



[2021] UKFTT 0274 (TC)

TC08219

EXCISE DUTY—Appeal against assessment (FA 1994 ss 12(1) and (2)(a))—Appellant purchasing duty-free LPG and maintaining no records of how it disposed thereof—HMRC concluding that the LPG was sold for use as fuel in a road vehicle—Standard of appellate review—Whether Appellant has discharged the burden of proving on a balance of probability that the LPG was not used in a way that made it liable to excise duty

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02584

BETWEEN

PRESSURE VESSEL SERVICES LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
SONIA GABLE**

The hearing took place on 7 July 2021. The form of the hearing was V (video). The remote platform was the Tribunal Video Platform. A face to face hearing was not held due to the Coronavirus (Covid-19) pandemic. The documents to which the Tribunal was referred are the hearing bundle (918 pages), the authorities bundle (93 pages), and the skeleton argument of HMRC.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Chris Holton, director of the Appellant, for the Appellant

Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. The Appellant appeals against an excise duty assessment issued by HMRC on 12 February 2019 pursuant to s 12(1) and (2)(a) of the Finance Act 1994 (“**FA 1994**”), as varied in a review conclusion letter dated 29 March 2019.
2. The assessment relates to quantities of liquid petroleum gas (“**LPG**”) which the Appellant purchased in 2015-2016, on which no excise duty was paid. HMRC issued the assessment having concluded that the Appellant sold the LPG for use as fuel in a road vehicle, such that it was liable to excise duty. The Appellant contends that the LPG was used for other purposes which did not render it liable to excise duty.
3. In this decision, the Tribunal finds that the burden of proof is on the Appellant to establish on a balance of probability that the LPG was used as claimed by it, and was not sold for use as fuel in a road vehicle. The Tribunal finds that the Appellant has not discharged this burden of proof.

FACTS

4. The Appellant company was established by Mr Chris Holton in about 2002. At material times, the business of the Appellant has consisted of selling, installing, refurbishing and decommissioning LPG tanks.
5. The Appellant has a business premises in Halifax.
6. Between 2012 and 2016 the Appellant’s business also used a yard in Rotherham.
7. During the period October 2012 to March 2016 the Appellant purchased from Northern Energy various quantities of LPG, totalling 599,651 litres. These quantities of LPG were all delivered by Northern Energy to an LPG tank on the Appellant’s Rotherham site. No excise duty was paid by the Appellant on these purchases of LPG.
8. In May 2017, HMRC opened an enquiry into the Appellant’s business. This ultimately led to the issuing of the assessment under appeal in relation to the period 1 April 2015 to 31 March 2016.

LEGISLATION

9. Regulation 4(1) of the Gas (Road Fuel) Regulations 1972 provides:
 - (1) Any person who intends to sent [*sic*] out, set aside or supply gas shall notify the Commissioners in such form and manner as they may require not later than 7 days before such gas is first sent out, set aside or supplied.
10. Section 8(1) of the Hydrocarbon Oil Duties Act 1979 provides:
 - (1) A duty of excise shall be charged on road fuel gas which is sent out from the premises of a person producing or dealing in road fuel gas and on which the duty charged by this section has not been paid.
11. Section 1 of the Customs and Excise Management Act 1979 (“**CEMA**”) relevantly provides:

“revenue trader” means —

 - (a) any person carrying on a trade or business subject to any of the revenue trade provisions of the customs and excise Acts, or which consists of or includes-

- (i) the buying, selling, importation, exportation, dealing in or handling of any goods of a class or description which is subject to a duty of excise (whether or not duty is chargeable on the goods);

12. Regulation 4 of the Revenue Traders (Accounts and Records) Regulations 1992 (the “1992 Regulations”) provides:

- (1) A revenue trader shall keep and preserve a record of—
 - (a) the production, buying, selling, importation, exportation, dealing in or handling of any excise goods carried on by him;
 - (b) the goods (whether or not they are excise goods) or services received by him in connection with or to enable him to undertake a transaction or activity described in sub-paragraph (a) of this paragraph; and
 - (c) the financing or the facilitation, made or effected by him, of a transaction or activity described in sub-paragraph (a) of this paragraph (whether or not that transaction or activity was carried on by him).
- (2) The record, required of a revenue trader by paragraph (1) of this Regulation, shall include—
 - (a) in the case of a receipt by him of excise goods, the date of receipt, and the name and address of the supplier of those goods to him;
 - (b) in the case of the disposal by him of excise goods, the name and address, except where disposed of by a retail sale, of the person who acquires them, and the date of that disposal; and
 - (c) in the case of a transaction described in sub-paragraph (c) of paragraph (1) of this regulation (financing or facilitation)—
 - (i) the date of receipt and the name and address of the person making or effecting that transaction, where the revenue trader (keeping and preserving a record as required by paragraph (1) of this regulation) is the recipient of that transaction; and
 - (ii) the date of making or effecting that transaction and the name and address of the recipient of it, where the revenue trader (keeping and preserving a record as required by paragraph (1) of this regulation) is making or effecting that transaction.
- (3) The record, required of a revenue trader by paragraph (1) of this regulation, shall contain sufficient information, by way of cross referencing or otherwise, to enable an officer to trace readily any payments, made or received by that trader in respect of any excise goods or of any financing or facilitation described in sub-paragraph (c) of paragraph (1) of this regulation.

