



[2019] UKFTT 638 (TC)

TC07414

EXCISE DUTY – revocation of RDCO approval – was decision one which no reasonable officer could reasonably have arrived at – decision-making process – some events reported as detections and cited as such as the basis for revocation decision not proven - additional detections had been made by HMRC before date of revocation that were not known by decision-maker – held decision was unreasonable but inevitable that on review HMRC would make the same decision – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/05700

BETWEEN

PROSPECT ORIGIN LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JEANETTE ZAMAN
CAROLINE DE ALBUQUERQUE**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 16 and 17
September 2019**

Mr Marc Glover, counsel, instructed by Jarmans Solicitors, for the Appellant

**Ms Natasha Barnes, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

INTRODUCTION

1. Prospect Origin Limited (“POL”) was approved as a registered dealer in controlled oil (“RDCO”) in accordance with The Hydrocarbon Oils (Registered Dealer in Controlled Oils) Regulations 2002 (the “2002 Regulations”). That approval enabled it to sell marked rebated gas oil, which is also referred to as MGO, gas oil or red diesel.
2. On 24 July 2018 HMRC revoked that approval. POL appeals against that revocation.

BACKGROUND

3. The Upper Tribunal in *Behzad Fuels Limited v HMRC* [2017] UKUT 0321 (TCC) set out a helpful overview of the regime:

“4. ...“white diesel” is the diesel that is used in road vehicles and is subject to full excise duty. “Red diesel” is in all material respects an identical product to white diesel, but because it may only be used in agricultural and similar vehicles which are not driven on the road is subject to a much lower rate of excise duty. In order to enable red diesel and white diesel to be distinguished, chemical “markers” and a red dye are added to red diesel; the chemical markers can be detected by chemical analysis.

5. Misuse of red diesel is a significant problem. At one end of the spectrum, there is widespread fraudulent use of red diesel in road vehicles which is a threat to the revenue. Aside from the simple fraud of fuelling a road vehicle with red diesel and hoping that the use will not be identified, there are more sophisticated versions of the fraud which involve seeking to remove either the red dye or the chemical “markers” from diesel to enable it to be passed off as white diesel. This process is known as “laundering.”

6. At the other end of the spectrum, there can be inadvertent misuse of red diesel, for example where the two types of diesel become mixed in the same tank, or there can be failure to follow what are known in the industry as “wet line procedures” so as to ensure that fuel lines which have contained red diesel are thoroughly cleaned before being used to dispense white diesel.

7. Because of the widespread problem of fraud and the need for users of both red and white diesel to have proper procedures in place to keep the two types of fuel separate, HMRC has been given wide powers to seize fuel that consists of a mixture of red diesel and white diesel and vehicles containing such fuel.

8. HMRC has also developed a strategy which has made it more difficult for fraudsters to obtain rebated heavy oil such as red diesel. We were taken to the published strategy, which states that the RDCO scheme has been central to the strategy. The scheme requires suppliers of controlled oils to register with HMRC and submit monthly returns showing how much they have supplied to customers. These returns are analysed and help HMRC target its response to the misuse of rebated fuels and fuel fraud in the supply chain. Registered suppliers are required to take every reasonable precaution to make sure that their supplies of controlled oil are made only to persons who use that oil as permitted by law and to put in place appropriate “know your customer” procedures. Failure to meet the requirements of the RDCO scheme can result in a registered supplier having its registration revoked by HMRC.”

4. POL sells fuels (including red diesel) by pump and, separately, recycles waste cooking oil. It has two premises – one at Unit 1, The Old Ironworks, Bowling Back Lane, Bradford, West Yorkshire BD4 8SS (the “ BBL Premises”), which sells fuel and takes in waste cooking oil, and a site at Unit 9, Brick Street, Brookside Works, Cleckheaton, BD19 5DD (the “Cleckheaton Site”) which is only involved in the collection and recycling of waste cooking oil.

5. POL had been approved as a RDCO since 1 March 2017. Stephen Pepper is the sole director and shareholder of POL.

6. On 10 October 2017 Officer Gilmartin of HMRC issued a warning letter to POL (the “Warning Letter”). That letter was addressed to POL at the BBL Premises and states:

“On 1 Oct 2017 a road vehicle was detected with rebated fuel (red diesel) in the running tank. During a cautioned interview the owner of this vehicle stated that they had purchased the rebated fuel from you and fuelled the vehicle directly from your pump.

...

Every time a supply of rebated oil is made you must ensure the customer has an eligible use for the fuel and they do not put the oil directly into a road vehicle. On this occasion you failed to correctly exercise your duty of care.

If you fail to meet any of your obligations as a RDCO a penalty of £250 under section 9 of the Finance Act 1994 may be issued for each breach or failure.

Knowingly supplying rebated fuel for road use, or putting rebated fuel into a road vehicle may lead to a wrongdoing penalty under The Finance Act 2008 Schedule 41, this can be up to 100% of the duty due.

However on this occasion I have decided to issue you a warning letter. If you do not comply with the regulations or requirements of the RDCO scheme, or, if there are any other failures in your duty of care or obligations, penalties may be applied and may ultimately lead to the withdrawal of your RDCO approval.”

7. Officer Gilmartin’s witness statement confirms that he made an unannounced visit to the BBL Premises on that date to deliver the Warning Letter. He spoke to Javid Khan, who told him that Mr Pepper was not there. Officer Gilmartin spoke to Mr Pepper and agreed with him to hand the Warning Letter to Mr Khan in a sealed envelope to pass to Mr Pepper.

8. Following this, Officer Gilmartin received an email from Mr Pepper on 16 October 2017 stating:

“My staff know that it is an instant dismissal offence if an event like this happens with their knowledge. I’ve explained it so many times that they definitely fully understand the consequences...

I’ve decided to write letters to them in the form of a written warning which I will need them to read and sign...

If you have any other suggestions or an alternative appropriate response then I’m open to suggestions?...”

9. Officer Gilmartin emailed Mr Pepper on 19 October 2017 reminding him that his obligations are outlined in Excise Notice 192 and that his staff should be familiar with these obligations.

10. On 14 May 2018 HMRC executed search warrants at the BBL Premises and at the homes of Mr Pepper and John Hillam (a former director of POL, and business colleague of Mr Pepper).

11. On 2 July 2018 Officer Elliott of HMRC wrote to POL at the BBL Premises stating that HMRC were minded to revoke the RDCO approval (the “Minded To Letter”). That letter states that:

(1) the purpose of giving POL notice of this intention is to invite them to make representations to HMRC as to why they should not take this proposed course of action – any representations should be in writing and received by 16 July 2018;

(2) HMRC have considered whether POL remains a fit and proper person to hold a registration and, as a result of these considerations, are minded to revoke the approval because of:

(a) Paragraph 4.8 of Excise Notice 192 states that HMRC are likely to cancel a person’s approval if:

- It's considered necessary for the protection of revenue because, for example, we consider you've neglected or ignored your obligations when supplying controlled oils
- We have evidence that you've been involved in the misuse of controlled oil or excise fraud, in such cases we may also prosecute you
- Any new information that comes to our attention, or that you notify to us, we're no longer satisfied that you're fit and proper to hold an RDCO approval;

(b) “On 01/10/2017 the Road Fuel Testing Unit (RFTU) detected a vehicle running on rebated fuel purchased from your site. A warning letter was issued to you on 07/11/2017. Despite this warning further detections of vehicles using rebated fuel purchased from your premises were made by RFTU on 01/12/2017 (2 vehicles), 21/12/2017 (8 vehicles), and 10/01/2018 (5 vehicles).”; and

(c) The activity continued even after POL was issued the Warning Letter.

(3) HMRC “will consider” any written representations received from you by 16 July 2018.

12. By decision letter addressed to POL at the BBL Premises dated 24 July 2018, Officer Elliott revoked the RDCO (the “Decision Letter”):

(1) the Decision Letter refers to paragraph 4.8 of Excise Notice 192 as cited at [11(2)(a)] above;

(2) it then states:

“On 01/10/2017 the Road Fuel Testing Unit (RFTU) detected a vehicle running on rebated fuel purchased from your site. A warning letter was issued to you on 07/11/2017. Despite this warning further detections of vehicles using rebated fuel purchased from your premises were made by RFTU on 01/12/2017 (2 vehicles), 21/12/2017 (8 vehicles), and 10/01/2018 (5 vehicles).

In light of the above, we no longer consider you to be fit and proper to hold an RDCO licence. Your activity continued even after you were issued a warning letter setting out the consequences of such activities continuing from

your premises. These facts lead us to believe that you have neglected or ignored your obligations as an RDCO.

I issued a letter to you on 02/07/2018 notifying you of my intention to revoke your RDCO approval. You were given until 16/07/2018 to comment on the proposed grounds for revocation and to present any information that should be taken into consideration before a final decision is taken. You have failed to make any representation.”

We refer to these three paragraphs as the “Stated Reasons” and as to the decision to revoke contained in this letter as the “Revocation Decision”.

13. On 3 August 2018 Officer Elliott wrote to Mr Pepper at his home address. The substance of this letter is the same as the Decision Letter – the only difference is the updated date, addressee and address.

14. Prospect gave Notice of Appeal to the Tribunal on 24 August 2018 appealing against that decision. The grounds of appeal were that:

(1) HMRC had historically used Mr Pepper’s home address for correspondence in relation to the RDCO. The Minded To Letter was sent only to the BBL Premises, after it had ceased to be operational. That letter was not received by POL.

(2) If any fraud was committed it was committed by Javid Khan, the site manager of POL. He was not a directing mind of POL; he was an employee. Mr Pepper runs the financial side of the business but due to his various business commitments he does not attend POL’s trading premises very often. Any fraud was not known to him. The fact that the Minded To Letter was not received by POL meant that there was no opportunity to explain this to HMRC.

15. POL’s skeleton argument before this Tribunal was markedly different, and the focus had changed to criticising the quality of HMRC’s decision-making process, although reference to any unlawful activity being that of Mr Khan remained. To the extent that POL were thus seeking to amend their grounds of appeal, HMRC did not object.

16. We decided that we should, having regard to the overriding objective that matters are dealt with fairly and justly, accept this amendment, noting in particular that several of HMRC’s witness, including most significantly the decision-maker, Officer Elliott, were attending the hearing to give oral evidence and could address the expanded grounds of appeal. We did, however, explain to the parties at the outset of the hearing that this would affect the approach we took to hearing evidence from the witnesses, as we noted that HMRC’s witness statements would have been prepared with POL’s grounds of appeal in mind and there might be additional evidence-in-chief which needed to be adduced. We expected to permit this for both HMRC’s witnesses and Mr Pepper.

RELEVANT LAW

17. Section 100G Customs and Excise Management Act 1979 (“CEMA”) provides as follows:

“(1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as “registered excise dealers and shippers regulations”)—

(a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

(b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.

(2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.

(3) In the customs and excise Acts “registered excise dealer and shipper” means a revenue trader approved and registered by the Commissioners under this section.

(4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe.

(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section.

(6) ...”

18. The relevant regulations are contained in the 2002 Regulations:

Regulation 4(1)

“For the purposes of section 100G of the Management Act, the Commissioners may approve any person who intends to buy, sell, or deal in controlled oil and register him as a registered excise dealer and shipper in accordance with section 100G(2) of that Act.”

Regulation 5(3)

“The approval and registration of registered dealers in controlled oil shall, in addition to any conditions or restrictions imposed on them by the Commissioners under section 100G(4) of the Management Act, be subject to such conditions as the Commissioners may prescribe.”

Regulation 8(2)

“When buying, selling, loading, unloading, delivering, moving or holding controlled oil a registered dealer in controlled oil must comply with any conditions or restrictions that the Commissioners may prescribe.”

19. Section 16 Finance Act 1994 (“FA 1994”) sets out the rights of appeal to the Tribunal that apply in relation to excise duty decisions:

“(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

...

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

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

(b) to require the Commissioners to conduct, in accordance with the directions of the

tribunal, a review or further review as appropriate of the original decision; and

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

EXCISE NOTICE 192

20. HMRC have published Excise Notice 192: Registered Dealers in Controlled Oil (“EN 192”), and the version that was current at the date of the Decision Letter was that which had been released by HMRC on 11 October 2017. Parts of section 5 of EN 192 have the force of law under the 2002 Regulations and The Revenue Traders (Accounts and Records) Regulations 1992. The sections which do not have the force of law are for guidance only. The extracts below are those for guidance, save where we identify otherwise:

21. Section 2 deals with background and general information:

“2.6 What are the conditions of the scheme?”

...Distributors must take reasonable steps to make sure that their customer is properly entitled to receive the oil that is being supplied...

...

2.8 What if I fail to comply with the conditions of the scheme?

If you fail to comply with any of the conditions shown in paragraph 2.6, we may apply sanctions against you. These may range from warning letters, to civil penalties and ultimately to withdrawal of your approval.”

22. Section 4 deals with approval:

“4.3 Fit and proper test

We will only approve your application if we’re satisfied that you’re fit and proper to deal in controlled oils. This means we must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and qualified.

a) We will only approve you if you satisfy us that:

- the business is genuine and commercially viable
- the relevant premises are (or will be) secure and suitable
- appropriate control will be exercised over the product, persons and vehicles entering and leaving the premises
- all rebated fuel supplied at or from your premises will be accurately measured and recorded
- your accounting and stock control systems will be adequate
- you will provide safe and secure access for our officers to all parts of your premises and
- you will be able to meet the obligations described in paragraph 5.2.

...

4.5 Conditions and restrictions

Where we have concerns regarding certain areas of your business we may grant approval but impose specific conditions or restrictions in order to address these concerns...

...

4.8 Can my approval be cancelled

Yes...

We are likely to cancel your approval if:

- it's considered necessary for the protection of the revenue because, for example, we consider you've neglected or ignored your obligations when supplying controlled oils
- we have evidence that you've been involved in the misuse of controlled oil or excise fraud, in such cases, we may also prosecute you
- any new information that comes to our attention, or that you notify to us, we're no longer satisfied that you're fit and proper to hold an RDCO approval see paragraph 4.3...
- you persistently fail to meet the requirements of the scheme, for example, fail to exercise your obligations or fail to submit H05 returns on time.

However, this is likely to be the final step following a series of warning letters and civil penalties - see paragraph 6.5 and section 8."

