[2019] UKFTT 561 (TC)

TC07354

Appeal number: TC/2017/07830

OIL DUTY - EXCISE WRONGDOING PENALTY - Appellant company buying and selling second-hand trucks, and decanting red diesel from them into storage vessels at the yard, which were then being used to fuel company vehicles - Whether red diesel was present in two Mercedes cars? - Yes - Whether the assessment was made to best judgment? - Yes - Whether the presence of red diesel was deliberate or careless? - Deliberate - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACK HILLAS AND SONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR NOEL BARRETT

Sitting in public at Tribunals House, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 2 July 2019

Mr Mark Hillas, a Director, appeared for the Appellant

Miss Kelly Bond, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is our decision in relation to an appeal brought by way of a Notice of Appeal dated 25 October 2017.

2. This appeal is brought against:

(1) An assessment in relation to Oil Duty in the revised sum of £4,494 (reduced from £6,657), imposed pursuant to the *Hydrocarbon Oils and Duties Act 1979*; and

(2) A excise wrongdoing penalty in the revised sum of £2,673 (reduced from £4,293), imposed pursuant to Schedule 41 of the *Finance Act 2008*.

3. Both the revised assessment and the revised penalty were issued by HMRC's Officer James Gilmartin on 11 May 2017, in respect of the alleged misused of gas oil as a road fuel contrary to the provisions of the *Hydrocarbon Oil Duties Act 1979.*

4. On 11 May 2018, the Tribunal (Judge Richard Thomas) allowed the Appellant to appeal out of time. Pursuant to that decision, HMRC prepared a detailed and comprehensive Statement of Case dated 9 July 2018.

5. The decisions under challenge in this appeal relate to events which took place at the Appellant's business premises, Thorn Tree Farm near Halifax, on 6 May 2015.

6. As to events before 6 May 2015, the following facts are not in dispute:

(1) On 19 July 2013, one of the Company's vehicles - a Ford Transit, NK52 AKO, being driven by one of its employees, a William Hillas (the son of one of its directors, Mark Hillas) - was stopped by the Hull Road Fuel Testing Unit at Stoneywood Recovery. The fuel was observed to be red in colour. Field-testing returned positive tests for Quinizarin and Euromarker. Gas oil was detected in its running tank;

(2) William Hillas was interviewed and said that he had put 4 gallons of red diesel into the van on the previous day, having taken the diesel from a JCB at the yard. He had been given money for fuel, but had spent it. The vehicle was seized and restored back to William Hillas on payment of £534. That was made up of £250 for using rebated heavy oil as a road fuel; £250 for putting rebated fuel in to a road vehicle; and £34 duty arrears on duty due on rebated fuel used as a road fuel;

(3) On 20 April 2015, Officer Kewley stopped the same vehicle, NK52 AKO, at Bradford Bulls ground in Bradford. On this occasion, it was being driven by one Liam Raynor, who told officers that he was an employee of the Appellant company. The fuel was observed to be red in colour. A field-test of fuel taken from its running tank detected Euromarker. He was interviewed under caution and, when asked about the red diesel in the van, said that he had put 20-35 litres into the vehicle that morning from a fuel store at the Company's yard. He said that it was a one-off and that he had never done that before. He said that the Company used red diesel for its fork lift trucks, a JCB, a crane, and some other vehicles;

(4) That vehicle was seized and restored on payment of £544.80, being £250 for using rebated heavy oil as a road fuel; £250 for putting rebated fuel in to a

road vehicle; and £44.80 duty arrears on duty due on rebated fuel used as a road fuel.

7. As to events on 6 May 2015, the following facts are not in dispute:

(1) That morning, Officers Mee, Wiseman and Kewley from HMRC's Road Fuel Testing Unit attended Thorn Tree Farm;

(2) During that visit, Officers Mee and Kewley field-tested the fuel in the running tanks of a number of vehicles, including a silver Mercedes car KG56 PZY and a black Mercedes car HK06 MBX;

(3) The fuel in the silver Mercedes was visually observed by Officer Mee to be "reddish yellow" and the field-test indicated the presence of various red diesel markers;

(4) The field-test indicated the presence of rebated fuel in the black Mercedes;

(5) Samples of fuel for further testing were taken from each vehicle.

