C was a "shunt vehicle" which "apart from one brief period in the audit period was not used as a road transport vehicle".

26. In an opening statement before the Tribunal at the 6 November 2015 hearing, Mr McNamee said that the Appellant's case was that vehicle C was a shunt vehicle which only operated within the curtilage of a factory, moving trailers around. It was contended that its mileage was thus considerably lower than the mileage figure used in the challenged assessment.

The evidence

The documentary evidence

27. The documentary evidence produced at a late stage by the Appellant included the following.

28. There is a repair order/sales invoice from Paul Saunderson Commercials ("Saunderson"), a sales, service and repairs company in Ballyclare, in respect of repairs to vehicle C (the "Saunderson receipt"). It is a pre-printed form on which entries have been made in handwriting. Under "Time/Date In" there has been entered "4.10.10". Under "Mileometer" there has been entered "448024". There has been entered in handwriting a list of the work undertaken. One of the items states "Got tacho & [illegible] done [in?] DCL …" The document also bears a "paid" stamp dated 18 December 2010, on which has been entered in handwriting what appears to be details of a cheque by which the invoice was paid.

29. There is an e-mail from Dennison Commercials Ltd ("Dennison") in Ballyclare attaching a tachograph record sheet in relation to vehicle C (the "Dennison certificate"). The whole of this document is typed/printed, except that it appears to have a handwritten signature under the hearing "authorised tester's signature". It bears the details of Dennison Commercials Ltd as well as those of Siemens VDO Trading Ltd in Birmingham. It bears a reference to Regulation (EEC) No 3821/85. It bears the date of 8 October 2010, and states that its date of expiry is 8 October 2012. It gives the operator of the vehicle as "Rocks Transport Ltd". It states that the "Odo before Test" was "447,175". It states that the "Odo after Test" was "447,179".

30. There is a letter from Gerald Lyttle & Sons, Commercial Repairs & Tachograph Centre ("Gerald Lyttle"), in Cookstown, Co Tyrone, dated 15 May 2014, relating to vehicle C (the "Lyttle letter"). The letter states: "This letter confirms that the above vehicle was Calibrated 21/3/13. Total Kilometres after Calibration were 489080 km. Tachograph Centre GB NI 226."

31. There is a photograph of an odometer (the "odometer photo"), showing a reading of 493,079.9 kilometres.

32. There are three tachographs, with handwritten dates and odometer readings. These are for dates in October 2012, August 2013 and March 2014 (the "tachographs").

The Appellant's oral evidence at the hearing

33. In his evidence in chief the Appellant stated as follows. The Saunderson receipt is an invoice for repairs to vehicle C undertaken by Saunderson. The date of 2 November 2010 at the top right hand corner of the invoice is the date that the vehicle was collected from Paul Saunderson by the Appellant. The odometer photo was taken in April 2014 for purposes of the April 2014 Tribunal hearing; at the time HMRC were invited to inspect the odometer themselves.

34. In cross-examination the Appellant said as follows.

35. The Appellant established the SRL business himself on 1 October 2010, and acquired the three vehicles from James Rocks who formerly used them for his own business, Rocks Transport. (James Rocks was driving vehicle A at the time that it was stopped by HMRC on 19 April 2012 (paragraph 4 above)). SRL does not and has never previously owned any other vehicles.

36. It was put to the Appellant that the written outline of case dated 1 April 2014 (prepared by the Appellant's representative for the earlier April 2014 hearing) stated that vehicle C "was a shunt vehicle and apart from one brief period in the audit period was not used as a road transport vehicle". The Appellant denied that it had ever been used as a road vehicle, and was silent when asked why the written outline of case said that it was for a period used as a road vehicle. The Appellant was asked why vehicle C was taxed if it had only ever been used as a shunt vehicle. The Appellant said that this would leave open the option of using it as a road vehicle, even though it never was. In response to subsequent questions, the Appellant accepted that vehicle C was driven on the road to take it to fuel stations to be fuelled.

37. It was put to the Appellant that fuel purchase invoices showed that vehicle C was fuelled twice on 4 March 2011 (100 and 496 litres on respective occasions), and that it was fuelled again on 8 and 16 March 2011 (150 and 100 litres respectively). The Appellant acknowledged that these were not inconsiderate amounts of fuel. It was put to the Appellant that the invoices showed that vehicle C was fuelled with 601 litres on 7 July 2011, and was fuelled on 19 August 2011, twice on 24 August 2011, and four times in September 2011. The Appellant responded to these questions with silence. He acknowledged that vehicle C was regularly fuelled in the Republic of Ireland. It was put to the Appellant that if the vehicle was only ever used as a shunt vehicle, there would be no need to fuel it with such large quantities of fuel, and that it would not make sense to take it all the way to the Republic of Ireland to be fuelled. The Appellant again denied that vehicle C was ever used as a road vehicle.

