TC08022

EXCISE – red diesel – whether penalty decision or restoration decision – whether decision valid – on assumption that a restoration decision, set aside as unreasonable – HMRC directed to make a new decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05060

BETWEEN

DAVID BROWN **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal decided the appeal on 27 January 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Both parties consented to the appeal being determined in this way and the Tribunal considered that it was in the interests of justice to do so.

The Tribunal decided the appeal having first read the Notice of Appeal dated 28 July 2019 (with enclosures), HMRC's Statement of Case dated 14 October 2019 and a bundle of documents prepared by HMRC which included Mr Brown's correspondence with HMRC and the other evidence summarised in this decision notice.

DECISION

Key points for Mr Brown

1. Mr Brown, on 26 April 2019 you were stopped by HMRC and rebated fuel ("red diesel") was found in the fuel tank of your van.

2. You had bought the van recently and had filled it up at Asda that morning. You accepted there was red diesel in your tank, but said you did not put it there and did not know about it. HMRC charged you £544.80 and you appealed to the Tribunal.

3. I have now made the decision in your appeal. It is long and complicated, and I have set out the key points for you here.

4. The first point is that, in this type of appeal, the Tribunal does not have the power to order HMRC to repay money to you. But if the Tribunal decides HMRC's decision was unreasonable, it can order HMRC to look at all the information again and make a new decision.

5. In your case, I have looked at all the documents and found that HMRC's decision was unreasonable. I have told HMRC to make a new decision.

6. There are now the following possibilities:

   (1) HMRC repay you £11.20. This is the excise duty and VAT they charged for the diesel in your tank which you had just bought from Asda. Duty and VAT had already been paid on that diesel.

   (2) HMRC repay you £267.20. This is the above £11.20, plus £250 because HMRC now accept you did not put red diesel in your tank.

   (3) HMRC repay you £511.30. This is the above £267.20, plus the £250 charged for driving with red diesel in your tank. HMRC may decide, when they look at the decision again, that you had a reasonable excuse for having the red diesel in your vehicle because you bought it a short time before and did not know the red diesel was there.

   (4) HMRC may repay all the £544.80, because there were other things wrong with their original decision.

   (5) HMRC may repay nothing, and decide they were correct to charge you the whole £544.80.

7. When HMRC have made a new decision, they will send it to you. If you are not happy with that new decision, you can appeal to the Tribunal again. You must appeal within 30 days of the date on the new decision, unless you have a good reason for being late. To your notice of appeal you must also attach a copy of HMRC's new decision and a copy of this Tribunal decision.

The evidence

8. HMRC provided the Tribunal with a bundle of documents which included:

   (1) correspondence between Mr Brown and HMRC and between Mr Brown and the Tribunal;

(2) the notebooks of Officer Brown and Officer Prescott, the HMRC Officers who stopped Mr Brown; and

(3) documents headed "Restoration Agreement", "Seizure Information Notice" and "Voluntary Attendance Record", all dated 26 April 2019.

9. In addition, Officer Gordon, the HMRC Officer who carried out the review of Officer Brown's decision, provided a witness statement dated 8 January 2020. For the most part, this witness statement is a recapitulation of her review decision, but it differs in two significant respects. For the reasons explained at §41-§42 and §57-§60, I found those parts of her witness statement to be unreliable.

The facts

10. I make the following findings of fact on the basis of the evidence provided. I make further findings of fact later in this decision notice.

Red diesel

11. Diesel fuel supplied for use in road vehicles ("white diesel") is subject to excise duty at much higher rates than that supplied for tractors and other agricultural vehicles, or for certain other specified uses, on which the duty has been reduced ("rebated").

12. In order to allow HMRC to detect the use of this rebated fuel, a red chemical marker is added (hence the name, "red diesel"). Other markers may also be added. The presence of these markers can be detected by chemical analysis. If any amount of red diesel is present, the markers spread through all the fuel in the tank, which then tests positive for red diesel.

Mr Brown's purchase of the vehicle and journeys made

13. Mr Brown lives in Great Blakenham, a village near Ipswich. On 20 February 2019, he bought a Ford Transit van on eBay from a vehicle rental business in the West Country. The registration number began BK02, and it was thus first registered in 2002. It was delivered to Mr Brown on a low-loader because it had no MoT; it was also subject to a statutory off road notification ("SORN"). The van was Mr Brown's only vehicle.