8. The Appellant company buys and sells second-hand commercial vehicles, mainly trucks. It is not in dispute that the Mercedes cars which were tested were not commercial vehicles of that kind, but are owned by the Appellant company, for use by its directors.

9. It is not in dispute that Officer Wiseman told Mark Hillas that HMRC was seizing both cars, and that Officer Wiseman interviewed Mark Hillas under caution.

10. It is not in dispute that Mark Hillas, asked by Officer Wiseman to account for a positive test of the cars, said (punctuation added):

> "We buy and sell wagons. As and when, we remove the Derv from them to use in our company vehicles to save on fuel bills. This is done by a Polish employee of mine who uses the same containers that he uses to drain the red diesel out of vehicles. From today we will use different containers for each type of vehicle. When we are on the road, if we need fuel, we buy it from petrol stations. In the last few weeks we have put fuel in both these vehicles at petrol stations."

11. When asked who is responsible for putting fuel into those 2 vehicles, Mr Hillas said:

> "My Polish employee George puts the fuel into the containers and anyone needing to use the vehicles puts the fuel in them from the containers."

12. When asked whether the Company holds stocks of fuel, Mr Hillas said:

> "We get 55-60 gallons of red a week and store it in a storage tank..."

13. The two vehicles were seized, and were immediately restored to the Appellant on payment of £1134.40, being £500 for using rebated heavy fuel as a road fuel; £500 for putting rebated fuel into a road vehicle; and £134.40 for duty arrears, it being noted by Officer Mee on the form: 'Duty double as second offence'.

14. There then ensued about 18 months of inconclusive correspondence.

15. On 15 September 2017, the Appellant's Mark Hillas wrote and challenged the sum of £4,494 (but not the sum of £2,673). He wrote:

> "I have supplied you with my invoices which show the mileage to the amount I have used. I have tried my best to give all the information you have asked for, but you have seen what happened to our premises. We have no workshop or offices. We have not requested any insurance money for our property. We have kept all our employees and not made anybody redundant. I [will] not pay a fine of this amount for something we are not guilty of. We have done nothing wrong. The diesel people were at our premises and they advised it was mucky drums NOT us putting red diesel in our cars. These was the ladies' words. I trust we can sort this out without having to go to court with something I have not done."

16. The Grounds for Appeal, dated 25 October 2017, in full, are as follows:

> "We had a serve (sic) office fire and all paperwork destroyed picture supplies (can google our address and comes straight up of the images and news reports etc). We disagree with the figures as the little paperwork we had we have forwarded on. Appealing .... £2,673.93 [and] £4,494.00 we cannot afford these figures as we are really struggling at the moment".

17. The letter and the Grounds of Appeal refer to a serious fire which occurred at Thorn Tree Farm on 3 July 2016.

18. At the hearing, one of the Appellant's directors, Mr Mark Hillas, represented it. He was anxious that he should not be treated unfairly because he did not have a lawyer acting for him. He told us that he had tried to find a solicitor, but had been told that it would cost over £10,000 to represent him at the hearing. Therefore (and perhaps unsurprisingly, given that £10,000 exceeded the sum in dispute, and, in a no-costs regime, would not be recoverable from HMRC if the Appellant won) Mr Hillas decided to represent the Appellant.

19. He outlined his case at the beginning of the hearing. In essence, he said that he felt that neither he nor the Appellant company had done anything wrong. He placed heavy reliance on the fire at the business premises, which he said had destroyed documents. Mr Hillas said that the company had "never once been stopped for and had controlled diesel in its vehicles".

20. It remained unclear whether the Appellant sought to challenge (i) whether there was any red diesel in the running tanks of the Mercedes cars at all; or (ii) just the amount charged by HMRC.