38. The Appellant said that his business was registered for VAT, and that he understood the importance of keeping business records for VAT purposes. When asked, he said he could not recall receiving a 17 November 2012 letter from HMRC

requesting the production of certain documents. He said that he recalled subsequently receiving a phone call asking only for bank statements. When it was put to the Appellant that the documents that he provided to HMRC in response did not show that vehicle C was a shunt vehicle, the Appellant responded that the documents provided were diesel purchase receipts. When it was put to him that he did not provide any of the other documents requested by HMRC, he responded that he could not recall being asked for other documents, and said that in the conversations with HMRC he was only asked for fuel invoices. He said he was not aware at the time that his whole business was subject to a fuel audit; he was simply asked to provide certain documents.

39. It was put to the Appellant that he never said in any of his conversations with or documents provided to HMRC that vehicle C was being used as a shunt vehicle. The Appellant responded that he was simply asked to provide fuel invoices, and HMRC had never asked him if the vehicle was a shunt vehicle.

40. The Appellant said that he purchased the vehicle for cash for £3,000, and that he had no receipt for the purchase. It was put to the Appellant that one of the documents provided by him to HMRC was indeed a receipt for the purchase of the vehicle, and it showed the vehicle as having been purchased on 23 September 2010, even though the Appellant said that his business was only started on 1 October 2010. The Appellant said that this document was not a receipt from the seller of the vehicle, but just a document created by the Appellant for his own records to record the details of the purchase. He said that he put 23 September 2010 in the document, because he was at the time no longer exactly sure of the date. When it was put to the Appellant that he did not tell Officer Connell that he had produced this document himself, he said that she had not asked.

41. It was put to the Appellant that he had told Officer Connell that he was not sure whether he had tachographs for the vehicle, when in fact he subsequently said he did. He denied that he had agreed with Officer Connell to use her proposed methodology for calculating the mileage. The Appellant denied that he had produced a handwritten document in the bundle stating that the average weekly mileage of the vehicle was "250 miles to 800 miles" and referred to "448611" kilometres. He said it was not produced by any of his employees. He said that the tachograph should have shown that the vehicle was a shunt vehicle. He agreed that as at 24 October 2012, his position was that he had provided to HMRC all of the documents he had. He said that after he received the notice of proposed assessment, he did not contact HMRC, but he contacted his representatives. When it was put to him that he did not provide any further information in response to the assessment, he said that the matter was now in the hands of his representatives. When it was put to him that his request for review did not state that vehicle C was a shunt vehicle, the Appellant said that this was not an issue at the time as HMRC only wanted fuel receipts.

42. It was put to the Appellant that at the time of assessment, he had never challenged the mileage of the vehicle used as the basis for the assessment. It was further put to the Appellant that he acknowledged in his witness statement dated 22 October 2013 that he had seen HMRC's breakdown of the assessment which was

faxed to his representative on 12 September 2013, but that the Appellant did not say at that stage that the vehicle was only used as a shunt vehicle. The Appellant said that that was not an issue at the time. When it was put to him that this would have been material to the mileage of the vehicle, the Appellant said that the tachograph should have shown that it was only used as a shunt vehicle. He was not asked about this at the time, he was only asked for fuel invoices.

43. It was put to the Appellant that the first time he mentioned that the vehicle was a shunt vehicle was on 1 April 2014, in the written outline of case presented by his present representative, Mr McNamee. It was also put to the Appellant that some of the documents produced at that late stage on which he now relies predate Officer Connell's request for service records. The Appellant repeated that this had not been an issue earlier, and that his accountants had had the documents on which he now relies.

44. It was put to the Appellant that Saunderson had confirmed to HMRC that the entry under "Mileometer" in the Saunderson receipt had not been entered by them, and that they did not know who had added it. The Appellant said that it would have been entered by the Appellant's driver or the Appellant himself for the Appellant's own records. It was put to the Appellant that an application made by his representative in June 2014 for this additional evidence to be admitted stated that "The Appellant at this stage is not able to say whether the mileometer reading was entered upon the Paul Saunderson Commercials' document by Mr Saunderson or by a member of his staff or by the Appellant himself for accounting purposes". It was put to the Appellant that it was inconsistent with that statement for him to say now that he knew this was entered either by him or his driver. The Appellant said that the vehicle was with Saunderson from 4 October 2010 to 2 November 2010, but that he did not know exactly when the "Mileometer" entry was added to the form.