13. Regulation 2(1) of those Regulations provides that “excise goods” means “any goods of a class or description which is subject to a duty of excise (whether or not duty is chargeable on the goods)”.

14. Section 12(1) of the Finance Act 1994 relevantly provides:

- (1) Subject to subsection (4) below, where it appears to the Commissioners—
 - (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
 - (b) that there has been a default falling within subsection (2) below,

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

...

(2) The defaults falling within this subsection are—

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

...

15. HMRC's Excise Notice 76: Excise Duty on Gas for use as Fuel in Road Vehicles sets out further details of the records which, in the opinion of HMRC, a producer, dealer or supplier of gas for use as road fuel must keep.

LEGAL PRINCIPLES

16. An assessment under s 12(1) FA 1994 requires the making of three separate findings by HMRC, namely:

- (1) a finding that an amount of excise duty due from a person has not been paid;
- (2) a finding that there has been a default by the person falling within s 12(2) FA 1994; and
- (3) a finding as to the amount of the excise duty due that has not been paid (the quantum of the assessment).

17. In respect of the first of these findings, the Tribunal has a quasi-supervisory jurisdiction. A decision of HMRC to make an assessment will not be set aside unless the Tribunal finds that it should never have been made at all, for instance on the ground that it was reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing, or was wholly unreasonable. (See *Mithras (Wine Bars) v HMRC* [2010] UKUT 115 (TCC) ("*Mithras*") at [9]-[11]).

18. In respect of the second of these findings, the Tribunal has a full appellate jurisdiction. The Tribunal decides for itself on the evidence whether there has been a default within s 12(2) FA 1994. The burden of proof is on the Appellant to establish that there has been no default. The standard of proof is the balance of probability. (Compare *Khan v Revenue and Customs* [2006] EWCA Civ 89 ("*Khan*") at [70]-[73] and [85].)

19. In respect of the third of these findings, the Tribunal applies a "best of judgment" standard of review. Under this standard, the Tribunal has a full appellate jurisdiction, and can consider any further evidence or arguments presented by the parties in the appeal and reduce the amount of the assessment, thereby substituting its own view on quantum for that of HMRC (compare *Mithras* at [7], [16]-[21]). However, in an appeal against quantum, generally the burden lies on the taxpayer to establish the correct amount of tax due. The HMRC assessment is *prima facie* right, and remains right until the taxpayer shows not only that it is wrong, but also shows positively what corrections should be made in order to make the assessments right or more nearly right. (Compare *Khan* at [69] and [85].) The reason for this approach is that there is an element of guess-work and an almost unavoidable inaccuracy in a properly made best of judgment assessment as to quantum. It is therefore not enough for an appellant to show shortcomings in the HMRC methodology. Rather, the Appellant must by evidence and argument positively show a methodology and/or figures that are more reliable than those used

by HMRC in determining the quantum of the assessment, even if the Appellant's methodology and figures may also have their own inevitable shortcomings.

WITNESS EVIDENCE

Chris Holton

20. Correspondence in the hearing bundle sent by Mr Holton on behalf of the Appellant states amongst other matters as follows. Mr Holton traded as Chris Holton Transport from 1985, and from 2002 changed to a limited company trading as Pressure Vessel Services Limited. The business activity is transporting, engineering, refurbishment and sale of new and refurbished LPG bulk tanks. The business also provides emergency call outs for gas leaks and run outs for major LPG companies and numerous smaller LPG independents. The rent for the Appellant's premises in Rotherham was paid in cash.

21. No witness statement of Mr Holton was served. In his evidence in chief he said as follows.

22. The Appellant company's business involves LPG tanks used for commercial heating, for fuelling forklifts, or for heating domestic premises that are not on the national mains gas supply. The business only deals with category 2 tanks between 450 and 4,600 litres. It does not deal with tanks used to fuel road vehicles which are category 1 tanks. The Appellant has never sold LPG as a separate product.

23. At the time material to this appeal, when the Appellant sold gas tanks, they were charged with LPG to 5% of their capacity. The invoice for the gas tank sold by the Appellant then gave just one price for the gas tank, which was sold with the small amount of gas in it. The LPG in the tank was not separately itemised on the invoice.

24. The Rotherham site was a storage yard used by the Appellant to store reconditioned tanks. This site was taken on just in case the Appellant ran into difficulties with the Halifax site, as the Appellant was struggling with the mortgage on the latter at the time. At the time the decision was taken to use the Rotherham site it was considered suitable as there were many shot-blasters and spray-painters in Rotherham, although ultimately the Appellant did not use any shot-blasters or spray-painters in Rotherham.

25. Northern Energy had a big customer in Rotherham. Whenever Northern Energy made a delivery of LPG to that customer, their truck making the delivery would sell whatever was left over to the Appellant at a low price. This explains why the amounts sold to the Appellant were so variable.