21. Accordingly, and in order to be fair to the Appellant, we have treated this as an appeal against both matters.

22. We read witness statements from Officer James Gilmartin, an Oils Assurance Higher Officer; Jennifer Mee, who, at the time of the tests was employed as a Road Fuel Testing Unit Assistant Officer but who has now moved on to other duties; and Officer Darren Wiseman, who was also an officer Road Fuel Testing Unit Assistant Officer but who has likewise now moved on to other duties. We also heard these officers give oral evidence.

23. We heard oral evidence from Mr Mark Hillas, Mr Harry Hillas, and Mr Gheorghe. On 25 June 2019, the Appellant wrote a short letter, in place of a witness statement, which said:

> "With our business being a commercial motor dealer which buys and sells used vehicles which are purchased from auctions and clients, we siphon the excess fuel/diesel out of the used vehicles and reuse. This process was done by our employees ... which was witnessed by [HMRC's] officers and Harry Hillas how this process was carried out, which this process is not mentioned in your officers' statements".

24. In our findings below, we have considered the totality of the evidence which we have read and heard. We remind ourselves that the burden lies on the Appellant and that, in the event of dispute, we apply the civil standard of proof, which is the balance of probabilities.

Was there red diesel in the Mercedes cars?

25. The first thing we must decide is whether there was red diesel in the running tanks of (i) the silver Mercedes; and (ii) the black Mercedes.

26. We are entirely satisfied that there was red diesel in the running tanks of both vehicles. The contrary is unarguable.

27. As to the silver Mercedes:

(1) Officer Mee observed that the fuel was reddish-yellow;

(2) The field test indicated the presence of markers;

(3) The sample taken was tested at LGC Limited (formerly, the Laboratory of the Government Chemist). Quinizarin was marked at 12%; Solvent Yellow 124 was marked at 12%; Accutrace S10 was marked at 13%. The comments were that the sample contained UK rebated gas oil.

28. As to the black Mercedes:

(1) The field test indicated the presence of markers;

(2) The sample taken was tested at LGC Limited (formerly, the Laboratory of the Government Chemist). Quinizarin was marked at 2%; Solvent Yellow 124 was marked at 2%; Accutrace S10 was marked at 3%. The comments were that the sample contained UK rebated gas oil.

29. Mr Hillas argued strenuously that he was not filling up the Mercedes cars with red diesel. We accept that neither reading was 100% red diesel, or anything approaching 100%. But neither reading could properly be described as negligible or trace. These are provable quantities. The silver car tested at 12%. That equates to about 1/8th red diesel, meaning about 6 litres of red diesel in a 50 litre tank. The black car tested at 2% which (i) is still a provable quantity, and (ii) being 1/50th, is still 1 litre in a 50 litre tank.

30. As to how red diesel got into the running tanks of the Mercedes cars, when it should not have been there at all, it is quite clear that the Company was decanting and storing red diesel from commercial vehicles which it bought. Some of this was from running tanks, and some was from tanks used to fuel refrigeration units. The Company

was entitled to do this, and we accept that it made commercial sense - it was, in effect, 'free fuel' (or, as Mr Hillas put it 'every mile's a smile').

31. But both the presence of red diesel detected, and the percentages detected, are entirely consistent with the Company's arrangements for handling this red diesel once it had been decanted. The Company was putting this red diesel (whether from an intermediate storage tank or not) into 5 gallon storage drums to fuel vehicles, and was then either (i) using a drum full of red diesel to fuel the Company's vehicles, including the Mercedes cars; and/or (ii) was mixing white and red diesel in drums and using that; and/or (iii) was using drums for white diesel which had previously contained red diesel, where there was still some red diesel in the jar.

32. White diesel is colourless. Red diesel is red. Red diesel mixed with white diesel is reddish, and is not colourless. The translucency of the storage drums meant that red diesel (whether on its own, or a mix) would have been visible on account of the colour. We note that emptying or siphoning off the running tanks was a two man job, and fuelling the Company's Mercedes cars was also a two man job. Hence, the colour of the contents would have been visible to more than one person.