45. It was put to the Appellant that the tachographs were outside the audit period, and that he should have had tachograph records from the audit period. The Appellant maintained that these had been provided to HMRC.

46. In re-examination the Appellant said as follows. He had felt harassed by HMRC. Vehicle C was still at the factory where it is still used as a shunt vehicle, and could have been examined there by HMRC.

Submissions of the Appellant

Challenge to the legality of the assessment

47. Under the Travellers' Reliefs Order, a lorry driver is entitled to fuel in the Republic of Ireland. Such fuel therefore is not subject to excise and does not fall within the definition of "goods" in the HMDP Regulations.

48. Even where a person is not entitled to relief under the Travellers' Reliefs Order on the ground that the fuel is rebated fuel which the person is not entitled to use, this still does not mean that the fuel becomes "goods" for purposes of the HMDP

Regulations. There are other specific provisions in the legislation dealing with misuse of rebated goods.

49. The assessment in this case was raised under s 12(1)(a) of the Finance Act 1994. A requirement for a valid assessment under s 12(1)(a) is that there must be a default under s 12(2). There was no such default in the present case. The assessment has therefore not been validly made. It is immaterial that the assessment could have been made under s 12(1A). The fact is that it was not made under s 12(1A). HMRC cannot now rewrite the assessment.

Challenge to the mileage of vehicle C

50. HMRC contend that the Appellant raised for the first time at a very late stage the contention that vehicle C was used as a shunt vehicle. However, the Appellant was only aware at a late stage of the exact basis of the HMRC case. The Appellant felt harassed by HMRC. HMRC was content to accept fuel purchase invoices produced by the Appellant at a late stage and reduced the assessment as a result (paragraphs 13-14 above). The Appellant has now produced evidence of the mileage of vehicle C in the audit period.

Submissions of HMRC

Challenge to the legality of the assessment

51. The fuel does come within the definition of excise goods. The reference to "Section 12(1)(a)" is clearly intended to be a reference to s 12(1A).

Challenge to the mileage of vehicle C

52. The burden of proof is on the Appellant. HMRC is not required to do anything, but has in fact gone out of its way to establish the facts. The Appellant at the very least knew the basis of the assessment by September 2013, yet the claim that vehicle C is a shunt vehicle was not made in the Appellant's 22 October 2013 witness statement. The Appellant had various conversations with HMRC at an early stage in which he could have explained this, and it beggars belief that the Appellant did not appreciate that HMRC was conducting a fuel audit or that the mileage of the vehicles was being established. On 24 October 2012 the Appellant's representatives expressly informed HMRC that the Appellant had no more information available.

53. The first mention of the claim that the vehicle was a shunt vehicle was made in the Appellant's representative's April 2014 outline of case. The Appellant has been represented since his December 2012 request for a review of the assessment, and his failure to mention this claim earlier raises issues of credibility. If the vehicle is a shunt vehicle, it seems implausible that it would be taxed, given the cost. Even if the vehicle was taxed to enable it to be driven to be fuelled, it is unlikely that it would have made sense to go all the way to the Republic of Ireland to fuel it, if it was only ever used as a shunt vehicle. The mileage on the Saunderson receipt is acknowledged to have been entered by the Appellant himself.

54. The Appellant has not shown the evidence to be sufficiently reliable to discharge his burden of proof.

The Tribunal's findings

Challenge to the legality of the assessment

55. The Tribunal finds no merit in this argument.

56. The assessment itself does not mention s 12 of the Finance Act 1994. HMRC's covering letter to the assessment indicates that the assessment is made under s 12, but does not specify any subsection. The Appellant has not argued that failure to mention a specific sub-section of s 12 at the time of assessment would render the assessment unlawful. The 18 January 2013 HMRC review letter refers to s 12(1)(a), but even if this was an incorrect reference, the Tribunal does not see how a review letter could retrospectively invalidate what had previously been a valid assessment. The argument based on the reference to s 12(1)(a) is therefore rejected.

57. As an aside, the Tribunal adds the following. The Appellant states that this assessment could not have been made under s 12(1)(a) as there has been no default under s 12(2). However, the parties did not address in argument in any detail why in this case it could not be said that there was a default under s 12(2)(a) or (b).