14. Mr Brown needed to get the van through its MoT before he could drive it. After the MoT, but before the events with which this decision is concerned, he made two return journeys, so four in total. Officer Brown's notebook records these as having been "from Bury to Ipswich". However, the van was Mr Brown's only vehicle, and it is reasonable to infer that he kept it at or near his home in Great Blakenham. On the balance of probabilities I find that he did not start and finished those journeys in Bury, but that they instead began and ended at his home.

The fuel in the tank

15. On 26 April 2019 Mr Brown stopped at Asda in Ipswich and put 15.43 litres of diesel costing £20.01 into the vehicle. He produced a receipt for that purchase when he was stopped by Officers Brown and Prescott. Mr Brown's letter to HMRC asking for a review of the decision stated that the van wouldn't take any more: in other words, that £20.01 of fuel was sufficient to fill the vehicle's fuel tank. HMRC accepted this was the position.

16. There are two sources of evidence relating to the amount of fuel in the tank when Mr Brown purchased the vehicle. One was Mr Brown's letter dated 5 June 2019 asking for a review of HMRC's decision. This first states that when Mr Brown bought the van it "had

over half a tank of fuel", and then says (his emphasis) "…as I said above, the vehicle was nearly full when picked up on the low loader".

17. When Mr Brown said that the vehicle's tank was "nearly full" he therefore referred back to his earlier statement that it had "over half a tank of fuel", without indicating that there was any contradiction between those two statements, and he underlined the words "nearly full". He clearly meant the reader of his letter to understand that the two statements were providing the same information, namely that the vehicle's tank was nearly full when he purchased it. Of course, a vehicle which is "nearly full" also has "over half a tank of fuel", so the two sentences can be reconciled.

18. The other source of evidence was Officer Brown's notebook. This reads:

> Officer Brown: How many times fuelled?
>
> Mr Brown: Once this morning, over half when started driving…
>
> Officer Brown: Aware of anyone else fuelling the vehicle?
>
> Mr Brown: No-one else refuelled.
>
> Officer Brown: Who is the previous owner?
>
> Mr Brown: Cornwall Rentals…bought on eBay, could be Cornish Rentals
>
> Mr Brown: Half a tank of fuel when purchased.
>
> Mr Brown: Fuelled in Asda in Ipswich this morning.
>
> Mr Brown: No dealings with HMRC before."

19. It is clear from the above, that, when asked whether he had fuelled the vehicle, Mr Brown said (my emphasis) "once this morning, over half when started driving". Although Officer Brown later records Mr Brown as saying that there was "half a tank of fuel when purchased", his notebook does not set out any question to which this was a response. I find that this isolated sentence to be less reliable than the other statements in the letter and in the notebook.

20. The only person who knows how much fuel was in the vehicle was Mr Brown. In reliance on his evidence in the letter requesting a review, and his initial statement to Officer Brown, I find that the fuel tank was almost full when he bought the vehicle.

HMRC stop Mr Brown

21. After fuelling the vehicle at Asda, Mr Brown drove to Stansted airport, where HMRC's Ipswich Mobile Enforcement Team had set up a check. Mr Brown was stopped by Officers Brown and Prescott. The fuel in the van was tested and found to contain red diesel.

22. Mr Brown was shown the results of the tests and agreed to stay for a voluntary interview. He accepted that the tests showed that the tank contained red diesel. However, he adamantly denied having put red diesel into the tank. Officer Brown's notebook then records that:

> "Officer Prescott explained to Mr Brown that under HODA 79 s 13(1)(a) and (b) 2 offences using and fuelling. This equals £500 (penalties). Plus 80L capacity tank, total £44.80. Total is £544.80."