23. Section 5 deals with supplying or selling controlled oil:

"5.2 The RDCO obligations when supplying controlled oil

As an RDCO, you must take every reasonable precaution to make sure that your supplies of controlled oil ...are only to persons who will use that oil as permitted by the law... [Set out in boxed text in EN 192 to mark it as having force of law]

The following is what HMRC regards as reasonable precautions.

...make it clear to your customers what kind of controlled oil they're buying and the restrictions which apply to the use of these fuels, for example...partially rebated marked gas oil (red diesel) must not be used in a road vehicle...

...you should display a red diesel poster in a prominent place on your business premises...

You must carry out appropriate checks on all of your customers and be accountable for all of your supplies to them. Your checks must be sufficient to satisfy you of a customer's integrity and that they intend to use the oil supplied to them for a lawful purpose...

...

5.15 Standard check to be made on your customers

Forecourt, distributor yard or other supplies made via pump or similar dispenser not exceeding 100 litres. Make sure the customer doesn't put the oil directly into a road vehicle.

...If you're unable to discharge your obligations to our satisfaction, we may apply conditions to your approval, or revoke your approval but only where our guidance and sanctions have failed to resolve the situation.

...

5.22 Checks carried out by your staff

...in cases where employees are found to have been in collusion with a fraudulent customer, you're ultimately responsible for your employees. However, providing you notify us immediately you become aware of the situation we will take due regard of the action that you take against the employee, which may include dismissing the employee...

...

5.24 Decisions on liability

...we will take escalating action such as the issue of warning letters followed by civil penalties. In the most serious cases we may also consider revocation of your RDCO authorisation."

24. Section 8 deals with action which will be taken if a holder fails to meet any of their obligations as an RDCO:

"8.1 General

Our priority is that you understand your obligations and are able to comply with them and wherever appropriate we will assist you to do so. However, we will take all circumstances into account in determining the appropriate response to non-compliance...The sanctions and penalties...will normally be applied in an escalating scale of action against you, depending on the nature of the contravention...

8.3 Warning letters

These will be issued where our guidance has failed to resolve non-compliance. If warning letter have also failed to resolve the non-compliance, we may proceed to civil penalties and, ultimately, withdrawal of approval.

...

8.5 Withdrawal of approval

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

TRIBUNAL'S JURISDICTION IN REVOCATION APPEALS

25. In *HMRC v Ahmed (t/a Beehive Stores)* [2017] UKUT 259 (TC) the Upper Tribunal described the Tribunal's jurisdiction in relation to the revocation of registration held under the Warehouse Keepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR 1999") as follows, and we consider this applies equally to revocation of RDCO approval:

"21. The combined effect of s16(9) FA 1994, paragraph 2(1)(r) and paragraph 2(1)(p) of Schedule 5, FA 1994 is that HMRC's decision which is the subject of this appeal is a decision as to "ancillary matters."

22. Consequently, the FTT only has a supervisory rather than a full merits jurisdiction in relation to the decisions which are the subject of this appeal. The correct approach to determine the question as to whether the decision concerned could not reasonably have been arrived at is that set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 which is to address the following questions:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

23. As the FTT correctly identified at [35] of the Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

24. However, as Ms Mannion submitted, the application of the reasonableness test to a decision by HMRC to revoke approval involves judicial intervention in a question which has built-in latitude. In *CC & C Ltd v HMRC* [2014] EWCA Civ 1653, the Court of Appeal stated at [15] that in circumstances such as this:

“... the fact that the criterion for the tribunal’s intervention is formulated in terms of unreasonableness reflects the fact that the management of the excise system is a matter for the administrative discretion of HMRC. The decision whether a registered owner remains a fit and proper person to trade in duty-suspended goods is a good example of the kind of decision which HMRC are peculiarly well-fitted to judge, since it requires what is necessarily to some extent a subjective—albeit evidence-based—assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities.”

25. Section 16(4) FA 1994 confers a power on the Tribunal to give certain directions if HMRC make an unreasonable decision. However, it does not require the Tribunal to order a further review in every case in which HMRC reach a decision that is unreasonable in the sense outlined at [22] above. Thus, in *John Dee Ltd v CCE* [1995] STC 941, a case which concerned an appeal originating in the VAT Tribunal, the Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant’s financial information. Neill LJ (with whom the other Lords Justices agreed) held that counsel for the company contesting the security requirement in that case had been right to concede that where it is shown that, had the additional material been taken into account the decision would inevitably have been the same, a tribunal can dismiss an appeal.

26. Nevertheless, in our view where the tribunal has found a decision to be unreasonable in the sense outlined at [22] above then unless the circumstances clearly demonstrate that HMRC would be bound to make the same decision the proper course to take is for the Tribunal to direct that the decision concerned should be reviewed again. If there is any doubt on the point, the matter should be determined in favour of directing a further review.”

26. The Upper Tribunal then gave guidance as to the correct approach for a tribunal to take when considering an appeal against a revocation decision. This guidance was inevitably focused on the due diligence procedures adopted by the appellant and referred to Excise Notice 196 (“EN 196”), that being the relevant notice for WOWGR 1999. It noted, at [51], that those who were given the privilege of authorisation were also given the responsibility for assessing

the risk of fraud. It said, at [52], that as the failure to carry out proper due diligence could result in a higher risk of such fraud, it was no surprise that EN 196 stated "that serious cases of failure can result in the revocation of" approval. But it then emphasised that there was a spectrum which HMRC would have to consider and that the guidance made clear that help would be given and opportunities provided to demonstrate that improvements had been made. It said:

"In our view, that would be a particularly appropriate course in cases where there is no evidence of the registered owner of being implicated in any actual fraud and where there is evidence that the registered owner is both able and willing to make the necessary adaptations".

27. It went on to say:

"54. Clearly, a decision to revoke registration should not be taken lightly and such a decision must be proportionate in all the circumstances. Section 100G(5) CEMA provides that an approval may only be revoked where there is "reasonable cause". Therefore, in order for such a decision not to be flawed it will be need to have been made after considering all the relevant circumstances, including where revocation follows a warning to improve, what steps the registered owner has taken to demonstrate that he is able and willing to comply with the justifiable high standards that are expected of a registered owner who is on the frontline when it comes to tackling excise duty fraud.

55. Therefore, when a tribunal is considering an appeal against a revocation of a registered owner's approval on the grounds that the registered owner has failed to comply with the due diligence condition, as Ms Mannion submitted, the starting point for the tribunal must be to consider all the circumstances that have led to that decision and the factors taken into account by HMRC in making that decision. The tribunal should then consider how HMRC have dealt with any representations from the registered owner as to his compliance with the due diligence condition and the steps he has taken in that regard, both in relation to his initial procedures and any improvements made as a result of HMRC's intervention.

56. It follows that will then be necessary for the Tribunal to make findings of fact as to the extent to which the due diligence condition has been complied with. Although it is not necessary for a registered owner to follow the guidance in EN 196 slavishly and it will be open to registered owner to demonstrate compliance with the condition by other means, it would be good practice to measure the procedures and steps that the registered owner has taken as regards due diligence against the detailed guidance set out in EN 196. Having made those findings of fact, the tribunal should then consider the extent to which HMRC may not have taken into account other relevant factors or may have relied on irrelevant matters, because, as the FTT correctly identified in this case, if that is the case it will need to consider whether HMRC's decision should be set aside. The tribunal will also have to consider whether, in all the circumstances, the decision to revoke can be regarded as a proportionate response.

57. However, the fact that HMRC may have relied on irrelevant factors, or taken into account relevant factors, does not inevitably mean that the Tribunal should direct that the decision should be reviewed. The tribunal needs to have in mind the observations of the Court of Appeal in *CC & C Ltd* at [24] above to the effect that the assessment of the attitude of the trader to due diligence issues is primarily a matter for HMRC to judge. It follows that tribunal should be very slow to interfere with the decision purely on the basis that HMRC should or should not have given different weight to particular factors, unless it is clear that because of the weight given or not given to particular factors

the decision to revoke must be regarded in all the circumstances as disproportionate. Consequently, the tribunal should bear in mind, as established in *John Dee*, as referred to at [25] above, that a direction should not be made to review a decision in circumstances where, despite flaws in the decision-making process, any review decision would inevitably come to the same result.

EVIDENCE

28. We had a bundle of documents and correspondence which included witness statements from:

(1) For HMRC:

(a) Officer Richard Elliott, officer of HMRC in the ISBC Risk & Workflow, Oils Approvals Team, who issued the Minded To Letter and the Decision Letter. His witness statement is dated 17 April 2019.

(b) Officer David Robinson, assistant officer of HMRC attached to the Road Fuel Testing Unit in Middlesborough. His witness statement dated 18 September 2018 described certain events of 1 October 2017 when he was on duty with Officers Kewley, Carroll and Allinson.

(c) Officer Andrew Ferguson, officer of HMRC based at The Custom House Hull where he works on the RFTU. His witness statement dated 16 September 2018 described certain events of 25 April 2018.

(d) Officer James Gilmartin, Oils Assurance Higher Officer at HMRC currently working in Leeds. His witness statement dated 8 August 2018 sets out his meetings with Mr Pepper on 8 June 2017 and 24 August 2017, email exchanges he had with Mr Pepper, and his unannounced visit on 10 October 2017.

(e) Officer Kelly Kewley, mobile enforcement team officer of HMRC. Her witness statement dated 8 April 2019 addresses detections on 1 October 2017, 1 December 2017, 10 January 2018, 25 April 2018 and 14 May 2018

(f) Officer Ciaran Hall, fraud investigation officer of HMRC based in Leeds. He had sworn two witness statements, dated 18 January 2019 and 15 April 2019. His first addressed the observations conducted by HMRC from 26 March 2018 to 25 April 2018. His second described events of 14 May 2018, in particular in relation to the execution of a search warrant at Mr Pepper's home and his subsequent arrest.

(g) Officer Simon Metcalfe, higher investigation officer of HMRC involved in criminal investigations. His witness statement dated 2 January 2019 described events of 7 April 2018.

(h) An unnamed, undated and unsigned witness statement which was attributed by HMRC to Officer Kevin Winters and describes events of 14 May 2018.

(2) For POL, Mr Pepper, the sole director. His witness statement is dated 27 March 2019.

29. Mr Pepper gave evidence on which he was cross-examined, as did Officers Elliott, Hall, Kewley, Metcalfe and Ferguson.

30. Mr Glover drew attention to the fact that POL's books, records and computer equipment were uplifted by HMRC in May 2018 when they executed the search warrant at Mr Pepper's home. This meant, he submitted, that POL had not been able to access or produce for the Tribunal matters which would otherwise have been in its control.

31. Mr Glover submitted that the witness statements of Officers Hall and Metcalfe were not relevant as they dealt with matters outside of the Revocation Decision. He reminded the Tribunal of the decision in *Elbrook Cash and Carry Limited v HMRC* [2019] UKUT 201 (TCC) in which the Upper Tribunal stressed at [20] that it is incumbent on all parties, and their advisers, to ensure that their witness statements contain only evidence which is relevant, and also reiterates that where a witness strays outside the giving of factual evidence relevant to the issue then that is of no value as evidence. However, the Upper Tribunal had acknowledged that in most cases it is not necessary or proportionate to identify such matters in a forensic exercise and direct they be excluded – instead, generally speaking the parties can rely on the good sense of the Tribunal to disregard purported evidence that represents conclusions that the tribunal itself must reach.

32. We noted that the development of POL’s arguments between the grounds of appeal and their skeleton argument, and the fact that witness statements from officers of HMRC had been prepared before HMRC were aware of the different arguments that were being run on behalf of POL, meant that in hearing evidence from the “live” witnesses (which would include Officers Hall and Metcalfe) we would be alert to questions relating to relevance, but that we would be seeking, so far as possible, not to restrict the scope of evidence which was given ahead of hearing the parties’ submissions. We would, when making our own decision as to whether the Revocation Decision could not reasonably have been arrived at, disregard material that was either irrelevant to the questions before us or represented opinions as to conclusions that we should reach.

FINDINGS OF FACT

33. We find the following facts on the balance of probabilities. We have had careful regard throughout to the challenges made by Mr Glover as to the detections of red diesel in the tank of road vehicles which have been identified by HMRC – he drew attention to the following points (in his submissions and when cross-examining witnesses):

- (1) Detection reports prepared by the RFTU had been prepared for the purpose of dealing with the seizure of the vehicles and had not always focused on the exact source of the red diesel; and
- (2) where a detection of illegal use was based on observation of a road vehicle using the particular nozzle on the pump at POL which supplied red diesel, this did not of itself mean that the customer had filled the tank with red diesel – the pump may not have been working, or fuel may not have been dispensed for some other reason.

34. Mr Glover also submitted that, when assessing the evidence given by witnesses, we should have regard to whether the evidence they were giving was also recorded in contemporaneous notebooks, that any such contemporaneous notes may not be completely accurate given the risk that the writer imports their own pre-determined views into those notes, and the impact that the passage of time or conversations with others may have had on their recollections (essentially drawing attention to the fallibility of the human memory). He emphasised that he was not suggesting that any of the witnesses had been dishonest in giving their evidence – but submitting that caution was required when assessing their evidence.

35. We have had regard to the evidential challenge which has been made in making our findings. We do not consider that it is appropriate to construct a general rule as to how to treat evidence which has been adduced – instead, in each instance we have assessed all information before us with a view to reaching our conclusion on the particular matter on the balance of probabilities.

36. We have considered below the evidence adduced by both parties. We have generally looked at the incidents on which evidence has been adduced chronologically. The key exception to this is that, having dealt with the meetings between Mr Pepper and Officer Gilmartin in June and August 2017 we have then set out the evidence from Mr Pepper (which covers the full range of events) before then assessing the incidents. This enables us to take account of Mr Pepper's evidence throughout in making our own findings. At the outset we note that we found all of the "live" witnesses credible and helpful, and they were clear when responding to questions as to whether matters were within their own knowledge or had been reported directly to them. This does not mean that we have accepted all of their evidence as correct, and have drawn attention to the challenges put to them when making our findings.

Meeting between Officer Gilmartin, Ben Caines and Mr Pepper on 8 June 2017

37. This meeting took place at the BBL Premises. We had a copy of the manuscript notes of Officer Gilmartin, which had then been typed up by Officer Caines. We could not discern any material differences between these accounts and, save in respect of two matters, their accuracy was not challenged by POL.

