[2017] UKFTT 654 (TC)

TC06081

Appeal number: TC/2014/02326

Excise Duty - s 13 Hydrocarbon Oil Duties Act 1979 - taking in and use of rebated fuel in road vehicles - whether insufficient evidence to rebut assessed use of rebated fuel for period of assessment - yes - whether quantum reasonable and fairly assessed - yes - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

ADRIAN JOSEPH MCQUAID **Appellant**

- and -

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

TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: PATRICIA GORDON

Sitting in public at The Tribunal Hearing Centre, Chichester Street, Belfast 20 June 2017

Mr Neil Manley, for the Appellant

Mr William Hays, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Adrian McQuaid ('the Appellant'), against a decision dated 4 December 2013, to raise an assessment under s 13 of the Hydrocarbon Oil Duties Act 1979 ('HODA') in the sum of £13,054, revised to £11,215 and further revised to £6,588, for repayment of rebated excise duty allowed on heavy oil, used in vehicles owned by the Appellant in contravention of s 12(2) HODA.

2. The assessment relates to a total of four vehicles owned by the Appellant during the assessment period, 17 September 2009 to 18 September 2012. The Appellant says that the mileage of the vehicles is much less than HMRC has concluded in its assessment.

The background

Red Diesel

3. It is illegal to use heavy oils (for example, kerosene or gas oil usually marked and dyed, also called 'red diesel') as fuel in a road vehicle unless the user obtains a licence from HMRC to pay the difference between the full rate of duty on the fuel and the rebated rate actually paid on the fuel used. Only vehicles which are specifically excluded from the legal definition of 'road vehicle' may use red diesel as road fuel. These are known as 'excepted vehicles'. A vehicle that is not used on the public road and has no licence under the Vehicle Excise and Registration Act 1994 is an excepted vehicle. Vehicles used for construction, agriculture, forestry and horticulture can be excepted vehicles, as can, by way of example, tractors, gritters, and road rolling machines.

4. Chemical markers ('Euromarkers') are added to fuels to indicate the difference between rebated, un-taxed fuels and taxed fuels. A dye is usually used with the marker so that rebated oil can be easily identified. The current gas oil dye is red in colour. In the UK, dyed gas oil, known as 'red diesel' is intended for use for agricultural and non-road applications and is significantly cheaper than taxed commercial diesel fuel. The dyes used are solvent dyes such as Solvent Red and Solvent Yellow.

5. Different countries add different dyes to fuels – the UK uses Solvent Red and Quinizarin in red diesel.

Factual Background

6. Following a Police referral, Officers of Her Majesty's Road Fuel Testing Unit ('RFTU'), on 19 September 2012, attended the premises occupied by 'Border Cars' in Dumfries, Scotland where they sampled fuel in the running tank of a Vauxhall Vivaro van registration, CEZ 3315, owned by the Appellant. The vehicle had an odometer reading of 136,293.

7. The fuel sample was red in colour and tested positive for the presence of Euromarker and Quinizarin (100%). The vehicle had been towing a caravan and was owned by the Appellant. The vehicle was seized. Subsequent Local Government Chemist tests showed that the sample contained marked UK rebated gas oil.

8. On 21 September 2012 HMRC wrote to the Appellant, as the owner of the vehicle, to advise him that the fuel contained in the vehicle was seized under s 13(6) of HODA and that the vehicle was seized under s 141(1)(a) of the Customs and Excise Management Act ('CEMA') 1979.

9. The vehicle was subsequently restored to the Appellant upon payment of a Restoration fee of £520.

10. HMRC also issued by post on 21 September 2012, a Notice of Sampling to the Appellant and advised him that a sample was available to him at the Road Fuel Testing Unit in Paisley. HMRC also issued a Notification of Rights of Appeal and a 'standard production' letter requesting all business records relating to the vehicle, including fuelling of the vehicle for the last three years.

11. On 25 January 2013 HMRC wrote to the Appellant requesting details of the running and fuelling of his vehicles.

12. On 8 February 2013, the Appellant telephoned HMRC to enquire what he needed to produce. Officer Stockman advised accordingly and agreed an extension of time to 28 February 2013, for the records to be delivered.