23. Officer Brown drew up a Seizure Information Notice which stated that the vehicle had been seized under the Customs and Excise Management Act 1979 ("CEMA"), s 139; he also drew up a "Restoration Agreement, disclaimer and warning letter" ("Restoration Agreement"). Under the heading "Analysis of Restoration Amount", the Restoration Agreement read as follows (italics in original):

> "An amount *equal to* the penalties under section 13(1)(a) and (b) of the Hydrocarbon Oil Duties Act 1979
>
> | | |
> |---|---|
> | • Using rebated heavy oil as a road fuel | £250.00 |
> | • Putting rebated fuel into a road vehicle | £250.00 |
> | An amount *equivalent to* Duty and VAT due on rebated fuel used as a road fuel based on the capacity of the vehicle's running tank | £44.80 |
> | Total restoration amount | £544.80 |

24. Mr Brown paid the £544.80 by debit card and returned home with the vehicle. On 5 June 2019 he wrote to HMRC requesting a review of the decision. His letter is handwritten on lined paper. He sets out the background as to his purchase of the van and the fuel, as already discussed above, and then says (text as in original):

> "And I didn't know it was there till the people done the test in front of me. I am appealing for my £250 which I shouldn't have to pay…I know I did use it on the road but didn't know what fuel was in it… I only own it for 2 months as I said above the vehicle was nearly full when picked up on the low loader and was sorned [statutory off road notification] so I don't think that is unresonable in any way."

25. On 3 July 2019, Officer Gordon provided her review decision, upholding Officer Brown's decision. On 28 July 2019, Mr Brown appealed to the Tribunal, saying (again, text as in original):

> "I am writing to you to see if you can look at this for me. I don't think their decision is right about me putting red diesel into a van. As you can see by the letter [of appeal to HMRC] which I enclose, I bought this van of ebay. It was brought to me on a trailer with no Mot."

26. The hearing of Mr Brown's appeal was delayed by the pandemic, and the parties subsequently both agreed that it should be decided on the papers.

The legislation about rebated diesel and about restoration

27. The legislation about rebated diesel is summarised as follows:,

(1) The Hydrocarbon Oil Duties Act 1979 ("HODA") sets out a regime for the taxation of hydrocarbon oils and prescribes a rate of duty. HODA, s 11 provides for a rebate on that duty where heavy oil is delivered "for home use".

(2) The term "home use" does not include the use of the rebated fuel in road vehicles, and using red diesel for those purposes is prohibited by HODA s 12(2).

(3) The Hydrocarbon Oil (Marking) Regulations 2002 require diesel oil delivered for home use to be dyed red and to contain specified chemical markers which can be detected by chemical analysis.

(4) HODA s 24 provides that the presence of a prescribed marker in heavy oil is conclusive evidence that a rebate on the fuel has been allowed.

(5) HODA s 13(1) provides that a person is liable to a penalty if he (a) "uses heavy oil in contravention of s 12(2)", and/or (b) " is liable for heavy oil being taken into a road vehicle in contravention of that subsection".

(6) HODA s 13(1A) states that where red diesel is used in contravention of the legal provisions, HMRC may "assess an amount equal to the rebate on like oil [sic] at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle".

(7) FA 1994, s 9 provides that a person who breaches certain statutory requirements, including HODA s 12(2), is liable for a penalty of £250 for each offence.

(8) FA 1994, s 10 provides that no penalty shall be charged under the previous section if the person had a reasonable excuse for the penalty.

28. There are also separate provisions about forfeiture, seizure and restoration:

(1) HODA s 13(6) provides that any fuel taken into a road vehicle in contravention of section 12(2) is liable to forfeiture.

(2) CEMA s 139 provides that any thing liable to forfeiture may be seized by an officer of HMRC, and CEMA s 141 provides that where anything has become liable to forfeiture, any vehicle used for the carriage of that thing is also liable to forfeiture.

(3) CEMA s 152 gives HMRC the power to "restore, subject to such conditions (if any) as they think proper, anything forfeited or seized".

The fee levied on Mr Brown

29. It is clear from the above that HMRC have the power to issue a person with penalties for using red diesel and for being "liable for heavy oil being taken into a road vehicle"; in other words, for being responsible for putting red diesel in a vehicle, that each of those penalties is £250, subject to a reasonable excuse defence (HODA s 13(3)(a) and (b); FA 1994, s 9 and 10). In addition, HMRC can also charge the excise duty which would have been paid had white diesel been used (HODA s 13(1A)).

30. As set out at §22, Officer Prescott told Mr Brown that he was being charged two penalties under HODA s 13(1)(a) and (b), plus the excise duty under HODA s 13(1A). However, the documentation is different: the Seizure Notice says the vehicle had been seized under CEMA s 139, and the Restoration Agreement that Mr Brown was to pay "an amount *equal to* the penalties under section 13(1)(a) and (b) of the Hydrocarbon Oil Duties Act" being two amounts of £250, and an "an amount *equivalent to* Duty and VAT due on rebated fuel used as a road fuel" being £544.80.