38. The meeting notes indicate that matters discussed included:

- (1) Customers come to the BBL premises and fill containers direct from the pumps. No due diligence is carried out on customers, and staff do not generally ask what the fuel is to be used for. Mr Pepper did state that POL does not allow customers to direct fill road vehicles, and made them aware that any sales over 100 litres would have to be fully recorded.
- (2) Deliveries of fuels are logged and recorded in POL's dispensing system which gives a running total of what should be in the tanks. This figure is entered and updated manually on an Excel spreadsheet used to record sales. This allows the running total figures on the two systems to be compared to ensure records of sales and tank levels are reconciled accurately.
- (3) There is no way to measure tank levels remotely or electronically. Mr Pepper had made one manual measure in the last two years, as the process was hazardous due to the height of the tanks and their inaccessibility.
- (4) There are two pumps, one outside and one inside. When a pump nozzle is lifted an alarm sounds in the office which allows staff members to observe the customer.
- (5) All staff are aware that controlled fuel must not be placed in the tanks of road vehicles.
- (6) There is no CCTV at the BBL Premises.

39. There is then a "Conclusion/Risks" section of the typed note (which is not reflected in the manuscript notes and is set out after the reference to the officers having left the BBL Premises), from which we infer that this represents the opinions of Officer Gilmartin (either on his own or shared with Officer Caines). That section includes:

- (1) HMRC had imposed conditions in 2016 in relation to record-keeping, which Mr Pepper stated had been met, and Officer Gilmartin stated that the company has a workable and efficient system to enable measuring of "sales/tank levels".
- (2) Mr Pepper had stated that he and all staff are aware of the potential misuse of controlled fuels, stated that he had "seen little suspicious activity" at his pumps are "attempts to direct fill road vehicles are non-existent".
- (3) During the visit a taxi (Skoda Octavia from Leap Taxis) presented at the pump and the driver filled a container with MGO. Office Gilmartin noted that there is a risk that

this fuel was later siphoned into the tank of the taxi, and he would consider a referral to RFTU in relation to this incident.

(4) Previous tank contamination was discussed and Mr Pepper was advised to report any suspicions in the future. Mr Pepper agreed and stated that he now only allows deliveries using trucks dedicated to one fuel type only.

(5) The final paragraph is:

“Mr Pepper was knowledgeable regarding this business sector, cooperative and amenable at all times during the visit. The trader’s record keeping has clearly improved following the intervention by Kath Adams in 2016. The main risk ...is the likelihood that some of the rebated oil collected by the customers is not put to a legitimate use.”

40. The two matters referred to in [37] relate to the reference to no CCTV (which is addressed by Mr Pepper at [47(6)] below) and his assertion that he had asked HMRC to send all correspondence relating to the RDCO approval to his home address. He did not know at which meeting this had occurred, and accepted that it is not mentioned in the meeting notes.

41. We find that this meeting note is an accurate record of the matters discussed at the meeting. That is not to say that this is a word-for-word account of what was said. We do accept Mr Pepper’s explanation of what is likely to have been meant by “no CCTV” and that he asked HMRC to send all correspondence to his home address (albeit that we make no finding as to whether that occurred in June or in August 2017). The reasons for these findings are set out in the context of our consideration of Mr Pepper’s evidence.

Meeting between Officer Gilmartin, Officer Caines and Mr Pepper on 24 August 2017

42. This meeting took place at the BBL Premises. As with the meeting on 8 June 2017, we had a copy of the manuscript notes of Officer Gilmartin, which had then been typed up by Officer Caines. We could not discern any material differences between these accounts and, save in respect of Mr Pepper’s position on using his home address as the correspondence address, their accuracy was not challenged by POL.

43. The meeting notes indicate that matters discussed included:

(1) The unit for the BBL Premises is locked up out of opening hours, but the yard in which they are located is open 24 hours a day due to the other business which operate from neighbouring premises.

(2) Mr Pepper confirmed there had not been any recent attempts to direct fill from the pump. Most customers bought fuel for use on building sites and there was a lot of industrial premises nearby.

(3) The tank had last been dipped in February. Officer Gilmartin advised they should take regular readings as this would be the only way to ensure that manual stock records were accurate.

(4) They inspected the outside pump, and noted that it had a built in card payment machine. Mr Pepper stated that the pump could not be used outside of business hours as the power was switched off.

44. The “Conclusion/Risks” section of the typed note (which, as with the June meeting, is not reflected in the manuscript notes and is set out after the reference to the officers having left the BBL Premises), from which we infer that this represents the opinions of Officer Gilmartin (either on his own or shared with Officer Caines) makes two points:

(1) There is a high volume of gas oil sales which are all made via the pump therefore record-keeping requirements are minimal. There is a likelihood that some of the fuel sold is being misused by customers.

(2) The external pump raises concerns – if sales can be made from this pump out of business hours this would raise serious duty of care issues. A request had been sent to RFTU to check this pump out of hours.

45. We find that this is an accurate record of the matters discussed at the meeting.

Evidence from Mr Pepper

46. Mr Pepper’s witness statement and additional evidence-in-chief included the following:

(1) He has been a director of POL since August 2016.

(2) He has been involved in a number of other businesses, some of which are ongoing. He is a director of City Asbestos Limited, which provides surveys, removal of asbestos and sampling to identify the presence of asbestos. This is a heavily regulated sector and he maintains high levels of compliance with health and safety and accounting.

(3) He has not had any issues with HMRC or any other regulatory or legislative body when running any of his businesses.

(4) Spen Valley Biodiesel Limited (“SVBL”) was originally run by Mr Hillam and Mr Pepper took over the business of that company, combining it with his own company (Ample Fuel Limited) into the business which is now run by POL. POL has taken over the premises that were used by SVBL, namely the BBL Premises.

(5) The BBL Premises are in a fairly industrial area of Bradford, and the unit itself is in an industrial yard with other business premises. The area is fairly run down, there are lots of skip recycling businesses, although there are a few houses. The local area is sometimes described by those familiar with it as “Bowling Back Lane”.

(6) There are “all sorts” of customers for red diesel – including JCBs and builders. This is one reason why he installed an outside pump – some machines that fill directly couldn’t fit through the unit door.

(7) He also runs a waste oil recycling business. This is part of POL’s business. This oil recycling business involves collecting used cooking oils from local restaurants and fast food outlets, taking it to the plant, removing the chemicals from it. At the BBL Premises, half of the site is used for this business and half for the sale of controlled oils. Space is rather cramped, and none of the recycling of oil is done at the BBL Premises, only collection – the recycling is done at the Cleckheaton Site. The recycling of oil is regulated in accordance with EU requirements, eg so that it can be checked that palm oil is not being passed off as used cooking oil. He has been doing this business for several years.

(8) The businesses he runs require a lot of paperwork. He deals with this at home as he prefers to centralise the admin work, and rarely visits the company’s premises. He spends most of his time dealing with customers, compliance, accounting, banking and regulatory matters. During one of the meetings with Officer Gilmartin in which they had discussed EN 192 he suggested that all correspondence relating to the RDCO approval should be sent to him at home. In particular, he states that the monthly RDCO returns which he needed to submit were sent to him by HMRC at his home address.

(9) He placed a high regard on EN 192, considering it sets out quite clearly how POL is supposed to behave and HMRC’s duty to holders. This seemed quite fair to him – in his other business areas you don’t get so much guidance.

(10) To ensure compliance, he educated the staff, put labels on pumps, installed cameras outside, kept records of what was sold and measured the tanks. The staff were well aware that red diesel was for off-road use only, and they also sold containers for customers who did not bring their own.

(11) He quite enjoyed these visits from HMRC as he was able to learn about best practice, and was told about the zero tolerance on cross-contamination from deliveries of fuel. Following the visits from HMRC he would try to improve POL's compliance in the light of the comments he received. One example of this was his manual inspection of the tanks. He does generally remember these meetings, but is not able to recall what was discussed at each specific meeting as they sort of merge together.

(12) When he received the Warning Letter he took this seriously. He reminded his staff not to put illegal fuel into vehicles – he put this in a letter to them in the form of a written warning, took it to the BBL Premises and went over it with them. He says he made it clear to them that if it happened again there would be further consequences which could result in them being sacked. He is not able to demonstrate this as HMRC had seized all of the computers, back-ups and paperwork from the business when they executed the search warrant at his home.

(13) When POL sells fuel, it is sold in barrels, but he cannot control what people do with that fuel once they have left the premises.

(14) Mr Pepper received the letter stating that the RDCO licence had been revoked on 9 August 2018. He had not been warned of this. HMRC knew that the business had been closed down and boarded up at the time they sent the Minded To Letter, so there would have been no-one there to receive it. He believes that HMRC intentionally sent the Minded To Letter to POL's address at the BBL Premises with the hope that Mr Pepper would not respond.

(15) Any fraud committed at POL was not committed by him. It is now apparent to Mr Pepper that an ex-employee, Mr Khan, who managed the BBL Premises and dealt with the fuel side of the business committed fraud. Any fraudulent activity was never drawn to Mr Pepper's attention because he rarely visited the premises, and the summary report given to him by Mr Khan at the end of each day always matched the amount of money the computer said should be in the tills. One factor leading him to believe that Mr Khan is responsible for fraud is that he never took any time off work. Mr Pepper now believes this to be because he did not want Mr Pepper or anyone else coming in case they figured out the fraudulent activity he was undertaking.

(16) It is now apparent to Mr Pepper that HMRC knew what Mr Khan was doing and he understands that they have camera footage of Mr Khan putting illegal fuel into vehicles. He is at a loss as to why HMRC did not inform him of what they knew so that he could be in a position to address it.

(17) When asked about other sources for red diesel, Mr Pepper referred to the Hammerton Street Filling Station which is on Hammerton Street itself, by Filey Street. He said he had also heard of pop-up businesses that appear for a few months then disappear. He didn't associate with these businesses at all.

47. In cross-examination and re-examination, Mr Pepper explained as follows:

(1) He is the sole director of POL.

(2) He had two employees working at the BBL Premises, Mr Khan who was the manager of the BBL Premises and dealt with the fuel side of the business, and Shariff

Gibba who dealt with the waste cooking oil collection. They were both full-time employees.

(3) The two employees were made aware that road vehicles must not be direct filled with red diesel “regularly verbally”, were told on multiple occasions and knew how serious a breach this would be of the RDCO approval.

(4) He was not involved with the BBL Premises on a day-to-day basis. He “rarely” visited, and what this meant varied. Sometimes he would visit the site once a month, sometimes every two months. There would have been times where he visited more often but not a huge amount. He expected his employees to act as they had been instructed. He did sometimes “dip” the tanks when he visited, to make sure the actual volumes matched what the computer said they should contain.

(5) He could not remember at which visit from Officer Gilmartin he had asked that correspondence be sent to his home address. On Ms Barnes pointing out this was not mentioned in the meeting notes, Mr Pepper said it definitely happened, he just didn’t know when.

(6) He accepted that the meeting note from 8 June 2017 included a statement from Officer Gilmartin that there was “no CCTV” in the yard. He had installed security cameras at the BBL Premises. The ones set up inside the unit were “dummies”. The security camera outside in the yard gave a live feed to the manager’s office inside but did not record. Mr Pepper had not told his employees that the cameras were not recording (or that the ones inside the unit did not do anything). Whilst it would have been straightforward to record the footage, Mr Pepper noted that he would then have had to store the recordings. Mr Pepper said HMRC knew there were cameras – they were visible; he took the reference to “no CCTV” as being a reference to there being no recording of the feed.

(7) Given that he was rarely at the premises, Mr Pepper was asked to comment on his statement to Officer Gilmartin that “he had seen little suspicious activity”, Mr Pepper said he had not seen anything when he was there, and his employees would have told him.

(8) Being referred to the notes of the two meetings with Officer Gilmartin, and it being pointed out that at no stage does he point out that he was rarely there and was entirely reliant on the two employees (Mr Khan in particular in relation to the controlled oils), Mr Pepper stated that he was never asked that question.

(9) The Warning Letter was addressed to POL at the BBL Premises (not to Mr Pepper at his home address). Did this mean that it was wrong to say that he expected all correspondence to be sent to his home address? Mr Pepper confirmed he did expect it, and had asked, but it was not up to him whether HMRC complied. The business was still open at the date of the Warning Letter and he did receive that letter (indeed it was confirmed in re-examination that this was delivered by hand by Officer Gilmartin to Mr Khan who then handed it to Mr Pepper). He didn’t think about re-stating his request that correspondence be sent to him at his home at the time (as he had actually received the letter).

(10) On receiving the Warning Letter, he was concerned and wrote to the employees in the form of a written warning. He was not able to provide a copy of this written warning as he did not have his computers and documents. He said he knew HMRC did have a copy of this letter as Mr Gibba had told him that when Mr Gibba was interviewed by HMRC they had showed him a copy of the letter from Mr Pepper to Mr Gibba.

(11) He had not seen any of the direct fills which HMRC stated occurred. He noted the evidence set out in sworn witness statements of HMRC officers but said he was not there and could not comment. He had not seen the video footage exhibited to Officer Hall's witness statement which had been provided to his legal team (in which, as he noted at [46(16)], Mr Khan is said to be visible putting illegal fuel into vehicles).

(12) When asked about Officer Metcalfe's evidence, and how could customers use the pump to direct fill apparently out of hours, Mr Pepper explained that the pump was a standard forecourt system that can be configured in any number of ways. He was not able to prevent access to a pump that is outside in the yard. He had never checked how it was configured as it is a complicated system that he had bought off-the-shelf.

(13) Being referred to the execution of the search warrant at his home address and his arrest, and the references in Officer Hall's witness statement (described at [142]) about the phone in his pocket which did not contain either a battery or sim card, Mr Pepper noted that his house was full of old phones and he was just getting up in the morning. He did not provide any additional explanation.

(14) Being referred to the text messages and screen shots exhibited to Officer Hall's witness statement, Mr Pepper explained that the BBL Premises had suffered from a significant contamination incident. There were four large tanks at the BBL premises, which were about 4-5 metres high. The space was very cramped. The tops of the tanks were used for storing all kinds of things, including bags of cement. During the compliance checks, Officer Gilmartin had suggested that Mr Pepper should be dipping the tanks manually to check levels. This was a difficult task as they were tall and the lids in the tops of the tanks would need to be unbolted – he had only been doing this about once a year. To give easier access, Mr Pepper had removed the bolts and left the lids in the top of all the tanks open - he was then checking levels about every two to three months. When customers reported engine problems, he was told that there was a grey residue in the fuel filters. He cleaned the tanks and found a grey substance. He thought this was cement from the bags stored on top. He had to involve the insurance company and deal with lots of angry customers (and 60 sounded about right) – there were so many problems at this time. When asked to comment on the specific text exchanges, he noted that at this time he did not know what had caused the contamination, and the main priority was trying to find the source of the problem and sort this out. He had not probed customers further as to what they were being told by mechanics. When it was put to him that he knew full well that customers were directly filling with red diesel and this had been going on for months, Mr Pepper said that he did not know this.