13. On 9 July 2013 Officer Imelda Gavin contacted the Appellant and asked why he had not submitted the records as requested. The Appellant said that he had sent the records to HMRC in Bootle (it subsequently transpired that, in fact, he had not). He informed Officer Gavin that he was a circus performer working part-time mainly at weekends. Officer Gavin asked for the mileage of vehicle CEZ 3315, saying that it would be noted on the last MOT.

14. On 31 July 2013, after a number of reminders, a letter from the Appellant, together with fuel receipts, were received at Customs House, Belfast. The letter advised that the current mileage on vehicle CEZ 3315 was 120,000, which could not be correct, as the mileage of the vehicle, when tested by the Road Fuel Testing Unit on 19 September 2012, was 136,293.

15. On 7 August 2013 Officer Gavin wrote to the Appellant repeating the request for the current odometer reading of vehicle CEZ 3315, and also information in relation to the five other vehicles which were deemed to be associated to him. The vehicles, HMRC identified for which information was required were as follows:

Vehicle 1 - CEZ 3315, the Vauxhall Vivaro van registered to the Appellant on 16 August 2011.

Vehicle 2 - WAO6 BWE, a 2006 Ford transit motor home.

Vehicle 3 - YCZ 5408, a 2004 Renault panel van registered to the Appellant on 25 July 2009.

Vehicle 4 - MNZ 8924, a 2006 Mercedes 4 door saloon registered to the Appellant on 15 April 2010.

Vehicle 5 - EUO6 FYN, a 2006 Mercedes van registered to the Appellant on 24 June 2010. This vehicle replaced Vehicle 3 when it was scrapped in February 2010.

Vehicle 6 - MLZ 6762, a 2001 Ford box van.

16. During an examination of the invoices and fuel receipts submitted by the Appellant it was noted that they included purchases of Marked Gas Oil i.e. red diesel, LPG and diesel. Only those invoices relating to diesel and dated within the audit period were accepted for consideration. In respect of those invoices on which only the monetary value was recorded, Officer Gavin used departmental records of historical fuel prices to determine the volume of diesel purchased.

17. In the absence of a response from the Appellant, on 5 September 2013 Officer Gavin wrote to him, advising that the audit showed a shortfall between the volume of road fuel purchased and that calculated to be required for his vehicles over the audit assessment period. She therefore advised that HMRC would be issuing an Excise Assessment and Wrongdoing penalty. She gave until 12th September 2013 as a final opportunity for the Appellant to provide any further information he wanted to be taken into consideration for the audit consideration; otherwise an assessment would be issued.

18. On 16 September 2013, as no further or additional information had been received, Officer Gavin issued an assessment EXA 967/13 for Excise Duty for misuse of rebated fuel in the amount of £25,794.

19. On 24 September 2013, McNamee McDonnell Duffy, Solicitors wrote to Officer Gavin asking for a review of the assessment by an Officer not previously involved in the case. The letter stated that the Appellant worked alone and did not employ anybody. They said he can "only drive one vehicle at a time". They also said that Vehicle 1, CEZ 3315 "remains totally in England" and is used by the Appellant only when he is there. The letter provided further information in relation to three of the five other vehicles, stating:

- Vehicle 2 is a motor home only used for holidays;
- Vehicle 3 was scrapped in February 2010 and was replaced with Vehicle 5;
- Vehicle 6 does not belong to the Appellant.

20. On 1 October 2013, Officer Gavin replied to the Appellant's Solicitors and advised that in light of the information provided, she would undertake a reconsideration of her decision. She also asked for further evidence in respect of Vehicles 4 and 5, and clarification in relation to employees, given that there was

evidence of employee expenses, another person's name, Shane McGleehnan, on some invoices and different types of fuel purchased at one time.

21. On 14 November 2013, the Appellant's Solicitors wrote to Officer Gavin with further information in relation to Vehicles 4 and 5. They also stated that all employees are students who are hired at weekends on a casual basis. The motorhome had a LPG tank for the fridge, oven, hob and heating.

22. On 4 December 2013, Officer Gavin advised the Appellant that she had reviewed the information supplied and that the assessment would be amended to £13,054.