31. The legal position, and in particular the appeal rights, are different depending on whether HMRC has made a decision to charge penalties, or a decision to restore a forfeited vehicle for a fee. The difference between what Mr Brown was told, and the paperwork, raises an issue as to the validity of the decision against which Mr Brown appealed. I return to this again at §37. The rest of this decision notice has been written on the bases that the decision was valid, and that it was a restoration decision. However, that may not be the position.

Restoration decisions

32. In restoration decisions, the issue the Tribunal has to decide is whether HMRC's restoration decision was "unreasonable". In C*&E Commrs v Corbitt* [1980] 2 WLR 753, Lord Lane said that a decision would not be "reasonable":

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

33. In *Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide the facts and then go on to decide whether, in the light of those findings, the restoration decision made by the Officer was reasonable.

34. If the Tribunal finds that HMRC's decision was unreasonable, it has the power to ask HMRC to make a new decision. That decision might be the same as the original decision, or it might be different.

Officer Gordon's review decision and discussion thereof

35. Mr Brown appealed because he did not accept he should pay £250 for having put red diesel in the vehicle. However, Officer Gordon said, entirely correctly, that she was not confining her review to that issue: she said:

> "whilst you have disputed this element of the restoration fee, I have considered the overall fee in this review."

36. I have set out below the various parts of her review decision, followed by a discussion as to its basis.

Failure to consider whether the decision was invalid

37. As set out earlier in this decision notice

(1) Mr Brown was told by Officer Prescott that he was being charged two penalties plus an amount of excise duty (and this was recorded in Officer Brown's notebook);

(2) Officer Brown then required Mr Brown to sign a document stating that his vehicle had been seized and restored for a fee equal to those amounts; and

(3) the legal position, and in particular the appeal rights, are different depending on whether the decision which has been made is the charging of penalties, or a restoration decision.

38. The reasonable decision maker would have considered whether the discrepancy between what Mr Brown was told, and the paperwork, meant that no valid decision had been made. Officer Gordon failed to consider this issue.

The findings of fact

39. Officer Gordon began her review decision by setting out the issue in dispute and the law. The next heading is "Facts", under which she lists a number of detailed points. However, none of those specific "facts" have as their source Mr Brown's request for a review, in which it was stated that the fuel tank was "almost full" and that he had "over half a tank of fuel". Neither did Officer Gordon record Mr Brown's statement to Officer Brown that the tank was "over half" full. Her finding of fact was instead that "the vehicle…contained half a tank of fuel".

40. She therefore relied only on the second reference in Officer Brown's notebook to the amount of fuel in the tank, words which were written down without any matching question and which were contradicted both by Mr Brown's earlier evidence in his interview, and by his letter asking for a review. She acted unreasonably by not taking into account, when making her decision, this other evidence about the amount of fuel in the tank. As explained further below, she then relied on her finding of fact that the tank was half full when purchased, to carry out the calculations on which she relied in making her decision.

41. However, Officer Gordon's witness statement, in striking contrast to the review decision, included these sentences (my emphases):

> "I concluded…that it contained (<u>at least</u>) 40 litres of fuel when he bought it…After travelling 108 miles, if the running tank was <u>at least</u> half full, I calculated that the amount in the running tan would have reduced from (<u>at least)</u> 40 litres to approximately 21 litres…taking into consideration that the running tank would have contained <u>at least</u> 21 litres of diesel…"

42. These references to the fuel tank being "at least" half full are not in her review decision which is instead based explicitly on the tank being <u>only</u> half full. In other words, that "fact" is a key building block of her reasoning (which is set out below). It is simply not possible that Officer Gordon could have carried out the same calculation if, as she asserts in her witness statement, she had accepted that the vehicle was "at least" half full. On this important issue, I find Officer Gordon's witness statement to be unreliable.