(15) Following this incident, he didn't change supplier of his fuel, but did require that deliveries were made in vehicles which only carried one type of product.

48. We make the following observations on this evidence:

(1) Mr Pepper explained that the area local to the BBL Premises is sometimes described as "Bowling Back Lane". We accept that such term may well be used to refer to locations that are not located directly on Bowling Back Lane itself, noting in particular (and by way of example) that the BBL Premises are in an industrial yard and although that unit may be nearest to the road, other units may be further in the yard and that locals could still refer to those businesses as being in the Bowling Back Lane area. There must, however, be limits to this – and we address this in the context of evidence given in respect of the detections.

(2) We noted at [41] that we accept Mr Pepper's explanation of Officer Gilmartin's comment as to there being "no CCTV" at the BBL Premises. Officer Gilmartin did not

give evidence in person and therefore he could not be cross-examined on this point. However, we note that, looked at from Officer Gilmartin's perspective, he was addressing the ways of scrutinising activity at the yard (either by Mr Pepper or HMRC if an allegation of unlawful use was made) and for this purpose anything less than cameras which recorded the footage, and stored that footage for a period of time, would have been irrelevant. We heard from Mr Pepper as to the steps he had taken and the differences between the cameras inside and outside the unit, and we accept this.

(3) We also accept that Mr Pepper asked Officer Gilmartin that correspondence relating to the RDCO approval was sent to him at home. We consider that such a request, made in a meeting rather than by filling in official forms notifying a change of correspondence address would be likely to result in HMRC retaining both addresses on HMRC's system. Mr Pepper said that the monthly RDCO returns were sent to him. We do not make any negative inference from his being unable to produce example letters for this purpose, given the execution of the search warrant. We note that Officer Elliott had thought that these were sent to the BBL Premises, but similarly he adduced no evidence and given that he was not involved in sending these returns to POL we consider that he would have no direct knowledge on this point. Furthermore, it would have been open to HMRC to adduce evidence showing the letters which had been addressed to the BBL Premises. They have not done this. On the balance of probabilities we accept that HMRC did send some communications relating to the RDCO approval to Mr Pepper's address. On the basis of the evidence before us, we are not satisfied that all correspondence was sent to Mr Pepper's home address, noting in particular that the Warning Letter was addressed to POL at the BBL Premises (albeit that it was actually delivered there by hand).

(4) Mr Pepper's assertion that the Minded To Letter was sent to the BBL Premises when HMRC knew that they were not operational with the intention (or hope) that he would not respond is dealt with in the context of assessing the evidence of Officer Elliott (who sent the Minded To Letter). In short, we do not accept this allegation as to intention.

(5) We accept Mr Pepper's explanation of why he was not able to produce evidence of sending a letter to employees after receipt of the Warning Letter. During the hearing, Ms Barnes confirmed that HMRC had found a copy of a letter which Mr Pepper had sent to Mr Gibba following the receipt of the Warning Letter along the lines which Mr Pepper had described in his evidence. They had not found a copy of a letter written in similar terms to Mr Khan. Given that HMRC found one letter from that time it strikes us as slightly odd that, if a letter to Mr Khan had been written, that was not found when HMRC examined Mr Pepper's computer and documentation. However, it is also similarly odd that, when faced with a Warning Letter relating to the misuse of controlled oils, Mr Pepper would have written to Mr Gibba (who dealt with the cooking oil recycling) and not to Mr Khan (who was responsible for the fuels business). On the balance of probabilities, we find that Mr Pepper did send a written warning to Mr Khan emphasising the seriousness of the breach which had occurred.

(6) Mr Pepper's evidence was that he attended the BBL Premises "rarely" and that he did not explain this to Officer Gilmartin because he was never asked. We accept this. It does, however, mean that we can place little weight on Mr Pepper's statement to Officer Gilmartin that he had seen little suspicious activity, or his evidence at the hearing that he had not seen any of the direct fills which HMRC had stated occurred.

(7) During the questioning about the events of 14 May 2018 (in particular the execution of the search warrant at Mr Pepper's home and his arrest), Mr Glover correctly raised the need for the Tribunal to be satisfied that Mr Pepper was aware that he need not answer

questions where there was a risk of self-incrimination. In such circumstances, no adverse inference can be drawn from a failure to explain the events. We confirmed with Mr Pepper that he was so aware – he chose to say nothing on the question of the phone other than his evidence at [47(13)] but he did choose to provide further explanations in relation to the various text messages and screen shots that were recovered, as explained at [47(14)].

(8) We consider Mr Pepper’s evidence in relation to the text messages and screen shots further at [60] to [62].

Detection on 1 October 2017

49. This detection prompted the issue of the Warning Letter.

50. The detection was described in the witness statement of Officer Robinson, and his statement included:

(1) He was on duty with Officers Kewley, Carroll and Allinson.

(2) They challenged the occupants of a house in relation to the VW Golf (registration VF55 YBU) on their drive. The male occupant admitted that the car was running on red diesel.

(3) He witnessed Officer Kewley remove a sample from the tank and she reported that it tested positive for rebated fuel.

(4) He conducted a cautioned interview (with Officer Allinson present) with the two occupants of the house. The female occupant confirmed that she owned the car.

(5) They were at the house for 70 minutes.

51. Officer Kewley’s witness statement also included this detection, confirming that she drew the sample of fuel and tested it. It tested positive for rebated fuel.

52. Giving evidence at the hearing, Officer Kewley explained this testing had taken place on the drive of residential premises. The owner of the car, Ms Sagar, stayed inside the house throughout and Officer Robinson had gone into the house to speak to her. The testing was watched by Mr Thomas, her partner (the male occupant referred to by Officer Robinson), and whilst she was doing the testing he was speaking “casually” to Officer Allinson. Mr Thomas said that the fuel came from the pump on Bowling Back Lane. He stated that people line up at night to fill their vehicles. Officer Kewley confirmed that he did not mention POL by name.

53. Mr Glover challenged Officer Kewley’s recollection of this event, noting that this information had not been included in any contemporaneous notes, the conversation occurred almost two years’ ago and she must have conducted many fuel tests at around that time and subsequently. He suggested to her that her recollection could have been distorted by conversations between the four officers involved afterwards. Officer Kewley responded that she would probably have been out three days per week with the testing unit, and some days she might do just one test, others four or five. As to how she could remember this discussion, she is generally an interviewer rather than a tester, this occasion was relatively unusual as it involved four officers on a residential driveway rather than at the testing centre, and Mr Thomas had been more chatty than usual. As she had been the tester rather than the interviewer she was not responsible for making the notes of conversations or interviews that day – she recorded the testing in her notes. These statements were made before Mr Thomas went into the house to join Ms Sagar for the cautioned interview.

54. When assessing this detection, we note that the detection of red diesel in a road vehicle was not challenged. The only question relates to whether there is a link to POL at the BBL Premises. Officer Robinson’s witness statement does not refer to the source of the fuel, we did

not have a copy of his notebook from this date and he had not been called to attend the hearing to give evidence. The consequence of this is that the only evidence which can support a finding that the fuel came from the BBL Premises is that of Officer Kewley. She was a credible witness, very clear as to her recollection of what was said and the circumstances surrounding it, and we also accept her reason for this not having been recorded in her notebook at the time. We do note (as will be described later) that Officer Kewley did respond to questions relating to other detections by saying she did not remember certain things (notably which police officer brought the various vehicles in for testing) – on the basis of this we did not consider that she was seeking to ensure that she could answer every question. We therefore accept that the driver of VF55 YBU had confirmed that the source of the fuel was the BBL Premises – we note that he had not named POL, but the reference to the pump on Bowling Back Lane is clear. We also infer from his comment that people line up at night to fill their vehicles that he had filled directly from the pump.

Complaints from customers in November and December 2017

55. We were taken to certain text message exchanges between Mr Pepper and what were inferred to be customers of POL which had been retrieved from Mr Pepper's phone following the exercise of the search warrant at his home and his arrest. We heard evidence from both Officer Hall and Mr Pepper in relation to these exchanges.

56. It was common ground between the parties that:

- (1) whilst the use of red diesel in road vehicles is unlawful it does not of itself cause damage to a vehicle;
- (2) the presence of kerosene in a vehicle's fuel tank can damage the engine, and this damage can occur if mixed fuels are used just one or two times; and
- (3) kerosene could become present in this way if a filling station has sought to "stretch" the fuel it supplies (which could occur with white diesel and/or with red diesel) or if the fuel which the filling station was supplying had been contaminated, either as a result of the delivery tanks being used to carry more than one type of fuel or in the filling station's tanks.

57. Mr Glover argued that:

- (1) for a filling station with a fixed presence such as POL it would not be in its commercial interests to seek to "stretch" the fuel it was supplying by adding kerosene as its customers would know the source of the problem and not only seek compensation but would then cease to use the filling station; and
- (2) fuel could also have become contaminated in other ways that were not related to the presence (accidental or deliberate) of kerosene if other substances had leaked into the tanks at the BBL Premises.

58. Officer Hall stated that the text messages in the bundle were a small sample of the complaints, and there were about 62 people complaining around this time. Mr Pepper had said that this number sounded about right.

59. The text messages before us include:

- (1) Message received at 1.55pm on 28 November 2017 "Picking receipt up at 2 mate but mechanic saying he dont wnt insurance ...ringing him cos he would have to tell truth on what work he did and the cause was red diesel and the new receipt wont match his work". The reply from Mr Pepper at 1.57pm was "If it has red diesel on the receipt it will cause a problem. If it doesn't then it will be ok."

(2) Exchange of messages with “Charlene” where she says at 6.51am on 9 December 2017 that she had taken her car to a different garage and they had told her the same as the first garage, that it “could be diesel pump injectors alsorts”. Later that day she says she had “dpi” taken out and that it was dripping water and blowing white smoke, and then that the car is “down there now with abid”. Mr Pepper then responded at 1.33 pm that “Abid is sorting it now”.

(3) Message received by Mr Pepper at 9.27pm on 9 December 2017 “Can you ring me regarding red diesel. Not happy”.

60. The text messages we have seen support Mr Pepper’s evidence that he was dealing with angry customers at this time. Whilst Mr Pepper emphasised that he was trying to deal with the problem, it is notable that the text messages we have seen neither deny responsibility for the problems nor do they ask customers to provide reports from the mechanics explaining what the problems were. We would have expected that Mr Pepper would have wanted to see this material – although we accept that if he had obtained this information it would still not be available to us as it would no longer be in his possession. This does, however, mean that the only evidence as to the cause of the problems is that of Mr Pepper, and whilst he confirmed that there was a grey residue in his tanks (which should not have been there) we have no direct evidence of what was found in the tanks of the customers’ vehicles. We find there was contamination of the fuel for which Mr Pepper took responsibility, but we do not make any finding on the cause of this contamination.

61. We also note that two of the text messages (but only two of the sample we have seen) refer to red diesel. The exchange in [59(1)] shows an awareness of both the customer and Mr Pepper that a reference to red diesel might be a problem. Mr Glover submitted that this does not evidence that a road vehicle was filled with red diesel at the BBL Premises – but we note that if the red diesel was in an off-road vehicle then this would not be a problem and there should not have been a concern about it being mentioned on the receipt. Similarly, if a customer had bought a container of red diesel and then filled a road vehicle with it then this should surely be the customer’s fault. The message at [59(3)] does not provide any information as to where the red diesel was or why the customer was not happy.

62. From these exchanges, and taking account of Mr Pepper’s evidence, we find that Mr Pepper was aware that red diesel from the BBL Premises was potentially being misused. He did not take any steps to investigate this risk further, or impose further controls at the BBL Premises to stop any further misuse, eg ensuring that the footage from the camera outside in the yard was recorded.

Detections on 1 December 2017

63. As described at [12], the Decision Letter states that there were two detections of vehicles using rebated fuel purchased from the BBL Premises on 1 December 2017. The evidence in relation to each of these is considered below.

Vehicle LC11 WVZ

64. Officer Kewley’s witness statement describes that she was on duty with Officers Atkin, Mee, Udberg and Allinson. She spoke to the driver of LC11 WVZ, Mr Zadrozny, who “admitted to fuelling the vehicle with marked gas oil by mistake at Prospect Origin”. Her manuscript notebook refers to the vehicle as having been “sighted at Prospect Origin Fuelling Station Bowling Back Lane”, and that the driver “admitted putting £10 worth of gas oil into vehicle to Officer Atkin”.

65. The challenge by Mr Glover was that Officer Kewley’s notebook does not include a reference to the driver having been seen filling his tank with red diesel at the BBL Premises. Nor does it contain any record in the format of direct questions and answers to show that the

driver had been asked to confirm that he had filled at the BBL Premises. He had been “sighted” at the BBL Premises and then the tank was tested at a different site several hundred metres away on Nelson Street.

66. Officer Kewley explained that the BBL Premises were under surveillance and the police officer saw the vehicle at the BBL Premises, stopped it upon leaving and then brought the vehicle to Nelson Street where the testing took place. She could not recall which police officer had made the sighting, but confirmed that the vehicle would have been escorted from the point of leaving the BBL Premises to the testing site. The driver had admitted putting red diesel into the car, and she was satisfied this was done at the BBL Premises as that is where the police officer had seen the car. There would have been no need to ask the driver to confirm exactly where he had filled the vehicle as he had been seen doing so.

67. We accept, from Officer Kewley’s explanation of how vehicles were brought to the testing site, that the vehicle had been seen at the pump at the BBL Premises (and not at a different filling station) and had not filled up at a different location between the BBL Premises and Nelson Street. This raises the question of what had happened at the BBL Premises, and in this case the driver had admitted putting £10 worth of gas oil into the road vehicle, albeit stating that this was by mistake. We consider that there is sufficient evidence to satisfy us that on the balance of probabilities there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle CE14 DMO

68. The second detection was of vehicle CE14 DMO and we had the manuscript notebook of Officer Udberg. The notes state that the van had been brought for testing to Nelson Street after police colleagues had seen the vehicle drive in and out of a fuelling station well-known to agencies for permitting fuelling practices including the direct fill of road vehicles with red diesel. The driver, Mr Kostov, stated that he had fuelled at Prospect Origin and provided a receipt. That receipt was dated 29 November 2017, which showed a purchase of £20 of gas oil. He explained that he had asked for £20 to be placed into his vehicle whilst he used their toilets, and claims he did not see what pump or fuel was used because of this.