58. The Travellers' Reliefs Order deals with the circumstances in which "a person who has travelled from another member State shall on entering the United Kingdom be relieved from payment of excise duty on the fuel and lubricants contained in a commercial vehicle that he has with him". Its very wording assumes that the fuel in such circumstances constitutes "goods" that are subject to excise duty. The Appellant has not identified any provision in the Hydrocarbon Oil and Duties Act 1979, or other primary or secondary legislation, that would exempt fuel in such circumstances from the definition of "goods". The argument based on the Travellers' Reliefs Order is therefore also rejected.

Challenge to the mileage of vehicle C

59. The Tribunal accepts the HMRC argument that the burden of proof is on the Appellant. The Appellant must produce sufficient evidence to establish the necessary facts on which his grounds of appeal are based on a balance of probability. To discharge that burden and standard of proof, it is not sufficient for the Appellant simply to produce documents attesting to those facts. It is also necessary for the Appellant to establish that those documents are sufficiently reliable to establish (together with all of the other evidence in the case) the facts on a balance of probability.

60. An assessment of the reliability of documentary evidence falls to be made by a consideration of all relevant circumstances. One relevant circumstance will be the manner in which a document is put into evidence. For instance, in this case the Dennison certificate and Lyttle letter might have been stronger evidence if they had

been introduced through the oral evidence of employees or officials of those respective companies. In this case, those documents were introduced through the evidence of the Appellant, and an assessment of their reliability may therefore be affected by assessments of the reliability of the Appellant's evidence and of the Appellant as a witness. The fact that documents are produced at a late stage with no adequate or plausible explanation of why they were not produced earlier is clearly also a matter that may be material to any assessment of the reliability of documents.

61. The Tribunal does not consider that there has been an acceptable explanation as to why the most important evidence in this case was produced as late as it was. Indeed, the circumstances of its production led to the making of a wasted costs order by the Tribunal. Nevertheless, credibility concerns in relation to a document do not automatically lead to a conclusion that the document is unreliable, and the circumstances as a whole still need to be considered.

62. A significant consideration in this case is that the evidence produced at a late stage by the Appellant included significant fuel purchase invoices that were accepted by HMRC. These were so significant that they led HMRC to reduce the assessment from some £66,000 to £23,000. It was of obvious detriment to the Appellant not to produce these documents as soon as he could. Nevertheless, the reliability of the majority of these fuel purchase invoices was not disputed by HMRC.

63. The Tribunal's assessment of the other significant documents relied upon by the Appellant is as follows.

64. HMRC's own case is that it contacted Saunderson, who confirmed the authenticity of the Saunderson receipt, save that the document when issued by Saunderson did not contain the entry under "Mileometer". However, in the Appellant's June 2014 application for this additional evidence to be admitted, the Appellant acknowledged the possibility that this entry may have been added by the Appellant himself.

65. The Tribunal considers that the Saunderson receipt and the Dennison certificate are mutually corroborative. The Saunderson receipt indicates that vehicle C was taken in by Saunderson on 4 October 2010, and that while with Saunderson, the tacho was done at "DCL", which the Tribunal is satisfied is a reference to Dennison Commercials Ltd. The Dennison certificate is dated 8 October 2010, and indicates that the tachometer reading at the start of that testing was 447,175 kilometres. Apart from the lateness of its production, there has been no suggestion that there is anything suspicious about the Dennison certificate, and there is nothing apparent to the Tribunal. The Tribunal is therefore satisfied that the odometer reading of vehicle C on 8 October 2010 was 447,175 kilometres.

66. There were three tachographs. One is dated 4 October 2012, which is after the end of the audit period, and shows a start odometer reading of 488,476. If the odometer readings in the Dennison certificate and the 4 October 2012 tachograph were correct, this would mean that the average mileage of the vehicle C in the period between 8 October 2010 and 4 October 2012 would be as follows. The start reading

on the 8 October 2010 Dennison certificate was 447,175 kilometres. The start reading on the 4 October 2012 tachograph was 488,476 kilometres. The difference is 41,301 kilometres, or 25,663 miles. The difference between the two dates is 727 days, which means that the average usage in that period was 35.3 miles per day or 247 miles per week.

67. The Lyttle letter indicates that the odometer reading on 21 March 2013 was 489,080. At the hearing, it was common ground between the parties that if the odometer readings in the Dennison certificate and Lyttle letter are correct, this would mean that the vehicle was driven an average of 204 miles per week in the period between 8 October 2010 and 21 March 2013. However, if the odometer readings in the 4 October 2012 tachograph and the Lyttle letter are correct, this would mean that the vehicle was driven a total of 604 kilometres in the period of over 5 months between 4 October 2012 and 21 March 2013. This would suggest that the usage of the vehicle in that latter period was not representative of its usage during the audit period. In any event, the odometer reading in the Lyttle letter was taken nearly a year after the end of the audit period, and for that reason is less useful than the 4 October 2012 tachograph for determining average mileage during the audit period.