Officer Gordon's reasoning

43. Officer Gordon set out the following "facts" in her review decisin:

(1) the van's average miles per gallon was 26, which equates to 5.72 miles per litre;

(2) the tank holds 80 litres of fuel;

(3) it was half full when purchased and so contained 40 litres of fuel;

(4) Mr Brown made two return journeys from Bury St Edmunds to Ipswich;

(5) the distance from Bury St Edmunds to Ipswich was 27 miles, and so two return journeys were 108 miles;

(6) Mr Brown therefore used 19 litres of fuel before 26 April 2019 (108/5.72); and

(7) when he filled up the tank on 26 April 2019, he purchased 15.43 litres of fuel and the tank was then full.

44. Officer Gordon then said that, as the tank was half full on purchase, there was room for 40 more litres. Mr Brown used a further 19 litres, bringing the level down to 21 litres. Yet the tank was full after the addition of the 15.43 litres on 26 April 2019. There were thus 43.57 litres unaccounted for. She therefore concluded that it was "implausible that [Mr Brown] did not refuel the vehicle before 26 April 2019".

45. There are two problems with this analysis. Firstly, it depends on Officer Gordon's flawed finding of fact that the tank was half full when purchased. I have found as a fact, on the basis of the evidence, that it was almost full. Secondly, she did not consider the inherent improbability of Officer Brown's evidence that Mr Brown had made two return journeys "from Bury to Ipswich", given that he had only that one vehicle, and lived at Great

Blakenham, a village near Ipswich. I have already found as a fact that Mr Brown started and finished his journeys in in Great Blakenham.

46. Taking into account all the above, I find that Officer Gordon's calculation, which formed the lynchpin of her decision, was unreasonable, because:

(1) it significantly relied on her earlier incorrect finding of fact that the fuel tank was only half full, and that was an unreasonable finding given the evidence; and

(2) she failed to consider whether Officer Brown's evidence as to the journeys made by Mr Brown was correct, given the undisputed facts as to his address and the fact that it was his only vehicle.

Failure to consider the fuelling of the vehicle at Asda:

47. Even if Officer Gordon's calculation *had* been correct, it would only have shown that Mr Brown fuelled the vehicle. It would not have shown that he fuelled it *with red diesel.*

48. The only documented evidence of Mr Brown fuelling the vehicle is his use of the pump at Asda on his way to the airport; he had the receipt for that purchase in his vehicle. In other words, Mr Brown sourced that fuel from a commercial seller of white diesel. That behaviour is entirely consistent with his case that he had not put red diesel in the vehicle. On the other hand, there is no evidence that Mr Brown filled the vehicle with red diesel – if there is red diesel in the tank (as there obviously was), the red colour shows up on testing despite any subsequent additions of white diesel.

49. The reasonable inference from the fact that Mr Brown filled up at Asda on 26 April is that he was not using a source of red diesel to fuel the vehicle.

50. Officer Gordon unreasonably failed to give proper weight to the clear and undisputed evidence about Mr Brown refuelling at Asda, and she failed to make the reasonable inference which followed therefrom.

Knowledge of the red diesel

51. Mr Brown's evidence was that he did not know there was red diesel in the tank. His letter asking for a review of the decision said that "I didn't know it was there till the people done the test in front of me". There is no evidence which contradicts this statement, and it is also consistent with Mr Brown having recently purchased the vehicle, driven it very little, and filled it up on only one occasion. I find as a fact that, until the test was carried out, Mr Brown did not know there was red diesel in the tank.

52. Officer Gordon has not referred to Mr Brown's evidence that he did not know there was red diesel in the tank, either in the "facts" part of her decision or in her consideration as to whether Officer Brown's decision should be upheld, and in failing to consider this evidence she acted unreasonably.

Proportionate to the value of the vehicle?

53. Officer Gordon's review decision says:

> "I have checked the accuracy of the calculations and consider them to be technically and arithmetically correct, and proportionate to the value of the vehicle".

54. The only evidence before Officer Gordon as to the value of the vehicle was its type, its age (derived from the registration number) and the fact that it had previously been owned by a vehicle rental business.

55. As the vehicle was manufactured in 2002, it was already 17 years old when it was stopped by Officers Brown and Patterson. Its previous owner had rented it out, and it is reasonable to infer that it was heavily used by numerous different drivers, and I so find.

56. The review decision does not explain why Officer Gordon considered that a fee of £544.80 was proportionate to the value of the vehicle. I find that she acted unreasonably in deciding, without explanation or justification, and in the face of the evidence which she did have as to its age, type and previous usage, that a charge of £544.80 was "proportionate to the value of the vehicle".