33. The 'dimpled' shape of the foot of the drums, as explained to us by Mr Gheorghe, meant that a more than negligible quantity of red diesel would have been left in the bottom even when the drum was tipped up and 'emptied'. On the basis that the drums were circular in cross-section, and approximately 30cm in diameter, then the area of the foot of the drum is about 700cm2. Even a depth of 2cm across this area equates to about 1400cm3, which is 1400 ml, which is 1.4 litres. The drums contained 5 gallons, which is 22.7 litres. 1.4 litres = is about 6%.

34. This figure is simply to illustrate what, in our view, would have been the position even when the drum was tipped up and 'emptied' of red diesel and then refilled with white diesel. The drum would not have been empty when refilled. There would still have been a more than negligible or trace amount of red diesel "sloshing around" in the bottom of it which would have been visible to the naked eye when the drum was being filled up; and which would have 'tainted' the colour of the white diesel.

35. We reject the Appellants' case that HMRC "advised" the Appellant 'it was mucky drums" and not the Appellant "putting red diesel in our cars." We do not think that this was what was said by any of the officers. As a matter of fact, scientifically tested and proved, the cars did contain red diesel. The red diesel was not coming from the local garage. It was coming from fuel which was being put into the Mercedes cars at the yard, by the Appellant, through its staff and employees, as described above. Although it is right that the drums (or at least some of them) may have been "mucky", that did not mean that HMRC was saying, then and there, at the time of the sampling, that this meant that no assessment would be raised or penalty imposed.

The amount of the Assessment

36. The next matter we must consider is the amount of the assessment.

37. HMRC's Officer Gilmartin wanted to conduct a fuel audit. A fuel audit is a conventional way of arriving at an evidentially sustainable assessment. Fuel audits of this kind have been approved by the Courts: e.g., see *Thomas Corneill and Co Ltd v HMTC [2007] EWHC 715 (*Ch) (Mann J).

38. The object of this paper-based exercise was to find out how much fuel the Company had bought, and, by comparing this to the known mileages of the vehicles involved (from their MOT records), to work out how much fuel the Company would have needed to buy. That would then allow the difference to be calculated.

39. On 6 January 2016, Officer Gilmartin wrote and asked for information, including the fuel receipts or invoices. That was about six months before the fire. On 14 March 2016, Officer Gilmartin, not having heard anything in the meanwhile, wrote again. He had calculated total excise duty of £7,899.

40. He had used a set of standard figures as to fuel consumption. Those figures are not challenged in this case. Nor is there any challenge in this case to HMRC's methodology.

41. On 15 April 2016, and again not having heard anything in the meanwhile, he re-calculated duty at £6,457. That is set out in the document at page 129 of the hearing bundle. That calculation related to the period from 16 April 2012 (i.e., 4 years before the calculation) to 5 May 2015 (i.e., the day before the visit to the yard). There is no challenge to the length of this period. His initial audit arrived at the figure of 13,795 litres. The assessed shortfall was 100% of the fuel calculated by HMRC as having been used. That happened because, at that point, HMRC had not been supplied with any information or documents at all by the Company.

42. In early June 2016, and doubtless prompted by the receipt of the assessment and the penalty, the Company appears to have decided to begin to co-operate with HMRC.

43. Eventually, on about 6 April 2017 (that is to say, about 16 months after Officer Gilmartin had first asked) the Company provided HMRC with some information - a set of fuel invoices from 2014 and 2015. Despite the fact that these were well over a year late, Officer Gilmartin was prepared to consider them, and he put them into a list.

44. Officer Gilmartin wrote on 19 April 2017 and asked for information in relation to fuel receipts, large fuel receipts, and fuel card receipts.

45. On 11 May 2017, he then revised his assessment (i) to remove one of the vehicles from the original list of 6 vehicles, leaving 5 vehicles; (ii) to include 3964 litres of diesel shown to have been purchased; (iii) to exclude fuel card receipts; and (iv) to exclude receipts for over 80 litres. The latter was on the basis that the Company did not have any vehicles with a tank bigger than 80 litres. That left a shortfall of 9,600 litres meaning that the duty shortfall was £4,494.