23. On 19 December 2013, the Appellant's Solicitors requested a further review by an Officer not previously involved in the case.

24. HMRC advised the Appellant on 1 April 2014 that, having undertaken the review, the assessment had been upheld.

25. The Appellant submitted a Notice of Appeal, received by the First-tier Tribunal on 28 April 2014. He stated that he had further details of fuel purchases which had not been taken into account when the assessment was raised and had they been taken into account, the assessment would be zero.

26. On 14 September 2014, the Appellant was asked to clarify the position and provide further details on the fuel purchases mentioned in his Notice of Appeal.

27. As nothing had been received from the Appellant, on 4 March 2015 HMRC lodged a Notice of Application with the Tribunal, asking for the appeal to be struck out unless the Appellant provided the information requested within 14 days.

28. On 16 March 2015 the Appellant e-mailed the Tribunal to advise that he had been working away from home for a year and therefore had not received correspondence. He stated that he had now returned for good. He stated that his bookkeeper had the receipts he had referred to, but due to personal circumstances had been unable to provide them. He said that the details would be with the Tribunal "within the next week or two" and therefore asked for an extension of time.

29. On 29 April 2015 the Appellant again e-mailed the Tribunal to advise that he was once again working away from home and that his bookkeeper had been taken ill. He said that he still wished to proceed with the appeal and would forward the outstanding information (requested 30 September 2014) as soon as possible.

30. On 2 July 2015, having heard nothing further from the Appellant, HMRC again applied to the Tribunal for the appeal to be struck out on the basis that the Appellant had been afforded ample time in which to provide the requested information.

31. On 11 November 2015 the Tribunal issued an 'unless' direction for the Appellant to provide the information that he wished to include with his appeal, within two weeks, otherwise his appeal would be struck out without further reference to the parties.

32. On 25 November 2015, the Appellant e-mailed the Tribunal to confirm that his bookkeeper had recovered from her illness and that he was in a position to provide the information.

33. On 20 January 2016 having heard nothing further from the Appellant, the Tribunal issued a further 'unless' direction advising the Appellant that the appeal would be struck out unless by 3 February 2016, he confirmed that he intended to proceed with his appeal and provided the information requested by HMRC.

34. Following the two further 'unless' orders, on 14 May 2016 the Appellant, through his solicitors, submitted further fuel receipts for audit consideration.

35. On 2 August 2016 Officer Gavin wrote to the Appellant advising that the submitted diesel purchase invoices had been accepted for audit consideration and amended the assessment from £13,054 to £11,215.

36. On 11 October 2016 the Appellant submitted a witness statement for inclusion with his appeal. He said that the Officer's estimated fuel consumption of the vehicles and their actual mileage had been over-estimated.

- Vehicle 4 – he said that the official Mercedes-Benz specification showed a mpg consumption of 34 and not 22.5 as estimated.

- Vehicle 5 - he provided a copy of a government MOT history which showed that on the test date of 27 March 2009 the odometer reading was 88,229 miles and on 13 February 2014 the reading was 182,998. This showed that the vehicles mileage averaged 19,000 per year, whereas Officer Gavin had assumed 32,000 miles per year in her assessment.

37. The Officer took into account the information provided and her final reduced assessment was £6,588 on the following basis:

- Vehicle 1. The Appellant's case is that he only uses Vehicle 1 when he is in England. As he is only in England for some of the time it is argued that there has been an overestimate of the fuel consumption. The Officer concluded that there should be an assessment in respect of Vehicle 1 for the full period of registration as it was clear that the vehicle was in use throughout that period.

- Vehicle 2. The motorhome is no longer the subject of assessment.

- Vehicle 3. The Vehicle was assessed until 10 February 2010 (the date it was scrapped).

- Vehicle 4. There should be an assessment for the period of 16 August 2011 to 18 September 2012, albeit now using the Appellant's figures as to the fuel consumption (miles per gallon).

- Vehicle 5. There should be an assessment in respect of this for the period of registration, albeit using the Appellant's figures as to the miles travelled per year.

- Vehicle 6. This vehicle was no longer the subject of assessment.