69. Mr Kostov was a courier and said he used Prospect Origin regularly as it was local to him. Officer Udberg observed that the fuel gauge on the vehicle showed the red light (close to empty). He put it to Mr Kostov that he or POL had seen police nearby that day and chose to leave without refuelling. Mr Kostov refused that this was the case at all. He reiterated that he did not fuel with red diesel, POL had fuelled for him directly into the vehicle and he did not know red diesel was being put in nor had he paid attention to the receipt. Mr Kostov had to speak to his manager at the courier service and attempted to explain the situation. The manager, “Paul”, appeared irate. Once Mr Kostov had paid for the vehicle to be restored, Office Udberg’s notes indicate that he spoke with the manager from UK Mail – “Graham” in “Paul’s” absence – and advised them that he was concerned Mr Kostov may face employment termination and reiterated the version of events that had been provided to him. He outlined that the offences were of a civil nature and not criminal in the eyes of HMRC in relation to Mr Kostov and highlighted that further investigation of the suppliers was required. His notes state that it appears Mr Kostov may have been unwittingly duped into buying marked gas oil. Naturally Officer Udberg cannot intervene in private matters but felt this needed to be stated in this case if disciplinary action was to be taken.

70. Mr Glover submitted that this incident demonstrated that just because the police had seen someone at the BBL Premises and brought them in did not mean that there had been a successful fuelling at that time. He also noted that the receipt from 29 November 2017 does not indicate whether red diesel had been filled into a container or into the tank of a road vehicle.

71. We accept Mr Glover's first submission. In each case, we need to consider what evidence there is as to what has happened, although in some circumstances it may be that such evidence entitles us to infer that there had been a successful fuelling at that time. That is not the case here. However, we do not accept his second submission - the evidence does indicate that on 29 November 2017 Mr Kostov bought red diesel from POL (as that was the information on the receipt), but Mr Kostov's statement was that whichever fuel he bought had been filled directly into his vehicle. We are therefore satisfied that, on the balance of probabilities, there was a direct fill of his vehicle with red diesel at the BBL Premises. We note that this occurred on 29 November 2017, and not on the date on which the vehicle was stopped and tested. However, the Stated Reasons in the Revocation Decision refer to the date of detection and not to the date on which the red diesel was purchased.

Detections on 21 December 2017

72. As described at [12], the Decision Letter states that there were eight detections of vehicles using rebated fuel purchased from the BBL Premises on 21 December 2017. The evidence in relation to each of these is considered below.

73. We had Detection Reports from the Hull Road Fuel Testing Unit in respect of all eight vehicles.

Vehicle MX58 ETY

74. The case officer was Officer Ferguson, and the summary of case states that the vehicle had been driven by Mr Ociepa when stopped by police at a routine road check in Nelson Street. The fuel was tested and found to be red diesel. Mr Ociepa could speak little English so his manager, Mr Khan, attended. The Record of Interview with Mr Khan includes, when he was asked to explain the red diesel, "One of the lads whom cannot speak very good English must have gone to the wrong pump by mistake."

75. Mr Glover put it to both Officer Elliott and Officer Ferguson that there was no suggestion in this report that the vehicle at been filled at the BBL Premises. They agreed that this was the case. Officer Ferguson could not add any further information to this report.

76. The absence of any evidence as to where the red diesel had been purchased means that we are not satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle NJ59 NOH

77. The case officer was Officer Worrell, and the summary of case states that the fuel was found to contain kerosene. The driver, Mr Muradi, was interviewed under caution during which he admitted to putting the kerosene into the vehicle on the advice of a friend who told him it would clean the fuel system for him. The Record of Interview contains further references to a mechanic suggesting that kerosene may kill the injector light which had come on. There is one reference to red diesel in that Record of Interview, where Mr Muradi says he didn't know it was illegal to put kerosene in the tank, but he thinks red diesel is.

78. Mr Glover noted that there is no mention in this report of red diesel having been found in the tank of the vehicle, and submitted that this seizure had been made on the basis of "stretching", with kerosene having been found in the tank.

79. The absence of any evidence as to red diesel having been found in the tank means that we are not satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle KR58 WHJ

80. The case officer was Officer Ferguson, and the summary of case states that the vehicle was found to contain red diesel. The driver, Mr Paleshnikov, was interviewed under caution during which he stated that he had bought the car the previous day and had put red diesel into it by mistake “at a garage on Bowling Back Lane” by selecting the wrong nozzle. The Record of Interview notes that Mr Paleshnikov said he “put red in by mistake”, and when asked which petrol station this was from, he answered “One on Bowling Back Lane”.

81. Mr Glover put it to Officer Ferguson that he had not asked the driver to identify the location of the filling station on a map. Officer Ferguson agreed – he said he was fairly familiar with Bradford, and there is only one filling station on Bowling Back Lane, the BBL Premises of POL. In the wider area around Bowling Back Lane, there is one on Hammerton Street, and a further two on the ring road, one of which possibly sells red diesel.

82. The challenge in relation to this detection is thus whether the vehicle was filled with red diesel at the BBL Premises or elsewhere. It was common ground between the parties that the reference to a filling station on Hammerton Street is to the Hammerton Street Filling Station. A map of the area was produced to us and (on the assumption that the map as produced was printed with North at the top of the page), then Bowling Back Lane broadly runs from East to West and Hammerton Street runs from North to South. The parties agreed that the junction of these two roads is about 800 metres from the BBL Premises. The Hammerton Street Filling Station was not stated to be on that junction, but further up the road near Filey Street.

83. Notwithstanding that it was shown to us that there is another filling station on a road which runs off Bowling Back Lane, given the distances which are involved we do not think it tenable that a reference to a filling station “on Bowling Back Lane” could be a reference to a filling station on a different street which is several hundred metres away. There was no suggestion that the filling stations on the (unspecified) ring road were any closer. We note that Mr Pepper had said he had been aware of pop-up businesses which appear for a few months and then disappear. However, we had no evidence as to where these might have been located, or whether one was operating at this time and, additionally, we note that the driver stated that he had picked up the wrong pipe. This clearly implies that the place where he had filled his tank had more than one type of fuel for sale, and we are not convinced that an unapproved pop-up business (from which Mr Pepper had been clear to disassociate himself) would be selling white diesel as well as red diesel. We are therefore satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle OE54 OAP

84. The case officer was Officer Worrell, and the summary of case states that the vehicle was driven by Mr Mir and found to contain red diesel. Mr Mir was interviewed under caution and admitted fuelling with gas oil that morning “at a garage just off Bowling Back Lane”. The Record of Interview notes that Mr Mir, when asked where he filled the vehicle, said “I got stopped a few yards from pulling out. I’ve never been to the place before...[Where did this happen?]....Just off Bowling Back Lane”.

85. Mr Glover drew attention to the absence of a specific reference to POL’s site, the BBL Premises, noting that the description was “just off” Bowling Back Lane. There is no evidence that the driver was asked to identify the location, eg by reference to a map. He submitted that Bowling Back Lane was used to refer to a wider area, and such a reference could capture other local filling stations.

86. We have set out at [81] to [83] our findings on the position of other filling stations. We note that the BBL Premises themselves are in an industrial yard, and conclude that they readily satisfy the description of being “just off” Bowling Back Lane even though they are at the

entrance to the yard. The Hammerton Street Filling Station is several hundred metres away, and we do not consider that this could be said to be “just off” Bowling Back Lane. We did not have any evidence as to the location of any pop-up businesses, or as to whether one was operating at this time. Furthermore, we are not satisfied that a temporary pop-up business would have the degree of permanence that is connoted by the driver’s use of the word “garage”.

87. We are satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle YE05 WBM

88. The case officer was Officer Ferguson, and the summary of case states that the vehicle was driven by Mr Kundi and was found to contain red diesel. Mr Kundi was interviewed under caution during which he admitted to fuelling the vehicle on red diesel that morning from “a garage on Bowling Back Lane”, adding that he didn’t realise it was red diesel as the pump was not marked to warn customers. The Record of Interview shows that when asked where he filled the car Mr Kundi replied “a garage on Bowling Back Lane”. When asked to describe the garage he said “opposite a scrap yard. They have a petrol station pump outside fastened to a wall”.

89. The challenge here is whether the vehicle was filled with red diesel at the BBL Premises, given that the driver did not identify POL by name. The description of “a garage on Bowling Back Lane” accurately matches the BBL Premises, and the reference to it being opposite a scrap yard also accords with Mr Pepper’s description of the location as being a fairly industrial area. For the reasons given above, we do not consider that the possible alternatives (the Hammerton Street Filling Station or a pop-up business) satisfy the description which was given of the location by the driver.

90. We do note that Mr Kundi stated that he didn’t realise the fuel was red diesel as the pump was not marked to warn customers. Mr Pepper gave (unchallenged) evidence that POL’s pump had been marked as containing red diesel (as is required by the RDCO scheme). We were shown a photograph of a “spare” pump owned by POL that had not been in use but which was identical in appearance to that which had been at the BBL Premises. We could see the required label, and the sticker on the nozzle was also red in colour. We do therefore find that the pump at POL was marked as being red diesel – however, that does not require that we therefore accept that the vehicle had been fuelled elsewhere. Given that Mr Kundi’s vehicle had been seized, he may have wanted to deny that his unlawful action was deliberate – stating that the pump was not marked would fit with this. We do approach this explanation with some caution given that we have not heard evidence from Mr Kundi.

91. Given our conclusion as to the other possible filling stations not matching the location which was described by the driver, and the reason he may well have had for avoiding admitting the truth as to the labelling of the pump, we have concluded, on the balance of probabilities, that we are satisfied there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle RV04 FWG

92. The case officer was Officer Worrell, and the summary of case states that the vehicle was driven by Mr Onwen, and found to contain red diesel. Mr Onwen admitted that this fuel had been put into the vehicle by his friend at a garage on Bowling Back Lane. The Record of Interview shows that when asked who last put fuel into the van he said “My friend Shariff”, he was with him when he put the fuel in and this was “West Bowling – Bowling Back Lane”. Mr Onwen works as a self-employed waste oil collector.

93. Mr Glover noted that this description of the location does not positively identify the BBL Premises.

94. We have set out at [81] to [83] our findings on the position of other filling stations and note that whilst POL is not identified by name the BBL Premises do match the description provided by the driver. In addition, we note that Mr Onwen said he works as a self-employed waste oil collector, and that it was his friend “Shariff” who put the fuel in. No evidence was adduced as to the possible identity of this friend, but we cannot help but note that Shariff Gibba was responsible for waste oil collection at the BBL Premises – he worked in the same business and in the same vicinity, and may well have been known to Mr Onwen. This provides additional support for our conclusion that we are satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle GU58 CYL

95. The case officer was Officer Ferguson and the summary of case states that the vehicle was driven by Mr Salkauskas and was found to contain red diesel. Mr Salkauskas stated he had been trying to save some money before Christmas and had bought some drums of red diesel in order to do so. The Record of Interview states that the red diesel came “from a garage on Bowling Back Lane”.

96. Officer Ferguson confirmed in cross-examination that he had not asked the driver to clarify that he was referring to the BBL Premises. Mr Glover noted that it is lawful for a filling station to put red diesel into drums.

97. We have set out at [81] to [83] our findings on the position of other filling stations and note that whilst POL is not identified by name the BBL Premises do match the description provided by the driver of being “a garage on Bowling Back Lane”. We find that the red diesel was bought from the BBL Premises. We also find that it was bought in drums and not directly filled.

Vehicle DV53 ZBZ

98. The case office was Officer Warrell, and the summary of case states that the driver, Mr Khan, admitted putting red diesel in the vehicle “at Spen Valley Bio Fuels” that morning. This is reflected in the Record of Interview, where Mr Khan confirmed that he had direct filled the tank.

99. This detection was not challenged by Mr Glover. We note that the filling station was named by the driver, and Mr Pepper had confirmed that the BBL Premises on which POL operates had previously been run by SVBL. We are satisfied that, on the balance of probabilities, that there was a direct fill of this vehicle with red diesel at the BBL Premises.

Detections on 10 January 2018

100. As described at [12], the Decision Letter states that there were five detections of vehicles using rebated fuel purchased from the BBL Premises on 10 January 2018. The evidence in relation to each of these is considered below. We note at the outset that, as acknowledged by HMRC, the bundle only contained evidence of four vehicles having been tested.

101. The four detections are described below. They all occurred at Nelson Street, and the officers involved are Officers Kewley, Robinson, Carroll, Mee and Allison (although the notebooks show that they were not all involved in each detection).

Vehicle X986 EGK

102. Officer Kewley’s witness statement states that she was on duty with Officer Robinson at Nelson Street, and they seized X986 EGK for using marked gas oil. She interviewed the driver, Mr Iqbal, and he “admitted fuelling the vehicle at Bowling Back Lane as he was told it was cheap fuel”.

103. Her notebook was also provided and this states that police had brought in the vehicle as it was “sighted filling with gas oil at Prospect Origin, Bowling Back Lane”. She had interviewed the driver, Mr Iqbal, and her notes record this exchange:

“KK What fuel did you put in Peugeot today

YI Someone told me it was cheap fuel

KK Did you know it was red diesel?

YI No

KK Where did you fuel

YI Bowling Back Lane

KK Did you put the fuel into car yourself?

YI Yes...

KK Did you have to wait for pump to be switched on?

YI I can't remember

KK Did anyone question you about putting red diesel into vehicle from garage?

YI No”

104. Mr Glover challenged Officer Kewley as to whether she had shown the driver a map of the area and asked him to identify the filling station. She had not. Officer Kewley stated that there is no other filling station on Bowling Back Lane. She agreed with Mr Glover that Bowling Back Lane is sometimes referred to locally as an area, but denied that Mr Iqbal could have been referring to the Hammerton Street Filling Station. The police were conducting surveillance that day at the BBL Premises and a police officer had sighted the vehicle at the BBL Premises of POL. The vehicle had been stopped and brought to the testing site. There was no need to confirm the location of the filling station on a map in this situation.