57. In coming to that conclusion, I have not overlooked her witness statement which includes this passage:

> "I checked the current market value on an online market site, the typical value of similar vehicles ranged from £900 to £3,695 from a trade seller. Without having proof of purchase for the vehicle I was unable to ascertain a more accurate value. However, using the above figures, I am satisfied that the fee did not exceed the lower end of the market value of the vehicle."

58. Officer Gordon's review decision does not include any mention of these steps, and no supporting evidence has been exhibited to her witness statement, such as a dated computer print-out showing that she checked a range of prices for "similar vehicles" and when she carried out that exercise.

59. I considered the way in which her review decision had been written. It begins with a meticulous calculation identifying the factors on which she had relied and how she came to her conclusions. In contrast, the only reference to proportionality is the brief and bald statement that "I have checked the accuracy of the calculation and consider them to be technically and arithmetically correct, and proportionate to the value of the vehicle". Had Officer Gordon in fact carried out, at the time of the review decision, the detailed analysis referred to in her witness statement, I find that she would have:

(1) referred to that process, the evidence and her conclusions in that decision; and

(2) sought to justify charging Mr Brown almost 100% of the "lower end of the vehicle's value" in exchange for the restoration of the vehicle.

60. On the balance of probabilities I find that Officer Gordon did not carry out this exercise as part of her review, and it therefore played no part in the decision which is under appeal. It follows that her witness statement is also unreliable in this further respect.

Failure to provide information

61. Officer Gordon's review decision also includes this paragraph:

> "In your request for a review you told Officer Brown that you bought the vehicle from eBay but you provided no evidence to support the condition or terms of the sale of the vehicle. I would expect you to be able to provide some evidence to support that you carried out some checks when you bought the vehicle; the eBay site contains safety tips and helpful advice when buying a vehicle. However, you have provided nothing to support your contentions."

62. Officer Gordon has therefore taken into account Mr Brown's failure to provide evidence that he carried out the checks recommended on eBay's site when he bought the vehicle.

63. Mr Brown's contention was that he did not know there was red diesel in the tank when he purchased his van. Officer Gordon has not said that eBay advises purchasers to ask vendors whether the vehicle has been fuelled with red diesel, and HMRC have not included any pages from eBay's site in their Bundle. Given the very restricted legal use of that fuel, it would be surprising if it were to form part of their advice.

64. I find that eBay's advice to purchasers was an irrelevant consideration, and not one which Officer Gordon should have taken into account.

Reasonable excuse

65. Officer Gordon's letter also says:

> "I have also considered whether you have a reasonable excuse for your breach of the legislation. A reasonable excuse would be something which stopped you meeting a tax obligation on time. Lack of information or ignorance of basic law would not normally be accepted as a reasonable excuse. Having considered the circumstances of your case I have not found that [sic] any evidence that constitutes a reasonable excuse."

66. She ended that part of her review decision with the words (my emphasis) "I <u>therefore</u> uphold Officer Brown's decision to offer restoration of your vehicle for a fee of £544.80".

67. Officer Gordon thus took into account, when making her decision, whether Mr Brown had a reasonable excuse and the nature of such an excuse.

68. As set out at §27(8), a "reasonable excuse" defence may apply to a person charged with a penalty under FA 1994, s 9. According to the Restoration Agreement; Officer Gordon's review letter, and HMRC's Statement of Case, Mr Brown was not charged with a penalty; instead, the fee for restoring the vehicle included two amounts "equal to" the penalties which could have been charged.

69. Officer Gordon has not explained why the existence or otherwise of a reasonable excuse was a relevant factor in this restoration decision, but I have assumed that her thought process went along these lines:

(1) a person whose conduct brings him within FA 1994, s 9 is not liable for a penalty if he has a reasonable excuse for that conduct;

(2) the Restoration Agreement stated that the fee charged to Mr Brown was calculated as an amount equal to the penalties;

(3) if Mr Brown would not in fact have been liable to the penalties because he had a reasonable excuse, HMRC should not have charged him an amount equal to the penalties for the vehicle to be restored to him.

70. I therefore accept that a reasonable decision maker would have considered whether Mr Brown would have had a reasonable excuse, had penalties been charged. However, there are flaws in Officer Gordon's understanding of what is meant by a "reasonable excuse", and with her application of that defence to Mr Brown's case.