38. In order for Officer Gavin to arrive at the assessment, she ascertained the mileage of each of the vehicles and then by applying a mpg figure, assessed the amount of fuel that must have been used. She compared the total fuel which she calculated as having been used with the total legitimate fuel purchased (where receipts had been produced) in order to determine the shortfall and after applying the amount of applicable rebate for each period of assessment (there being different periods of assessment corresponding to separate rebate changes), calculated the amount of excise duty payable.

39. The table below sets out the figures used to arrive at the final assessment.

Vehicle	Registration	Audit period start	Period end	Days	Miles	Litres required
1	CEZ 3315	16.08.2011	18.09.2012	400	35,200	4,233.31
3	YCZ 5408	17.09.2009	14.02.2010	151	13,288	1,537.08
4	MNZ 8924	16.04.2010	18.09.2012	887	78,856	10,436.55
5	EUO6 FYN	25.06.2010	18.09.2012	817	43,073	6,918.62

40. The total litres of fuel required was 23,125.56L. The Appellant had provided valid fuel receipts for 9,469.60L and therefore the shortfall was 13,656L, which at an (average) duty rate of £0.482 per litre equated to £6,588.

41. On 29 March 2017 the Appellant lodged a further witness statement in which he said:

- He is a one-man business and could not drive all the vehicles simultaneously. Vehicle 1 is left in England for his use as an entertainer when working for the circus.

- There had been "double counting" for the period 16 August 2011 to 18 September 2012 in respect of vehicles 4 and 5. He could not have driven both vehicles and accumulated the mileage estimated.

Relevant legislation

42. The relevant legislation is set out below:

HODA 1979

Section 6 - *Excise duty on hydrocarbon oil:*

(1) Subject to subsections (2)...and (3) below there shall be charged on hydrocarbon oil -

a. imported into the United Kingdom; or

b. produced in the United Kingdom and delivered for home use from a refinery or from other premises used for the production of hydrocarbon oil, or from any bonded storage for hydrocarbon oil not being , hydrocarbon oil chargeable with duty under paragraph (a) above

a duty of excise at the rate specified in subsection 1A below.

Section 11 - *Rebate on heavy oil*

1) Subject to sections 12, 13, 13AA and 13AB below, where heavy oil charged with the excise duty on hydrocarbon oil is delivered for home use, there shall be allowed on the oil at the time of delivery a rebate of duty at a rate -

(a) in the case of fuel oil, of £0.0274 a litre less than the rate at which the duty is for the time being chargeable;

2) In this section -

"fuel oil" means heavy oil which contains in solution an amount of asphaltenes of not less than 0.5% or which contains less than 0.5% but not less than 0.1% of asphaltenes and has a closed flash point not exceeding 150°C;

Section 12 - *Rebate not allowed on fuel for road vehicles*

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

(2) No heavy oil on whose delivery for home use rebate has been allowed may -

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

(b) be taken into a road vehicle as fuel

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

(3) For the purposes of this section and section 13 below -

(a) heavy oil shall be deemed to be used as fuel for a road vehicle if, but only if, it is used as fuel for the engine provided for propelling the vehicle or for an engine which draws its fuel from the same supply as that engine; and

(b) heavy oil shall be deemed to be taken into a road vehicle as fuel if, but only if, it is taken into it as part of that supply.

Section 13- *Penalties for misuse of rebated heavy oil.*

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

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

(b) notify him or his representative accordingly.

(7) For the purposes of this section, a person is liable for heavy oil being taken into a road vehicle in contravention of section 12(2) above if he is at the time the person having the charge of the vehicle or is its owner, except that if a person other than the owner is, or is for the time being, entitled to possession of it, that person and not the owner is liable.

Section 24 - *Control of use of duty-free and rebated oil*

(3) For the purposes of the Customs and Excise Acts 1979, the presence in any hydrocarbon oil of a marker which, in regulations made under this section, is prescribed in relation to -

(b) rebated heavy oil or rebated light oil,

shall be conclusive evidence that that oil has been so delivered...