105. We accept Officer Kewley's account. We are satisfied that, on the balance of probabilities, that there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle YE02 WXC

106. Officer Carroll's notebook states that she was on duty at Nelson Street with Officers Kewley, Mee, Robinson and Allison and was advised by Officer Mee that the fuel in vehicle YE02 WXC was red in colour and the vehicle had been seized. Officer Carroll interviewed the owner, Mr Zaman, and he said that he had filled up at Bowling Back Lane. He didn't know the business name and had filled the vehicle himself directly from the pump.

107. Officer Mee's notebook confirmed that she had tested the fuel and it contained the red marker.

108. We did not have any direct evidence linking this detection to the police surveillance operation being conducted at the BBL Premises. We do however note that this detection was made on the same day. Given that the driver said he had filled up at Bowling Back Lane, and there is no other garage on that road, we are satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle FH54 XPG

109. Officer Carroll's notebook states that she was on duty at Nelson Street with Officers Robinson and Allison. Officer Robinson took a sample of fuel and it was red in colour. The driver was Mr Hassan. Officer Carroll interviewed him and an extract is as follows:

“AC Where do you normally fuel up?

MH Morrisons

AC When last fuelled?

MH Saturday morning

AC Where did you go for it?

MH Bowling Back Lane

AC Did you put fuel in yourself?

MH Somebody put it in

AC Did they tell you it was not for road use?

MH Well, you know, they know everyone goes there for it"

110. Officer Robinson's notebook confirmed that he took a sample of fuel and it was red in colour.

111. As with the previous detection, we did not have any direct evidence linking this detection to the police surveillance operation being conducted at the BBL Premises. We do however note that this detection was made on the same day. Given that the driver said he had filled up at Bowling Back Lane, and there is no other garage on that road, we are satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Vehicle XR08 RRX

112. Officer Robinson's notebook states that he was on duty at Nelson House and vehicle YR08 RRX was stopped and red diesel was found in the tank. The owner, Mr Akhtar, was interviewed by Officer Robinson and he stated that he had just filled the vehicle at Bowling Back Lane. He had direct filled, did not receive a receipt and paid cash of £22 to the owner (whom he did not name).

113. Officer Kewley's notebook states that she was on duty at Nelson Street with Officers Robinson, Carroll and Mee. Officer Robinson took a sample of fuel from the tank and it was red in colour. On testing, it contained the red marker.

114. As with the previous two detections, we did not have any direct evidence linking this detection to the police surveillance operation being conducted at the BBL Premises. Officer Kewley was not challenged on the evidence in her notebook on this detection. We do however note that this detection was made on the same day. Given that the driver said he had filled up at Bowling Back Lane, and there is no other garage on that road, we are satisfied that, on the balance of probabilities, there was a direct fill of this vehicle with red diesel at the BBL Premises.

Observations between 26 March 2018 and 25 April 2018

115. Officer Hall's witness statement dated 18 January 2018 explains that between these dates HMRC conducted intermittent observations at the BBL Premises and during this period approximately 200 customers were observed directly filling their road vehicles with red diesel and on a further 61 occasions employees of POL were observed directly filling vehicles with red diesel on behalf of customers.

116. Giving evidence Officer Hall explained that there was about 52 hours of video footage from this exercise, and he had extracted an example of the observations made on 14 April 2018. Those extracts were exhibited to his witness statement but not seen by the Tribunal – the time stamps referred to indicate that there was about 20 minutes of footage exhibited. The witness statement does describe the footage as follows:

- (1) 11.31-11.36am - red VW golf enters the unit and an employee of POL fills the vehicle with red diesel;
- (2) 11.16-11.18, 11.18-11.28 and 11.28-11.30 - an unknown white man walks to the entrance and talks to Mr Khan. He then moves out of view and returns in a vehicle pulling a trailer. Mr Khan places a large blue drum onto the trailer and fills the drum using the inner pump. The man takes three smaller cans from his car and places them in the trailer; he appears to tell Mr Khan not to fill the drum to the top. A second silver barrel is placed onto the trailer, the nozzle is then attached to this drum. The man pours an oil-like liquid into the blue drum with assistance from Mr Khan; and
- (3) 8.59-9.01 - a Skoda Octavia is parked near the shutter. Mr Khan is filling the customer's vehicle using the shutter pump.

117. Mr Glover challenged the relevance of Officer Hall's witness statement and evidence, given that it was addressing events not mentioned in the Decision Letter.

118. Mr Glover stated that he had watched these clips and submitted as follows:

- (1) none of the vehicles which were filled with oil from the pump were stopped and tested – just because Officer Hall had observed the red diesel nozzle from the pump in the tank of the road vehicle did not mean that there had been a successful fill;
- (2) Mr Pepper did not appear in any of the footage; and
- (3) the filling of the blue drum was not a direct fill, and it was not known what was filled into the blue drum or the silver drum.

119. He also submitted that this evidence could not properly be assessed by POL as they had not seen the 52 hours of footage. Ms Barnes' response was that the witness statement of Officer Hall (along with the 20 minutes of footage exhibited to it) was served on POL's legal team in April 2019, and no request had been made for more of the footage to be provided even though it was clear on the face of the witness statement this was just an extract.

120. Addressing Mr Glover's challenge on relevance, we need to make our own findings on the facts and then decide whether, on the facts we have found, this evidence is relevant. That will be a necessary part of our reaching a decision as to whether the Revocation Decision could not reasonably have been made.

121. We do not accept Mr Glover's complaint about only having 20 minutes of footage given that no request to receive all of the surveillance footage had been made by or on behalf of POL before the hearing, and indeed this was only raised on the second (and final) day of the hearing.

122. We do however accept Mr Glover's note of caution as to what the footage appears to show given that the extracts described by Officer Hall in his witness statement do not all relate to red diesel (and whilst we need to consider the question of relevance, and do so in the Discussion below, HMRC's own arguments revolve around the detections of red diesel in road vehicles that had been filled at the BBL Premises). We do note that Officer Hall did not suggest (either in his witness statement or giving evidence) that the three extracts provided all showed direct fills of red diesel at the BBL Premises. They clearly do not.

123. Officer Hall's witness statement explains, as noted at [115], that approximately 200 customers were observed directly filling their road vehicles with red diesel and on a further 61 occasions employees of POL were observed directly filling vehicles with red diesel on behalf of customers during the one month period in which the intermittent observations were conducted. These numbers are striking, particularly given that this was not a "round-the-clock" surveillance operation.

124. Whilst Mr Glover submitted that, in the absence of testing the tanks of the vehicles immediately after they have left the BBL Premises, we cannot know that they had successfully fuelled with red diesel, we consider that, on the balance of probabilities, in the vast majority of cases they would have done so. We note that the detection considered at [68] to [71] shows that just because a vehicle enters the BBL Premises and drives out it does not mean that it has successfully filled. We accept that proposition – however, the evidence of Officer Hall is different. He does not state that the vehicles were seen entering and/or leaving the premises. His evidence is that they were filled with red diesel at the BBL Premises, and he identified separately whether customers filled themselves or if employees of POL did this for them. Given that he has said that these direct fills were with red diesel, and Mr Glover has not submitted that the nozzle in question could not be identified, the only issue is whether red diesel was actually transmitted from the pump through the hose and nozzle and into the tank of the vehicle. We agree that this is not capable of being seen; but consider that whilst there may be a few occasions where nothing happened and there was no actual fuelling (perhaps because the card payment facility, if payment in advance is required or at least authorisation on the card, is not working, or the customer is not able to operate it) we can infer that in the vast majority of cases there was a successful fuelling of road vehicles with red diesel.

Detections on 7 April 2018

125. Officer Metcalfe’s witness statement sets out that he was conducting observations “in the vicinity of” the BBL Premises, and that at approximately 12pm on 7 April 2018 he observed the shutter being closed. Then at 12.23pm he observed a red Seat Leon using the outside red diesel pump and at 12.25pm he observed a black Ford Mondeo using the outside red diesel pump. At 12.30pm, after this second car had left, he approached the pump and noted that the sale had been recorded as £20 for 22.5 litres at a rate of £0.889 per litre. The pump had an electronic payment by card facility.

126. Replying to questions in cross-examination, Officer Metcalfe added:

- (1) He was conducting surveillance from various different places around the BBL Premises.
- (2) The BBL Premises are on an industrial estate with various units, and the shutter closing meant it looked like the unit was closed.
- (3) He does not know how long the red car, which he observed using the pump at 12.23pm, was at the pump. He was driving past the BBL Premises slowly at 12.23pm when he saw the car there. The outside pump had two handles, and he could clearly see that the driver was using the red diesel nozzle and that this nozzle was in the tank of the car.
- (4) He accepted that he couldn’t know that red diesel was actually being transferred from the pump to the fuel tank of the car, and that the car was not tested upon leaving the BBL Premises. It was not a targeted day for those operations.
- (5) Officer Metcalfe pulled onto a grassy verge just past the BBL Premises, and when he saw the black car leave the pump, he turned his own car around and drove back to the BBL Premises to inspect the pump.

127. Mr Glover’s challenge to this evidence included that Officer Metcalfe could not have seen if red diesel was successfully fuelled into the tank, and that the payment of £20 shown on the card facility could have been from 30 minutes previously (ie when the unit was still open) if both of the fills that Officer Metcalfe thought he had witnessed had been unsuccessful.

128. We have explained at [124] our conclusion that where the red diesel nozzle is seen in the tank of a vehicle, we can infer that in the vast majority of cases there was a successful fuelling

of that vehicle with red diesel even in circumstances where the vehicle was not then tested upon leaving the premises. The timings stated in Officer Metcalfe's witness statement do not change our conclusion on this matter – the red car was already at the pump when he first saw it, a second then pulled up to the pump and he was then able to approach the pump at 12.30pm (when the second car had left). We have also had regard to the fact that Officer Metcalfe stated that he made these observations from his car (whilst driving) and then pulled over nearby so that he could drive back to the BBL Premises to inspect the pump once the customers had left. The evidence he gave was straightforward, and the level of detail he provided was consistent with what we would expect from someone who was driving at the time. We do accept Mr Glover's submission that, viewed in isolation, the payment shown on the card facility could have been made earlier that day during business hours. But it is not appropriate to view this in isolation. We are satisfied that, on the balance of probabilities, there were two instances of road vehicles direct filling with red diesel at the BBL Premises.

Detections on 25 April 2018

Vehicle SV52 WWC

129. The detection was described in the witness statement of Officer Ferguson, and his statement included that he was on duty with Officer Hillaby and other officers of HMRC on Nelson Street and vehicle SV52 WWC was brought into the site by members of West Yorkshire Police. The fuel was tested and was red in colour and contained the markers for red diesel. He interviewed the driver, Shahzad Mahmood Khan (who is referred to in the bundle as both Mr Mahmood and Mr Khan) and seized the vehicle.

130. We also had a copy of the manuscript Record of Interview of Mr Mahmood, the driver, by Officer Ferguson. In that interview Mr Mahmood admitted putting red diesel in the car. When asked about why they had found that the fuel in his vehicle contained red diesel, the notes show:

“SK: I was short of fuel and only had £10 on me so I was passing an put that in

AF: Where were you passing

SK: Bowling Back Lane – I was going to see a friend who lives further up

AF: Which garage did you use on Bowling Back Lane

SK: The on opposite the waste traders”

131. This description of the location of the garage is consistent with the location of the BBL Premises, and we have already set out our conclusions on the locations of other filling stations. We are satisfied that, on the balance of probabilities, a road vehicle had direct filled with red diesel at the BBL Premises.

Vehicles SA58 GPE, WU60 LTJA and SD07 HPP

132. Officer Kewley's witness statement includes that she was on duty with Officers Carroll, Robinson, Lyons and McGinty. They seized:

(1) SA58 GPE for using marked gas oil, and the driver Mr Awan declined to be interviewed;

(2) WU60 LTJA for using marked gas oil, and the owner Mr Patankar was interviewed under caution. He denied fuelling with red diesel or any knowledge of how it came to be in the tank; and

(3) SD07 HPP for using marked gas oil and the driver Mr Wade declined to be interviewed but said he filled at Morrisons petrol station.

133. We have no additional information in relation to these three seizures and there is thus no evidence linking these detections of red diesel with the BBL Premises. Accordingly we are not satisfied that, on the balance of probabilities, these vehicles had direct filled with red diesel at the BBL Premises. We did note that the licence plate referred to at [132(2)] may well have been incorrectly recorded, but this is not relevant to our conclusion.

Detections on 14 May 2018

Vehicles VU58 PKF and ND13 FMF

134. The detections are described in what was referred to as the witness statement of Officer Winters. His evidence is that he was on duty with other HMRC officers at “Spenn Valley Bio Diesel, Bowling Back Lane” and he took samples of fuel from the tanks of two road vehicles (VU58 PKF and ND13 FMF) which were red in colour and in field tests these were positive for rebated fuel.

135. Officer Winters had not been called to attend the hearing to give evidence. The witness statement which is attributed to him (by which we mean that it was indexed in the bundle as being his witness statement) does not include a date, his name or an e-signature. Viewed in isolation (ie without reference to the index) it is not possible to identify whose statement it is. It is, however, apparent on its face that it is given by someone on behalf of HMRC (using HMRC’s official form) and the opening words are “On 14th of May 2018 I was on duty with other HM Revenue & Customs Officers...” thus indicating that the author is also an officer of HMRC. POL did not object to the inclusion of this witness statement and, having considered this in the light of the overriding objective and the flexibility which this Tribunal has as regards accepting evidence from witnesses, we decided we should admit it.

136. We have previously referred to the fact that the BBL Premises were previously operated by SVBL. We are therefore satisfied that the premises to which Officer Winters refers as “Spenn Valley Bio Diesel” are those of POL, namely the BBL Premises. We note that he states that he was “at” this location and took samples of the fuel in the tanks of road vehicles, but does not expressly state that the road vehicles in question had fuelled at the BBL Premises. However, we consider that this can and should be inferred, and Mr Glover did not challenge this evidence. We therefore conclude that we are satisfied that, on the balance of probabilities, these vehicles had direct filled with red diesel at the BBL Premises.

Vehicle LB56 DWV

137. Officer Kewley’s witness statement states that she was on duty with other (unnamed) officers at the BBL Premises and they seized LB56 DWV for using marked gas oil. The owner Mr Ahmed was interviewed under caution. Her statement records that “He admitted fuelling the vehicle from the pump that showed Gas Oil and that he had done so previously, paying by card. He stated Javid Khan said that if he went between 8-9am he could use the pump, normally it is put in drums. He claimed people go to the garage on a night and line up when it’s closed, and that Javid Khan didn’t own the garage, there was another guy.”