71. Officer Gordon defined a reasonable excuse as "something which stopped you meeting a tax obligation on time". It is true that a person who had a reasonable excuse for not meeting a tax obligation within a time limit would not be liable to a penalty, but the reverse is not true: reasonable excuses do not only relate to failures to meet tax obligations on time.

72. In *Perrin v HMRC* [2018] UKUT 0156 (TCC) ("*Perrin*") the Upper Tribunal ("UT") explained what is meant by the term "reasonable excuse". At [81] the UT said that having established the proven facts, it is then necessary to:

> "decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

73. Officer Gordon did not follow that approach. Instead, she stated that "lack of information" would not normally be considered a reasonable excuse, and that the same was true of "ignorance of basic law".

74. In relation to the first, she is wrong: lack of information can provide a person with a reasonable excuse. In relation to the second, Mr Brown never sought to argue that he was ignorant of the law about red diesel. His case rested entirely on *not knowing* there was red diesel in his vehicle. Officer Gordon has therefore misunderstood and misapplied the "reasonable excuse" defence, and the decision must be set aside for that further reason.

The charge for using red diesel

75. Officer Gordon said she had "checked the accuracy of the calculation and consider[ed] them to be technically and arithmetically correct". The £44.80 charged to Mr Brown was based on the 80 litre size of the van's fuel tank. However, HMRC knew that Mr Brown had added 15.43 litres of fuel from the garage at Asda; this was duty paid. It was clearly unreasonable to charge him on the basis that the entire tank contained red diesel.

Decision

76. I set aside Officer Gordon's review decision because she:

(1) failed to consider whether informing Mr Brown orally that he was being charged penalties, but then issuing him with restoration paperwork, invalidated the decision;

(2) failed to take into account (a) Mr Brown's evidence in his letter asking for a review letter and (b) part of the evidence in Officer Brown's notebook, as to the amount of fuel in the tank when the vehicle was purchased;

(3) carried out a calculation which was flawed for the reasons set out in the main body of this decision notice;

(4) used that flawed calculation to justify charging Mr Brown a penalty for fuelling the vehicle with red diesel, when (even had the calculation had been correct) it could only have shown that he fuelled the vehicle, not that he had fuelled it with red diesel;

(5) failed to take into account the fact that Mr Brown had fuelled the vehicle with white diesel and could prove this with a receipt;

(6) failed to take into account the evidence that Mr Brown did not know there was red diesel in the vehicle;

(7) provided no basis for her conclusion that a fee of £544.80 was proportionate to the value of the vehicle;

(8) took into account Mr Brown's failure to show he had followed guidance from eBay, when that guidance was irrelevant to the matters she had to consider;

(9) misunderstood and misapplied the reasonable excuse defence; and

(10) confirmed Officer Brown's incorrect calculation as to the excise duty due on the fuel in the tank.

Directions

77. HMRC are directed to make a new decision, taking into account in particular:

(1) the following facts:

(a) Mr Brown did not fuel the vehicle with red diesel;

(b) the red diesel was in the vehicle when he purchased it;

(c) the fuel tank was almost full when Mr Brown purchased the vehicle;

(d) Mr Brown did not know there was red diesel in the tank;

(e) in the period before 26 April 2019 when he was stopped by HMRC, he carried out two return journeys from his home in Great Blakenham to Ipswich;

(f) on the morning of 26 April 2019 he filled up the vehicle at Asda with 15.43 litres of fuel worth £20.01;

(g) the vehicle was manufactured in 2002, and before being purchased by Mr Brown had been rented out to multiple users; and

(2) the following other matters:

(a) whether the decision made by Officer Brown was invalid for the reasons set out at §29-§31;

(b) in the light of the UT's guidance in *Perrin*, whether Mr Brown would have had a reasonable excuse given that he did not know there was red diesel in the vehicle;

(c) the proportionality of the fee charged, taking into account all relevant matters including the likely value of the vehicle given its age and usage history; and

(d) the failure to take the fuel purchased at Asda into account when calculating the £44.80 which formed part of the fee charged to Mr Brown.

78. HMRC are directed not to take into account either of the following:

(1) the eBay advice to purchasers of vehicles; or

(2) whether ignorance of the law is normally not a reasonable excuse;

Appeal rights

79. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 08 FEBRUARY 2021