68. The other two tachographs are from dates that are even later than the odometer reading in the Lyttle letter, and for that reason are even less helpful.

69. The odometer photo shows a reading of 493,079. This is said to have been taken in May 2014. If so, it was taken on an even later date, and is for that reason even less helpful still.

70. HMRC contended that it was implausible that the vehicle would have been taxed if it was only used as a shunt vehicle within the curtilage of a factory. The Tribunal does not agree. It is plausible that the vehicle would have to be taxed in order to take it on the road to be fuelled, which would also have meant that it was available to be used for other purposes if the occasion arose.

71. HMRC submitted that it is implausible that the vehicle would be taken to the Republic of Ireland to be fuelled if it was only used as a shunt vehicle. However, there was no detailed analysis of the fuel and staff time costs involved in taking the vehicle to the Republic of Ireland to be fuelled as compared to the savings in fuel costs that would be made in so doing. The Tribunal is therefore unable to conclude that it made no commercial sense for the Appellant to do this. The Tribunal is therefore unable to accept the HMRC submission that this casts doubt on the reliability of the other evidence.

72. It was argued by HMRC that fuel records showed that vehicle C had been fuelled frequently. The records at exhibit PC 6 of the witness statement of Officer Connell show that it was fuelled with approximately 850 litres (187 gallons) in March 2011, 600 litres (132 gallons) in July 2011, 740 litres (163 gallons) in August 2011, and 1,000 litres (220 gallons) in September 2011. With a fuel consumption of 7.9 miles to the gallon, this would be the equivalent of 345 miles per week in March 2011, 243 miles per week in July 2011, 300 miles per week in August 2011, and 406

miles per week in September 2011. While these figures are (with one exception) higher than the figure of 247 miles per week referred to in paragraph 66 above, they are not in themselves inconsistent with an average over a longer period of 247 miles per week, especially as fuel purchased in one month may be consumed in part in a subsequent month.

73. The Tribunal takes into account, in determining the reliability of the evidence, the difficulties that HMRC encountered in obtaining information from the Appellant, the fact that he produced further evidence after his representatives stated in a 24 October 2012 letter that he had no further evidence, and the fact that late production of evidence resulted in the making of a wasted costs order by the Tribunal. The Tribunal also takes into account that the Appellant in his oral evidence was often hesitant and evasive. The Tribunal has taken into account the other HMRC arguments concerning the reliability of the Appellant's evidence.

74. However, the Tribunal has already found at paragraph 65 above that it is satisfied that the odometer reading of vehicle C on 8 October 2010 was 447,175 kilometres. Despite all of the issues concerning reliability of evidence in this case, and especially the concerns about the late production of the evidence, the Tribunal has no difficulty in finding that Saunderson receipt and the Dennison certificate are reliable. HMRC have accepted that other evidence produced by the Appellant at a late stage is reliable (see paragraph 62 above). The fact that significant documents produced at such a late stage have been found to be reliable is of relevance when considering other of the late-produced documents.

75. Of all of the other documents produced by the Appellant, the one most relevant to determining the mileage of vehicle C during the audit period is the 4 October 2012 tachograph, which is the closest in time to the end of the audit period. On its consideration of all of the evidence and circumstances as a whole, the Tribunal finds that the 4 October 2012 tachograph is sufficiently reliable to establish the mileage of vehicle C on 4 October 2012 on a balance of probability.

76. As noted in paragraph 66 above, this means that the average mileage of vehicle C between 8 October 2010 and 4 October 2012 was 247 miles per week. The audit period was 1 October 2010 to 18 April 2012. The Tribunal is in the circumstances satisfied that the Appellant has discharged the burden of proving on a balance of probability that the average mileage of vehicle C during the audit period was 247 miles per week.

77. The Tribunal decided at the hearing that the assessment should have been calculated on the basis that vehicle C was driven 243 miles per week during the audit period. It may be that that figure of 243 was the result of an arithmetical error, and that it should have been 247 miles per week. However, the Tribunal having already given its decision at the hearing with a figure of 243 miles per week, it does not propose to change that unless either party makes an application proposing an amendment and setting out the Tribunal's power to do so.

Conclusion

78. For the reasons above, the appeal is allowed in part, to the extent indicated in paragraph 16 above.

79. 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 CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2016