138. This evidence was not challenged and we accept it. We are satisfied that, on the balance of probabilities, this vehicle had direct filled with red diesel at the BBL Premises.

Execution of search warrants on 14 May 2018

139. As noted at [10], HMRC executed a search warrant on 14 May 2018 at the BBL Premises and at the homes of Mr Pepper and Mr Hillam. We had no evidence before us in relation to the exercise of the warrant at the home of Mr Hillam.

140. The search warrant exercised at the BBL Premises was subsequently quashed by the High Court as the warrant for the BBL Premises had, in setting out why the additional items sought were likely to be of substantial value to the investigation stated “Officers intend to remove the

pumps and associated paraphernalia in order to stop the business from operating, thus preventing the suspects from continuing to profit from their criminal activity”.

141. Whilst the search warrant at the BBL Premises was subsequently quashed and the entry by officers of HMRC onto those premises was declared unlawful, we do note that this warrant was in fact exercised as this is brought into relevance by the explanation from Mr Pepper as to why no representations were made by POL to the *Minded To Letter* (see [46(14)]). We do not have regard to the warrant exercised at the BBL Premises for any other reason.

142. Officer Hall’s witness statement dated 15 April 2019 describes the execution of this warrant at Mr Pepper’s home address, and the arrest of Mr Pepper at 8.06am by Officer Allen. That statement includes:

- (1) Mr Pepper asked to use the toilet and locked the door. He was asked to open the door, but had replied he was on the toilet. Mr Pepper was taken to Elland Road custody and before being searched by a police officer he removed a mobile phone from the pocket of his jeans. That phone did not have a battery or a sim card. During a search of the bathroom at Mr Pepper’s home address Office Benson uplifted a mobile battery, but no sim card was found; and
- (2) examination of the phone identified a series of text messages between customers of POL and Mr Pepper relating to serious mechanical issues with vehicles which had filled at POL, and screen prints of conversations between Mr Hillam and third parties. These are described at [59].

143. Mr Pepper’s evidence in relation to this is set out at [47(13)] and we made certain observations at [48(7)]. We have considered whether we can draw an adverse inference from the lack of what we regard as an adequate explanation from Mr Pepper. In *Safe Cellars Limited v HMRC* [2017] UKFTT 78 (TC) Judge Hellier set out the following at [50] to [51] which we gratefully adopt:

“50. In *HMRC v Sunico* [2013] EWHC 941, as in this appeal, a potential witness had made a witness statement which had been read by the judge before the hearing. In that case the judge, referring to CPR 32.5, said that the witness statements could not be taken into account and that she would disregard her pre-reading of them. The rules of this tribunal do not require us to disregard the contents of the statements but we have given them no weight.

51. In *Sunico* Proudman J reviewed the authorities relating to the drawing of adverse inferences from the absence or silence of a witness. She recalled the principles in *Wisniewski v Central Manchester Health Authority* 1998 PIQR 324 at 340:

- (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
- (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call a witness.
- (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
- (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If on the other hand there is some

credible explanation given, even if it is not wholly satisfactory, the potential detrimental effect of his/her absence or silence may be reduced or nullified.”

144. In this instance, the reason for Mr Pepper’s failure to explain these events, beyond the comments he made at [47(13)], was to avoid the risk of incriminating himself. This is a satisfactory reason within the approach set out by Proudman J in *Sunico* and accordingly we may not draw an adverse inference from Mr Pepper’s failure to explain. This does not mean that we are required to ignore the evidence of Officer Hall at [142], which was not denied, or the existence of the text messages described at [59] which were retrieved from Mr Pepper’s phone.

145. We do accept HMRC’s submission that the events described at [142] show that Mr Pepper was trying to hide or destroy something. We do not, however, go any further than that. In particular, there was insufficient evidence from which we can infer that he was seeking to hide evidence which would be relevant to the Revocation Decision. We have considered and made findings on the text messages that were retrieved at [60] to [62].

Decision Letter dated 24 July 2017

146. The Decision Letter is described at [12].

147. Officer Elliott’s witness statement includes the first two paragraphs of the Stated Reasons. He then referred to paragraph 4.8 of EN 192 and said:

“Due to the number of detections of vehicles being run on rebated oils purchased from this trade, and in light of this action continuing after a warning letter was issued, I consider the above 3 bullet points [from 4.8] to be relevant in this particular case. As a result I decided to revoke their RDCO approval. The trader can no longer be considered fit & proper to deal in controlled oils.”

148. He issued the Minded To Letter on 2 July 2018 notifying POL of his intention to revoke, giving POL until 16 July 2018 to comment on the proposed grounds and present any information that should be taken into consideration. No representations were received, and he revoked their RDCO approval.

149. Giving additional evidence in chief, Officer Elliott added:

(1) The Minded To Letter was sent to POL at the BBL Premises as this was the address held for POL on HMRC’s system. At the time he sent this letter he thought there was only one address held by HMRC. He thought that RDCO returns were being sent to POL every month at the BBL Premises.

(2) The Decision Letter was sent to POL at the BBL Premises as well, but he then became aware that a second address was held by HMRC and so he sent it to that address as well.

(3) HMRC had not received correspondence from POL saying that the business address was no longer being used.

(4) The Stated Reasons referred to a warning letter having been sent on 7 November 2017. The date of the Warning Letter is 10 October 2017. This was an error.

(5) Referring to the approach in paragraph 4.8 of EN 192, at the time of the Minded To Letter, one warning letter had been sent to POL and no civil penalties had been imposed. He did not consider issuing a further warning letter at this time. He was aware no civil penalties had been imposed – and he would not be the person imposing such penalties. Asked why he proceeded straight to revocation without taking these steps (which for civil penalties would have involved referring to a colleague) or imposing conditions, Officer Elliott considered that the seriousness of the acts found merited

immediate revocation, noting that the detections related to three separate occasions after the Warning Letter had been issued.

(6) He was not aware of the events set out in the witness statement of Officer Metcalfe when he made his decision.

150. Replies given during cross-examination included:

(1) At the date of the Minded To Letter, he was not aware that the BBL Premises had been the subject of the execution of a search warrant by HMRC nor that those premises were closed. If he had known of this he would have made sure the letter was sent to an address at which it could be received, and would have taken into account any representations received.

(2) When no responses were received to the Minded To Letter, he did not at that time double-check HMRC's systems to see if there was an additional address which could be used for POL.

(3) The Decision Letter sent to POL at the BBL Premises was dated 24 July 2018. The version sent to Mr Pepper at his home address was dated 3 August 2018, as that was the date on which he had identified that there was an additional address - he prepared and sent the letter that day. There was no particular reason that he could recall looking at the address records. He had not been told that POL was no longer operating at the BBL Premises.

(4) The Stated Reasons refer to detections made by HMRC. They had not been made by him – he had been informed of them by Officer Gilmartin. He had reviewed the meeting notes of Officer Gilmartin.

(5) He had not looked further and investigated the assertions made by Officer Gilmartin as to the detections which had been recorded, challenging as to whether those detections had included written confirmation in notes of interviews that the driver of the vehicle had confirmed that the red diesel had been bought from the BBL Premises. In particular, he had not seen:

(a) Any underlying evidence in respect of the detection which was recorded as having occurred on 1 October 2017 and is described now in the witness statement of Officer Robinson.

(b) Any underlying evidence of the detections which are set out in the Stated Reasons - not the notebooks, nor the Detection Reports from the Hull Road Fuel Testing Unit.

(6) He “might have” taken a different view on the number of detections that he was assigning to POL if he had reviewed these underlying reports. However, Officer Elliott reiterated that any seizure would have led him to consider revocation.

(7) With the benefit of hindsight, it would have been reasonable and fair to check whether the detections could have been attributed to other premises.

(8) He accepted that HMRC's policy was to give warnings “in normal circumstances” and then proceed through a process of escalation, which might include giving a penalty. He accepted that no further warnings were given following the detections made on 1 December 2017 in order that POL could have the opportunity to address the failings, but said that this was what the Minded To Letter was for.

(9) He accepted that EN 192 said that HMRC's policy was to take account of how a business dealt with employees who were miscreants. But he emphasised that at the same time it is POL's responsibility to train its employees.

151. We accept Officer Elliott's evidence. We do however note that in cross-examination at [150(6) and (7)] his responses included matters of opinion which did not relate to his making of the Revocation Decision and issuing the Decision Letter. We have no regard to these opinions in making our own decision.

152. The evidence of Officer Elliott reveals the information he did and that which he did not have before him at the time he made the Revocation Decision. Mr Pepper stated at [46(4)] that his belief was that HMRC sent the Minded To Letter to the BBL Premises knowing that they were not operational and thus, effectively, deliberately ensuring he would not be able to make representations to HMRC. We do not accept this serious allegation. Not only did Officer Elliott expressly confirm that he, as the author and sender of the Minded To Letter, had not known that the business was not operating from the BBL Premises at that time, but POL has not established that there was evidence before him from which he could have known this – he was not aware of the search warrant which had been exercised at the BBL Premises, could not have seen the witness statement of Officer Hall, and had no other correspondence before him from POL asking that letters only be sent to Mr Pepper's home address. He did have Officer Gilmartin's meeting notes, but these do not record Mr Pepper's request that correspondence be sent to his home – indeed, Officer Elliott stated that he had thought the monthly RDCO returns were being sent to the BBL Premises. We accept Mr Pepper's evidence that this was not the case, as Officer Elliott did not have any basis for his belief, he was simply approaching this from the position of someone who was not aware that there might have been another address that was being used.

SUBMISSIONS

153. Mr Glover's submissions as to the unreasonableness of the Decision Letter and the evidence adduced by HMRC included:

- (1) The Decision Letter was predicated only on allegations of direct filling having taken place at the BBL Premises – the evidence of Officers Hall and Metcalfe strays outside this.
- (2) The inaccurate reference in the Decision Letter to the date of the Warning Letter (whilst appearing a small error) supports his submission that the process was not approached with care.
- (3) Officer Elliott as decision-maker had not scrutinised the underlying evidence supporting the detections which were referred to in the Stated Reasons and he did not approach the matter critically or independently. He did not therefore consider whether the quality of that evidence (where the link to the BBL Premises was less than the specific naming of POL) could suggest that a lesser sanction might be appropriate.
- (4) No account was taken of factors which pointed against revocation, including:
 - (a) Mr Pepper's history of engaging with HMRC when matters were brought to his attention,
 - (b) that POL did not have a fair opportunity to make representations prior to the Revocation Decision,
 - (c) that any neglect or deliberate fraud was that of the employee not POL (or its directing mind), and
 - (d) that Mr Khan had been dismissed by POL.
- (5) The response of Mr Pepper to the receipt of the Warning Letter, namely writing to his employees in the form of a written warning, was appropriate. It would have been folly to dismiss Mr Khan at that time.

(6) With just one warning letter having been sent and the Minded To Letter, Officer Elliott then proceeded straight to revocation without referring the matter for civil penalties to be imposed or seeking to impose conditions on the approval. He drew attention to the guidance in EN 192.

(7) We should not have regard to matters that are irrelevant, including the evidence of contamination of fuel having occurred, or suggestions of “stretching” of fuel by the addition of kerosene

154. Ms Barnes explained that HMRC’s position was that the evidence of Officers Hall and Metcalfe should be taken into account:

(1) The basis of the Revocation Decision was that red diesel from POL’s site at the BBL Premises was being used in road vehicles. The new evidence goes directly to that point, and shows that this was occurring on a far greater scale than had been evident to the decision-maker.

(2) It is relevant to determine the issue raised in the grounds as to whether POL or its directing minds were aware of the fraud, as Officer Hall’s evidence suggests that Mr Pepper knew what was going on. The sheer scale of the activity meant that it was inconceivable that Mr Pepper, as the sole director of POL, could not be aware.

(3) It also goes to the *John Dee* argument that HMRC make, namely that even if the Tribunal is satisfied that the decision of HMRC to revoke approval was flawed, the appeal should not be allowed as it is inevitable that HMRC would make the same decision again knowing what they do now.

155. Ms Barnes submitted that the Tribunal can be satisfied that HMRC’s decision was reasonable:

(1) It was reasonable on the basis of detections known about by the decision-maker at the time of the revocation. She did not accept the majority of criticisms made by Mr Glover about the links between the detections and the BBL premises. She did accept that in respect of two of the eight detections on 21 December 2017 there was no evidence in the bundle to link them to the BBL Premises; and that there was no evidence of the fifth detection on 10 January 2018. She did not however accept that references to “on Bowling Back Lane” or “just off Bowling Back Lane” could be a reference to a filling station that was 800m away from the junction with Bowling Back Lane.

(2) The Revocation Decision is even more reasonable given the sheer number of direct fills now known to have taken place. The numbers recorded in the evidence of Officer Hall are truly startling. The evidence of Office Metcalfe shows that customers were filling up outside of business hours – and HMRC does not accept that where an officer sees the red diesel nozzle in the tank of a road vehicle anything more should be required.

(3) We should be satisfied on the evidence that Mr Pepper, the controlling mind of POL, knew of the misuse of red diesel and this was not just the actions of a miscreant employee. She submitted this was a reasonable inference to draw considering the sheer extent of the activity now known about, from the circumstances in which Mr Pepper was arrested, and from the text messages that HMRC retrieved.

(4) Alternatively, even if the Tribunal does accept Mr Pepper’s account, that only serves to demonstrate the absence of control or safeguards in place to ensure the oil was not put to an illegal use. There was a complete lack of control over the employees, he accepted that he visited rarely, and doesn’t seem to have contemplated the risks of having a pump outside. The employee was acting with total impunity. HMRC do not accept that Mr Pepper’s response to the Warning Letter was adequate – there was just one

employee, Mr Khan, responsible for selling red diesel. Mr Pepper was informed that there was evidence of a vehicle direct filling with red diesel in circumstances where Mr Pepper says he had previously told staff this was illegal. Action should have been taken against Mr Khan, or at the very least change the camera system to ensure it recorded to check for further misuse.