(4B) Where -

(a) any oil is delivered without payment of duty, and

(b) a person contravenes or fails to comply with any requirement which, by virtue of any regulations made under this section, is a condition of allowing the oil to be delivered without payment of duty,

the Commissioners may assess an amount equal to the excise duty on like oil at the rate in force at the time of the contravention or failure to comply as being excise duty due from that person, and notify him or his representative accordingly.

Evidence

43. The hearing bundle contained:

(i) A chronological copy exchange of correspondence between the Appellant and HMRC relating to the assessment, together with a schedule, spreadsheets and an explanation of the methodology used in arriving at the total estimated rebated fuel used.
(ii) Detection reports by HMRC's Road Fuel Testing Unit.
(iii) A schedule of fuel receipts provided by the Appellant.
(iv) Witness statement by Officer Gavin for HMRC. She also gave evidence on oath.
(v) A witness statement by Mr Michael Roddie, the Officer working for the road fuel testing unit who sampled and tested fuel from the

Appellant's vehicle. As his statement was not challenged he was not called upon to give evidence on oath.

(vi) Two witness statements by the Appellant. He also gave evidence on oath.

The Appellant's contentions

44. The Appellant's grounds of appeal are:

A. *HMRC have failed to take into consideration, during the course of calculation of the assessment, the fact that the Appellant is a sole trader who does not employ any additional permanent full time staff.*

i. The Appellant was quite simply incapable of operating four vehicles simultaneously during the period under assessment.

ii. For the periods 25 June 2010 to 18 September 2012, HMRC have effectively made an assessment on the assumption that all four vehicles were being operated on a simultaneous basis. Due to the nature and structure of the Appellant's business, calculating an assessment on this basis is both fundamentally flawed in methodology as well as practical application.

iii. The Appellant is classified as a sole-trader and during the period under assessment did not employ any additional staff on a full time basis. His position is respect of his employment of full time staff has remained consistent throughout.

iv. HMRC are basing their assumption of multiple vehicle use on correspondence received from the Appellant's Solicitor dated 14 November 2013, wherein representations were made regarding the casual employment of staff during the period under assessment. The 'casual' hiring of staff would not have been sufficient to warrant an assessment of simultaneous use during the period under assessment.

v. Had HMRC taken into consideration the practical operating of the Appellant's business, it could reasonably and logically be deduced that the Appellant was incapable of operating four vehicles simultaneously.

B. *HMRC have erred in their calculations of the alleged duty payable by effectively 'double counting' the estimated fuel consumption for the period between 16 April 2010 to 18 September 2012 where overlaps occur in the use and assessment of vehicles.*

The audit periods for the 4 vehicles overlap, thus significantly distorting the output assessment figure produced. Had HMRC not effectively 'double counted' then a zero assessment figure was likely. The Appellant has provided sufficient documented proof to verify that his total fuel usage has been vouched and indeed accounted for.

C. *HMRC have erred in their mis-application of the principles of 'best judgment' set forth in the judgment of Pegasus Birds Ltd -v- Customs and Excise Commissioners* [2004] EWCA Civ 1015.

i. The starting point of any calculation of assessment should take into consideration the long standing principles of 'best judgment' as set out in the decision of *Pegasus Birds.*

ii. It is sufficiently clear from the output figures provided in this instance that HMRC has ignored the Appellant's business structure. He was exclusively a sole trader and as such any assessment should reflect the fact that he was only in a position to avail of one vehicle at any one time.

iii. HMRC appear to have justified their position by relying on correspondence between the Appellant's Solicitor and HMRC dated 24 September 2013, wherein reference was made to casual staff. The Appellant's position remains in that he is for all intents and purposes a sole trader and incapable of driving all vehicles under his control on a simultaneous basis.

iv. In considering the principles established in *Pegasus Birds* and applying them to the facts in question, it appears wholly unreasonable that HMRC would reach an assessment as detailed.

45. At the hearing the Appellant gave evidence under oath. He said that he operates a company, Jollys Promotions Ltd, a children's entertainment theatre company, which puts on stage shows such as 'Humpty Dumpty' and 'Goldilocks and the Three Bears', mostly in Ireland and at other times in Dumfries, Scotland. He sometimes works with Circus Vegas, a travelling circus, but he is self-employed and they pay for his services. He does not work for them as an employee. He sometimes puts on magical acts for children. He works alone. He works only Saturdays and Sundays at the circus and often in theatres and hotels. He also does children's puppet shows, when he also arranges the catering.