46. Officer Gilmartin also increased the disclosure reduction from 10% to 30%, reducing the penalty from 66.5% to 59.5% of the excise duty amount.

Discussion on the Assessment

47. The Appellant bears the burden of showing (i) that there is evidence 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) and (ii) that there is evidence to suggest that the amount of tax assessed is incorrect.

48. We are not prepared to adjust the assessment. We are confident that the assessment was a fair process, fairly done, in good faith, and done on the basis of unchallenged assumptions. We are confident that HMRC took account of all information provided to it by the Company.

49. The Company has put forward a number of arguments as to the assessment. We reject them.

50. The Company has relied extensively on the fire on 3 July 2016 as the main reason why it did not provide more information than it did. The fire was obviously a very serious one. Fortunately, it did not result in any loss of life, but we accept that it would have caused great disruption in the business. The fire took place six months after HMRC had first asked for information about fuel use, and we have not been provided with any explanation as to why the Company did not engage with HMRC sooner, and when asked.

51. We accept that the fire may well have damaged or destroyed whatever business records were there at the time. However, we do not accept that the fire would have left the Company without any business or fuel records to show HMRC. The Company is a busy undertaking with a significant turnover. It had accountants for many years, who, each and every year, prepared the Company's accounts. The Company was, according to Mr Hillas, paying its accountants a large sum every year to prepare these accounts. This would, in the ordinary course of things, have included the accountants considering the Company's fuel receipts, because those, if relating to business use, would have been a deductible expense. Indeed, as much is suggested in the unchallenged record of Mr Hillas' phone call to HMRC on 1 July 2016 (i.e., just before the fire) when he explained "that he was due to see his accountants ... next week and would then have all the records available to send me." On 19 July 2016, Mrs Hillas spoke to HMRC and the unchallenged record of her call was that "she has now spoken to the accountants and was going to collect the records held by them."

52. In our view, it would have been an entirely easy thing for the Company to have provided HMRC (or, for that matter, the Tribunal) with its accounts and/or the amounts spent on fuel for earlier years. However, no information was provided by the Company - whether to HMRC or the Tribunal - from the accountants. Nor did the Company provide any information or figures from its accounts.

53. Indeed, Officer Gilmartin's letters after the fire (for example, his letters of 12 September 2016 and 15 February 2017) are clear that HMRC understood the Company's position, and suggested that the Company would be able to provide evidence of fuel purchased 'possibly through your bank records or information held at your accountants'.

54. We reject Mr Hillas' explanation that HMRC had not explicitly asked for anything other than fuel receipts. It is true that fuel receipts were asked for in the Information Notice. But, even then, it was with respect to the Appellant company and to Mr Hillas - entirely obvious what HMRC wanted to know: how much fuel was the Company buying.

55. Even if it had not been obvious then, it became obvious (or, even more obvious) when HMRC did its first audit.

56. Mr Hillas sought to take issue with the precise wording of HMRC's requests. One example of this related to the record of his phone call to HMRC on 30 November 2016, and HMRC's need for details of all the diesel vehicles he had operated in the past three years. Here, Mr Hillas intensely focussed on the word 'operate', and said that his understanding was that this related only to vehicles being driven under the terms of an 'operators' licence (which he did not have).

57. Another was his stated understanding (which we also reject) that the reference to "vehicles" included only the Company's own small fleet of vehicles (5, including Mercedes cars for Mr and Mrs Hillas, as the Company's directors) and did not include fuel used by the Company to drive the trucks which it had bought, on their journey from the yard to the port at Immingham to be exported. This latter is a significant feature which we shall return to discuss below.

58. We found Mr Hillas' explanations unconvincing. We conclude that in reality he did know what he was being asked for, and why, but simply decided not to produce anything more than he wanted to. It is significant that there were lengthy periods of silence from the Company; and that, when the Company did eventually begin to engage with HMRC, it did not ask for clarification of what was wanted.