- (5) POL's criticism of the decision is unwarranted. That criticism had related to:
- (a) the decision to proceed straight to revocation without further warnings or imposing conditions – EN 192 does not require a specific process, Officer Elliott was entitled to revoke and his evidence was that the seriousness warranted revocation given that each occasion was a serious breach of the RDCO approval resulting in an evasion of duty;
 - (b) the sending of the Minded To Letter only to the BBL Premises – the correspondence had been addressed to the BBL Premises on previous occasions. HMRC accept that POL was not operating from the BBL Premises at that time; but there is no reason to think that correspondence would not have been collected; and
 - (c) the fact that Officer Elliott didn't scrutinise further the underlying evidence of the detections and relied on what he was told – he is not required to undertake surveillance or testing himself. He is entitled to rely on the notes of colleagues; and this does impose a degree of distance between the decision-maker and those who have day-to-day interactions with the trader.
- (6) Even if the criticisms are made out we should dismiss the appeal because of the inevitability that HMRC would make the same decision again knowing what they do now as to the sheer number of direct fills. Accepting that the Tribunal should use this jurisdiction sparingly, it was submitted that the requisite high hurdle is met.

DISCUSSION

156. The burden of proof is on POL to show that the grounds on which the appeal is brought have been established, ie that the decision to revoke is not one that a decision-maker could reasonably have come to.

157. Having made our own findings on the facts, we need to consider whether, in the light of these findings, the decision by Officer Elliott to revoke the RDCO approval was one which no reasonable officer could have reached.

158. Considering first whether Officer Elliott took into account all relevant considerations, we note that the Stated Reasons for the Revocation Decision refer to:

- (1) stated numbers of detections of vehicles using rebated fuel purchased from the BBL Premises having been made – namely two vehicles on 1 December 2017, eight vehicles on 21 December 2017 and five vehicles on 10 January 2018; and
- (2) such activity having continued even after POL was issued a Warning Letter setting out the consequences of such activities continuing from the BBL Premises. That Warning Letter was incorrectly referred to as having been dated 7 November 2017, the correct date being 10 October 2017.

159. The Revocation Decision was thus based on HMRC's assertion that POL was selling red diesel which was being used in the tanks of road vehicles.

160. On the basis of our findings, we conclude that there were two detections on 1 December 2017, six on 21 December 2017 and four on 10 January 2018. Our findings are explained above and these were certainly relevant considerations for Officer Elliott to have taken into account.

161. One of the six detections on 21 December 2017, namely vehicle GU58 CYL merits further explanation as to why we consider it relevant given that we found that the red diesel had been bought in drums from the BBL Premises (not that it was filled directly).

162. The first paragraph of paragraph 5.2 of EN 192 is marked as having the force of law and states that as an RDCO a supplier must “take every reasonable precaution to make sure that your supplies of controlled oil...are only to persons who will use that oil as permitted by the law”. There is then guidance (not having the force of law) as to what HMRC regards as reasonable precautions, and includes a supplier carrying out appropriate checks on all of its customers and being accountable for all of its supplies to them. RDCOs are told that their checks must be sufficient to satisfy them of a customers’ integrity and that they intend to use the oil supplied to them for a lawful purpose.

163. We are not satisfied that POL fulfilled its obligations in this regard – they did not carry out any due diligence on customers, staff did not generally ask what the fuel was to be used for and, given Mr Pepper’s rare attendance at the BBL Premises, there were few controls on the activities of employees. We consider there were other failings by POL (as set out below), but on this specific point it cannot be said that POL took every reasonable precaution to make sure that supplies of red diesel were made only to persons who would use that oil as permitted by law, ie not in road vehicles. Having failed in this regard, POL should be accountable for the supplies made to customers in accordance with paragraph 5.2. Mr Pepper said that POL cannot control what customers do once they leave the BBL Premises. The facts as we have found them indicate that POL made little attempt to control what customers did on the premises. This is not a situation where, despite all reasonable efforts having been taken to ensure red diesel was not used unlawfully POL has fallen victim to a rogue customer who had deceived it about the intended use. Vehicle GU58 CYL was tested with red diesel in its tank having bought red diesel from the BBL Premises. The Stated Reasons were not confined to instances of direct fills – and in the light of the surrounding facts relating to the absence of reasonable controls, this detection was a relevant circumstance to be taken into account in making the Revocation Decision.

164. Mr Glover criticised the decision-making process in that Officer Elliott had not scrutinised the underlying evidence which supported the detections he cited in the Stated Reasons. That he had not done so was accepted. However, we do not consider that he was required to. We consider it is appropriate (and indeed necessary) that the decision-maker have regard to what he is told by other officers. This lack of scrutiny by Officer Elliott is essentially what has resulted in our finding that three of the detections relied upon by him were flawed. This does not mean that it was not reasonable to base his decision on detections that he was informed of by a fellow officer who was familiar with the trader, particularly given that there is no suggestion of any dishonesty on the part of any of the officers involved.

165. Mr Glover also referred to the reference to the incorrect date of the Warning Letter as an example of lack of care in the decision-making process. We do not accept this. Officer Elliott did confirm that he had reviewed the Warning Letter. The reference to the wrong date was a mistake, and may indicate a lack of care in writing the letter. We do not consider that it is more than this.

166. Giving evidence, Officer Elliott stated that he had reviewed the meeting notes of Officer Gilmartin. From this we infer that he would have been aware of Officer Gilmartin’s observations on Mr Pepper, namely his knowledge of the sector, and the cooperative manner in which Mr Pepper approached those meetings and would have taken this relevant information into account.

167. There were, however, a number of factors which were not, and in some cases could not have been (because the evidence in relation to them was not available to Officer Elliott as it was to us) taken into account by Officer Elliott in reaching his decision. They were:

(1) Officer Hall's evidence that approximately 200 customers were observed directly filling their road vehicles with red diesel and on a further 61 occasions employees of POL were observed directly filling vehicles with red diesel on behalf of customers during the one month period in which intermittent observations were conducted from 26 March to 25 April 2018.

We agree with Ms Barnes that this evidence of direct fills of road vehicles at the BBL Premises is relevant, as it goes to whether the decision made was one which no reasonable officer could have made, and our findings on this evidence are ones which are relevant considerations when assessing whether to revoke the RDCO approval. They should have been taken into account when making that decision. For the avoidance of doubt, this is why the admission of Officer Hall's evidence is accepted.

(2) The evidence from Officer Metcalfe of two direct fills of red diesel from the BBL Premises on 7 April 2018, as set out at [125] to [128].

For the reason given at [167(1)], this evidence should have been taken into account when assessing whether to revoke the RDCO approval, and we accept the admission of Officer Metcalfe's evidence.

(3) The evidence from Officer Ferguson of a direct fill of a road vehicle with red diesel from the BBL Premises on 25 April 2018, as set out at [129] to [131].

For the reason given at [167(1)], this evidence should have been taken into account when considering whether to revoke the RDCO approval.

(4) The evidence from Officers Winter and Kewley of three direct fills of road vehicles with red diesel from the BBL Premises on 14 May 2018 as set out at [134] to [138].

For the reason given at [167(1)], this evidence should have been taken into account when considering whether to revoke the RDCO approval.

(5) Mr Pepper's lack of involvement with POL's business of selling controlled oils, which in practice meant that the only directing mind of the controlled person exercised little real practical control over its activities. Mr Pepper rarely visited the premises, a fact of which Officer Gilmartin was unaware, he did not ensure that he had the ability to monitor the activities remotely (by installing recording CCTV cameras throughout), and he was not familiar with how to control the use of a key risk namely the outside pump. He failed to have proper regard to the warning signs that there was a problem with unlawful use of red diesel, in circumstances where only one person, Mr Khan, could have been responsible for this. Not only had the Warning Letter informed him of an unlawful sale of red diesel, but the text messages from November/December 2017 show that around the time of the contamination incident mention was made of red diesel in circumstances which should have put him on alert that there was a problem to be addressed. Further, the fact of search warrants being exercised in May 2018 and his own arrest should have alerted Mr Pepper to the fact that something was seriously wrong. The only change in behaviour which we noted at any time was his decision to monitor the tank levels more frequently. Important as this was, it does not address the risk of red diesel being sold for unlawful use.

We have carefully considered Ms Barnes' submission that Mr Pepper knew of the unlawful activities. Mr Pepper has denied this, and his very absence from the BBL Premises means that the only direct links are the references to red diesel in text messages, and the circumstances of his arrest. We are not satisfied that this supports actual knowledge. We do, however, consider that not only should he have known, but that Mr Pepper showed an almost complete disregard for what was going on at the BBL Premises and took little action to ensure he had control over the actions of POL's employees at the premises.

(6) We have also found that the BBL Premises were known locally as the place to buy red diesel – this can be seen from:

- (a) Mr Thomas telling Officer Kewley on 1 October 2017 that people lined up at night to fill their vehicles;
- (b) the quantity of detections that were observed during the one month surveillance operation; and
- (c) Mr Ahmed informed Officer Kewley on 14 May 2018 that "...he had [filled with red diesel] previously... He stated Javid Khan said that if he went between 8-9am he could use the pump, normally it is put in drums. He claimed people go to the garage on a night and line up when it's closed, and that Javid Khan didn't own the garage, there was another guy."

We consider this is a relevant consideration as it goes to the lack of checks made on customers by POL.

(7) Actions as regards Mr Khan – We have found that Mr Pepper did give a written warning to Mr Khan after receipt of the Warning Letter. He has since been dismissed by POL.

These are relevant considerations, although that is not to say that failure to take these into account means that a different decision would otherwise have been made. We accept Ms Barnes' submission that, given that Mr Pepper's evidence was that any wrongdoing was that of Mr Khan and that Mr Khan had been told regularly and was well aware that it was unlawful to fill a road vehicle with red diesel, and Mr Pepper had been told by the Warning Letter that there had been unlawful use of red diesel, it is not sufficient to give a written warning. It should still be one of the factors taken into account.

168. The factors set out at [167] are all relevant considerations which should have been taken into account but were not. We have also considered whether Officer Elliott left out of account all irrelevant considerations.

169. Having examined the evidence and made our findings, we are not satisfied that, of those detections set out in the Stated Reasons, two of those on 1 December 2017 (MX58 ETY and NJ59 NOH) and one of those on 10 January 2018 (namely that which is missing from the bundle) should have been treated as detections of POL selling red diesel for use in road vehicles. Taking these into account was therefore an irrelevant consideration.

170. Having carefully considered the approach taken by Officer Elliott to making the Revocation Decision, we have concluded that there were no further irrelevant considerations which he took into account when making that decision.

171. We have also considered whether, in all the circumstances, the decision to revoke can be regarded as a proportionate response to the breaches of RDCO approval.

172. HMRC issued a Warning Letter on 10 October 2017, then proceeded straight to the issue of a Minded To Letter on 2 July 2017 followed by the Decision Letter. Officer Elliott had been aware that no civil penalties had been issued, and he did not seek to impose conditions on the approval rather than revoking the approval. Mr Glover is correct to note that there was thus no slow, gradual escalation of steps in this instance. However, Officer Elliott's position at [149(5)] was that the seriousness of the acts found merited immediate revocation, noting that the detections related to three separate occasions after the Warning Letter had been issued. He added that any seizure (of a vehicle with red diesel in the tank purchased from the BBL Premises) would have led him to consider revocation.

173. Section 8 of EN 192, which sets out the action that will be taken if an approved RDCO fails to meet any of his obligations, is guidance and does not have the force of law. Paragraph 8.5 clearly indicates that HMRC may withdraw approval. It does not suggest that having issued civil penalties or imposed conditions is a pre-condition to this, and states that a decision to revoke "will not be taken lightly". This sanction (as with other sanctions) is subject to a right to a review and the right to appeal.

174. POL did not submit any representations in response to the Minded To Letter. Mr Pepper's explanation was that this letter had been sent to the BBL Premises which was no longer operating (as a result of the unlawful exercise of the search warrant by HMRC), and, by implication, he was not checking whether or not any post was being sent to that address. He stated that he did not know of the Revocation Decision until he received the copy of the decision letter sent to his home address in August 2018, which implies that he had not by that time checked the post at the BBL Premises (but, perhaps, been too late to submit representations in time).

175. As stated above, we do not accept that the Minded To Letter had been deliberately sent to the BBL Premises with the intention that Mr Pepper would not respond. We accept Officer Elliott's evidence that the BBL Premises were the address for POL recorded on HMRC's system. It was therefore appropriate for the Minded To Letter to be sent to that address. Furthermore, Mr Pepper still had access to that address even though it was not operational, and we would expect that he would regularly check the security of the premises and whether any post had arrived which needed to be dealt with. The fact that this did not happen meant that POL did not submit any representations to HMRC in response to the detections cited. Officer Elliott stated that he would have taken into account any such representations – indeed, this was stated in the Minded To Letter itself. This does not, however, mean that where serious allegations are made (such as here) those representations would be able to change the outcome.

176. We have concluded that the Revocation Decision was proportionate in the circumstances.

177. We have concluded that the decision was unreasonable on the basis of the facts as we have found them. On our findings of fact there were relevant matters which should have been taken into account and were not, and matters which were taken into account which should not have been. We do, however, find that the Revocation Decision was a proportionate response, both on the basis of the facts as Officer Elliott was aware of them, and in the light of the facts as we have now found them. This finding on proportionality cannot "cure" the unreasonableness of the decision given the above matters.

178. Where a decision is found to be unreasonable, this Tribunal can still dismiss the appeal if it is shown that, had the additional material been taken into account and irrelevant factors left out of account, the decision would inevitably have been the same.

179. We note that since the exposition of this principle in *John Dee*, subsequent tribunals have been at pains to emphasise that if there is any doubt on the point, the matter should be determined in favour of directing a further review.

180. The relevant information which was not taken into account by Officer Elliott (for the simple reason that he was not aware of it) is set out at [167]. Not only does this show that the problem of red diesel bought from the BBL Premises being used in road vehicles was far more extensive than Officer Elliott had realised, but there were little controls over sales at the BBL Premises and the site was known locally as the place to go (by inference, for cheap fuel). By contrast, the irrelevant considerations (wrongly) taken into account comprised three detections out of what Officer Elliott had thought were 15 detections in the Stated Reasons

181. We do not see any merit in seeking to over-analyse what might be meant by the word inevitable in this context. It is clear that we are not looking at “more likely than not” or even “probably”. It requires us to be certain that no different decision could be taken. We accept this is a very high hurdle. However, we have no doubt that on the facts as we have found them this very high hurdle has clearly been satisfied. Accordingly, we dismiss POL’s appeal.

CONCLUSION

182. The Revocation Decision made by HMRC was unreasonable as there were relevant matters which should have been taken into account and were not, and irrelevant matters that were taken into account. However, on the basis of the facts as we have found them, if the additional material had been taken into account (and the irrelevant factors not taken into account) the decision would inevitably have been the same. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

183. 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.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

RELEASE DATE: 21 OCTOBER 2019