46. He said that he keeps vehicle 1 in England because it would be too expensive to ferry back and forth between Belfast and Stranraer to where the circus was based. He said that he keeps it in a field and moves it whenever needed when he returns to Scotland. However, later in evidence he conceded that others drove the vehicle to move it around with the circus. He agreed that he had not provided evidence of its current mileage. He had not provided any MOT's which would have shown the vehicle's mileage. He acknowledged that his signed statement that vehicle 1's mileage was 120,000 was incorrect. The vehicle's mileage at the time of fuel testing over a year earlier was more than 136,000. He agreed that he had made no attempt at compiling average weekly mileages with narrative as to where he was travelling from and to.

47. In evidence the Appellant agreed that he had not provided any estimate of his annual earnings in order that a comparison could be made between those earnings and his travelling costs.

48. The Appellant agreed that he had claimed travel expenses for employee Mr Shane McGeehan, but said that Mr McGeehan was just a part-time courier.

49. The Appellant maintained in evidence that his book keeper held all his fuel receipts, but then agreed that at one stage he said that he had found a lot of his receipts at home. He explained that he was extremely disorganised. He agreed that some of the receipts he had obtained from other people who had driven his vehicles and left them in the vehicle, but qualified his statement by saying that the only other person who drives his any of his vehicles is his wife who only drives the Mercedes (Vehicle 4). He agreed that the receipts for fuel which were provided late in the investigation bore dates, which meant they could have been provided during the early stages of the investigation. He was unable to provide an explanation for that.

HMRC's contentions

50. The Appellant has failed to establish (as he must, if he is to succeed in the appeal) that the assessment was wrong.

51. The Appellant consistently failed from 7 August 2013 to provide any of the information requested and consistently failed to respond to the Tribunal's letters and directions, including at least five 'unless' directions.

52. The evidence suggests that other people were driving the vehicles. This includes (i) the Appellant's reference to 'employees', casual or otherwise. (ii) the failure of the Appellant, despite being asked, to provide records showing the mileage of the vehicles concerned (except in relation to two vehicles, one of which was incorrect (far too low) and the other (which was supplied during these proceedings, and which has been accepted by the Officer); (iii) the apparent difficulty the Appellant has had in gathering fuel receipts.

53. HMRC refer to the Tribunal case of *Thomas Corneill v HMRC* [2007] EWHC 715 (Ch.) where Justice Mann allowed HMRC to assess for vehicles which were not tested, but there was evidence that the vehicles were operated by the business.

54. The Appellant was caught driving his vehicle using 'red diesel'. The Officer was entitled to proceed on the basis that this was not the first time he had driven a vehicle in this way and, as is common practice, to carry out an assessment.

55. In making an estimate as to the appropriate assessment, the Officer properly investigated the circumstances. In particular she requested all the information she would need in order to ascertain the mileages of the vehicles registered to the Appellant during the relevant period and the likely fuel consumption.

56. By the end of the process, the Appellant had supplied the following:

- A quantity of fuel receipts on 29 July 2013 and further receipts on 13 May 2016.

- Vehicle 1: an incorrect mileage.

- Vehicle 3: no information.

- Vehicle 4: no information (other than the rate of fuel consumption, which has been taken into account).

- Vehicle 5: no information (other than the mileage, which has been taken into account).

57. The Appellant's claim that he is the only person driving the vehicles is not credible. Despite prompting, he has failed to provide evidence (which must be available to him) which would support his assertions. The absence of evidence calls for an inference that the Officer's assessment is correct.

58. The Officer proceeded on the material available to her and assessed the Appellant reasonably and properly. By contrast, the Appellant has failed to provide relevant evidence and has failed to discharge the burden to support his grounds of appeal.