59. If there are gaps in the information given by the Company to HMRC, then the responsibility for this falls fairly and squarely at the doors of the Company.

60. Mr Hillas also took objection to the 80 litre 'cap' imposed by HMRC. He took issue with HMRC's exclusion of any purchases of more than 80 litres. Mr Hillas said that more than 80 litres would sometimes be bought by the Company - for example, filling a tank, and then some drums as well.

61. We reject this evidence: (i) Mr Hillas did not raise it with HMRC when he received the revised audit, where it was clear what HMRC had done; (ii) he failed to raise it at any time until the day of the hearing, in the course of his evidence; (iii) in any event, there was no evidence that this has happened, other than in the most general terms. He did not (for example) point to any of the over 80 litre purchases recorded in the receipts, to say 'that was such and such'.

62. A further point of challenge was that HMRC treated the whole of the eventually calculated shortfall (6,900 litres) as subject to assessment, rather than only some proportion of it. The gist of this argument is two-fold (i) it includes the Company's vehicles which were tested on the day and found clean; (ii) if only (say) X% (being less than 100%) of the fuel actually tested was red diesel, then why should all the shortfall (i.e., 100%) be treated as red diesel.

63. This challenge does not succeed. The law is clear. The Appellant Company bears the burden of displacing the assessment in this regard, and has not put forward any sufficient evidence to do so.

64. As to the first point (assessment in relation to other vehicles), as Mann J remarked in *Thomas Corneill & Co Ltd v HMRC* [2007] EWHC 715 (Ch) at Para [32]:

> "It seems to me inevitable in the real world, and in many cases, unless a culprit is caught red-handed, that some element of judgment or assessment is going to be necessary ... I do not see why it should be confined to the red-handed. A recalcitrant haulier may mix red and white diesel from time to time in a manner which makes it impossible to say for certain that a specified quantity was used in a given lorry or lorries at a given time which would enable HMRC to show extremely clearly that over a period of time a given quantity of red diesel was used in unspecified lorries, even if none of them are caught with red diesel in the tanks. I can see no legislative purpose in excluding that situation from the operation of section 13 and there is nothing in the wording of the section which requires it." (emphasis added).

65. *Corneill* was a haulage company. 6% red diesel had been detected in one lorry, but not in others. A fuel audit - of the same kind as that done in this case - was done, in relation to the shortfall over a number of lorries, and not just the one.

66. It is for the Appellant to show that the assessment is wrong for any particular vehicle or period. We are not satisfied that it has done so.

67. We must have regard to the two previous seizures, the facts of which are set out in detail above. On two occasions - almost two years apart - the same company vehicle was found to be unlawfully using red diesel on the road.

68. Moreover, and only a fortnight or so after the second seizure, two of the company's five vehicles then present were found to have provable quantities of red diesel in them. This is not a case of a single reading, in one vehicle.

69. The 12% percentage in the silver Mercedes is strongly suggestive of a pattern of fuelling vehicles using recovered red diesel. These features were appropriate evidence which meant that it was within the proper margin of HMRC's estimation or inference to treat all the Company's vehicles, over that period of time, as fuelled with red diesel.

70. The same argument applies in relation to the treatment of the entirety of the 6,900 litres shortfall as red diesel rather than (say) 12% of it. The burden of undermining the integrity of HMRC's estimate or inference on this point fell on the Appellant, and it has failed to discharge that burden.

71. Indeed, one point emerged in the course of Mr Hillas' evidence which suggested that HMRC may, in fact, have significantly under-estimated (and hence significantly under-assessed) the amount of fuel actually being used by the Company. This is because HMRC had not taken any account of the fuel being used to get the trucks to the port at Immingham. Some vehicles arrived at the yard with enough in the tanks to get them there. Others did not, and will have been fuelled with up to 15 gallons of fuel from the Company's fuel stores. That is to say, and before the Company changed its working practices (which was after the visit) there was also a real likelihood that those vehicles - as the Mercedes cars - were also being fuelled with red diesel, whether on its own, or mixed with white diesel.