Conclusion

59. The questions to be determined by the Tribunal are, firstly, could the assessment have been properly made under s13 HODA? The Appellant does not dispute that rebated fuel had been taken into and used in his vehicle CEZ 3315 in contravention of s 12(1) HODA. Neither does he dispute that HMRC are empowered to raise an assessment against him, nor that HMRC are entitled to assess for vehicles which were not tested, but there is evidence that the vehicles were operated by the Appellant in his business and there is an overall shortage between the litres of fuel required to operate the vehicles and the receipts produced for the litres of normal diesel fuel purchased. He does not dispute Officer Gavin's methodology for the assessment, but does dispute her assessment of his total mileage.

60. Therefore the assessment has been properly made.

61. The second question is whether the assessment has been carried out to best judgment. That is, does the evidence justify a finding that the fuel used by the Appellant in the vehicles registered to him, for which he has not been able to produce valid fuel receipts, was not rebated fuel? The assessment has to be based on estimates and best judgment. Although there is no reference to the use of best judgment in s 13 HODA, that is the recognised and inevitable method of assessment under s 13 where inferences have to be drawn from the primary facts.

62. Mr Manley for the Appellant refers to the principles laid down in *Pegasus Birds*. The *Pegasus* case establishes that a tribunal should consider two stages in the process of reviewing a "best judgment" assessment.

i. First, is there any evidence to suggest that the officer has not used his best judgment in his calculation process; for example, has he acted dishonestly or unfairly, or ignored important information provided by the taxpayer?

ii. Second, is there any evidence to suggest that the amount of tax assessed is incorrect? Is there evidence to indicate that the assessed amount should be reduced? This would be the case where the defence clearly shows that the taxpayer's vehicles could not realistically have done the miles which HMRC say they have.

63. With regard to the assessments, the Appellant has been unable to produce a full set of receipts to show clear and legitimate sources of all the diesel which his vehicles used, or any clear evidence that the estimated mileages were incorrect.

64. The assessment is not measured against an objective standard. The question is whether the assessment is an honest and genuine attempt to make a reasoned assessment of the duty payable or whether it was of such a nature that no officer seeking to exercise best judgment could have made it. It is for the Appellant to show that the assessment is wrong, either in its entirety or for a particular vehicle or period of assessment, so that if he is able to do so the assessment may be adjusted. For that purpose the Appellant has to show that the assessment is unreasonable by reason of its methodology or some other reason. If the Appellant asserts that the assessment is unreasonable it must satisfy the burden of proof upon him to demonstrate the correct amount of unpaid excise duty.

64. The Appellant is self-employed and therefore one would have expected him to claim mileage allowances in the computation of his profits. There is no reason why he could not have supplied copy P60's, company accounts, copy tax returns or other information relating to mileages and his net earnings which may have shown that the assessments were incorrect.

65. HMRC are obviously not suggesting that the Appellant has driven three vehicles simultaneously. It is clear that others must have been driving the vehicles, whether it was the Appellant's wife, employees or third parties. The Appellant has failed to address this.

66. The assessments were not made capriciously or based on spurious estimates. The element of estimation does not serve to displace the validity of the assessments which must be regarded as correct until the taxpayer has shown them to be wrong (see '*Van Boeckel v Customs and Excise Commissioners [1981] STC 290*').

67. HMRC's calculation of mileage and fuel required is based on actual figures provided by the Appellant and reasonable estimates from accepted statistics and manufacturers' guidelines. HMRC have taken into account that one of the vehicles was scrapped and replaced part way through the assessment period and therefore only three vehicles were the subject of HMRC's assessment at any one time. They must therefore be regarded as fair and reasonable in all the circumstances.

68 It is clear from *Corneill* that even if only one vehicle is shown to have tested positive for rebated fuel, s 13 HODA applies and permits HMRC to carry out an assessment even if the Appellant's other vehicles are not tested. Some common sense must of course be applied, but HMRC's calculations and assessments are not irrational or excessive. They are reasonable estimates and the calculations have been arrived at by accepted methodology.

69. The Tribunal finds that the assessments were calculated on a fair and reasonable basis by HMRC.

70. The appeal is accordingly dismissed and HMRC's amended assessment in the amount of £6,588 is upheld.

71. 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: 30 AUGUST 2017