The Penalty

72. Here, we remind ourselves that, in relation to the appeal against the Penalty, and unlike the appeal against the Assessment, HMRC and not the Appellant bears the burden.

73. We have no doubt in concluding that the Company's conduct was, at the least, careless and sufficient to attract a penalty.

74. The question which he have to ask is whether the Company's conduct went beyond careless and was 'deliberate'.

75. The legislation does not define 'deliberate', or give any further guidance as to what it means, but, in this context, in our view it means to do something knowingly, and with a set purpose.

76. The Tribunal (Judge Harriet Morgan and Mr Nicholas Dee) considered a similar point in *John Chu v HMRC* [2016] UKFTT 0665 (TC) in which they remarked (at Para [102]), in relation to a 'deliberate but not concealed' penalty that:

> "In our view, on its natural meaning, the use of the term "deliberate" in this context requires that the relevant person must to some extent have acted consciously or with intent..."

77. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the Tribunal (Judge Greenbank and Mr Bell) considered the penalty provisions of Schedule 24 of the *Finance Act 2007*, and remarked that an inaccuracy could be regarded as deliberate when it was made "knowingly".

78. The statutory test is "deliberate". The legislation does not mention honesty, and therefore we are not required to consider any question of honesty. It is not part of the test. Nor, as a civil jurisdiction, are we bound to consider criminal law concepts. Something can be done deliberately, within the meaning of the legislation, even if it could not be shown to have been done dishonestly.

79. Here, we are satisfied that HMRC has succeeded in showing, to the appropriate standard, that the Company's conduct was deliberate.

80. This was not an isolated incident. There was a history of red diesel being used in company vehicles. There were three seizures, the last of which was only about a fortnight before the visit to the yard. Despite this, neither of the first two seizures (or, for that matter, the payment of the restoration amounts) seems to have prompted any change in the Company's working practices when it came to the storage and use of red diesel in its vehicles.

81. The Mercedes cars belonged to the Company. The cars were being fuelled by the Company's employees, using an asset (red diesel) belonging to the Company. The two Mercedes had each been fuelled with red diesel. That red diesel was not being bought from the garage. It was coming from the Company's own fuel stores at the yard, which in turn was coming from the tanks of the commercial vehicles which were being bought and emptied by the Company. The topping or filling up was not being done by strangers. It was being done by the Company's staff and employees, on the Company's

premises. They would have known - because they would have seen - that there was red diesel (or, at the very least, some red diesel) in the drums. This Company's business was commercial vehicles, and we are satisfied that the staff and employees all should knew and understood the difference - in tax terms - between red diesel and white diesel, and knew that red diesel should not be used in the Mercedes cars.

82. Mr Hillas' said that he could not watch what everyone was doing. In a business which employs 16 or so people, this is self-evidently true - but only up to a point. But it does not mean that, if Mr Hillas cannot be shown to have actually known that something was happening, that the penalty must be dismissed.

83. The directors of the Appellant company (as the directors of all companies) owe common law and statutory duties to ensure that the company under their direction - through its staff and employees - does not break the law. If - as here - there have been previous seizures of vehicles found to contain red diesel, then the directors are responsible for putting in place an appropriate system to prevent the same thing happening again.

84. In this case, it is clear that the directors of this company did actually know that red diesel was being used to fuel its vehicles. It knew this, at the time, from the previous seizures. Possessed of that knowledge, it did not put in place any appropriate system (indeed, any system at all) to prevent the same thing happening again. That is clear both from the evidence which we have heard; and also from the very fact of the detections.

85. Schedule 41 does not contain any provision for 'reasonable excuse'.

86. We have also considered the (increased) deduction - from 10% to 30% - applied by HMRC to the penalty. We see absolutely no reason to increase this deduction. Indeed, if anything, it seems to us, in the circumstances described above, to have been generous.

Conclusion

87. For the above reasons, the appeal against the assessment, and the appeal against the penalty are both dismissed.

88. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 03 SEPTEMBER 2019