26. The Appellant stopped buying LPG in 2016 because it closed its Rotherham site so could no longer could take delivery in Rotherham of leftover amounts in the Northern Energy truck. The Appellant then ceased charging all the tanks it sold with LPG to a 5% capacity, although it still did so in some cases. It began using air compressors instead of LPG for pressure testing. It also began using a vapour recovery system which allowed it to extract any remaining LPG from tanks that it acquired, and this LPG was sufficient for its needs without having to purchase LPG from Northern Energy.

27. In cross-examination Mr Holton said as follows.

28. He had never supplied the name "Green Autos" to Northern Energy, and the Appellant had never intended to trade under that name. This name appeared on only the first invoice sent to the Appellant by Northern Energy, and was a mistake on their part. The Appellant is referred to in all subsequent invoices from Northern Energy as "Green Gas".

29. The A-frame sign (see paragraphs 36-38 below) was not pointing to the Appellant's premises. The sign was already there before the Appellant took over the Rotherham premises. The garage across the road from the Appellant's Rotherham premises is no longer there so Mr Holton cannot get evidence from them concerning whether they sold LPG.

30. There was no electricity on the Rotherham site, and electricity is needed to put LPG into road vehicles. A different nozzle is also needed for fuelling road vehicles.

31. The Appellant also used the LPG to heat its premises in Halifax, and to fuel the forklifts at its premises in Halifax. From time to time the Appellant also delivers LPG to domestic premises pursuant to a call-out service. Additionally, the Appellant used LPG for ring mains testing.

32. The Appellant had no written lease for the Rotherham site, and had no document to show what rent was paid for it. Mr Holton only knew the first name of the "landlord", who in fact did not own the property, but was sub-letting it while the owners were abroad, and was not supposed to be doing this. Originally the rent for the site was £40 per week, and later it was raised to £75 per week.

33. During the time that the Appellant had the Rotherham site, it was used for most of the Appellant's refurbishment work, while the Halifax site was used for most of the work relating to new tanks. However, Mr Holton said he could not remember all details going back to 2012. When tanks were refurbished, they had already been shotblasted and spray-painted in Halifax. At Rotherham they were resealed and tested with a handheld battery-powered ultrasonic device.

HMRC Officer Marsden

34. Officer Marsden, who has been an officer of HMRC since 2002, issued the assessment against which the Appellant now appeals. In her evidence she states amongst other matters as follows.

35. As a result of a visit to Northern Energy Autogas Limited in February 2016, an entity called Green Gas was identified as the recipient of duty-free LPG. Northern Energy advised that the purchaser was Mr Holton in Rotherham, who was the owner of Green Gas, and that the purpose listed for the LPG was LPG cylinder filling. In July 2016, Officer Marsden made an unannounced visit to the Green Gas address in Rotherham, and no LPG tanks or persons relevant to Green Gas were found on the site. Further enquiries with Northern Energy established that Chris Holton was known to them through his LPG tank installation business in Halifax. In May 2017, HMRC opened an enquiry into that business. This ultimately led to the assessment being issued.

DOCUMENTARY EVIDENCE

36. The hearing bundle includes pages from Google Maps showing two street view photographs captured in July 2012. One of these photographs depicts an A-frame sign sitting on the pavement bearing the words "LPG FILLING STATION OPEN", with an arrow pointing to the right. The other shows a commercial yard, which Mr Holton accepted was the Appellant's Rotherham premises. Mr Holton confirmed that a gas tank that could be seen on the premises in the photograph was the tank into which Northern Gas delivered the LPG. He pointed out that parts of other gas tanks could be seen in the photograph, which he said were tanks being refurbished at the site.

37. On 1 July 2021, HMRC made an application for the admission into evidence of further street view photographs from Google Maps, captured in July 2015. The application was considered at the hearing. Mr Holton opposed the HMRC application, due to its lateness. The Tribunal after hearing the parties decided that the additional photographs should be admitted. Mr Holton had not identified any prejudice to the Appellant in granting the application; in particular, he had not identified anything he would have said or done in the light of this new evidence had it been submitted within time that he could not do now at the hearing. Furthermore, the new photographs provided the Tribunal with a better understanding of the physical situation of the Rotherham property, and potentially assisted the Appellant's own case.

38. Having heard the Appellant's explanations of the new photographs, the Tribunal finds as follows. The A-frame sign bearing the words "LPG FILLING STATION OPEN" is depicted in the same location as in the earlier photographs. This sign is on a main road, near the mouth of the road on which the Appellant's Rotherham premises was located. The arrow points in the direction of the road on which the Appellant's premises was located. The Appellant's premises were on the opposite side of the road to the side on which the A-frame sign was located. The Appellant's premises were some distance down the side road from the point where the A-frame sign was located.

APPELLANT'S SUBMISSIONS

39. The Appellant has supplied to HMRC all documents that HMRC has asked for, other than documents relating to how the LPG was used, which the Appellant was not required to keep as it is not a "revenue trader". The Appellant is willing to provide any documents it has, but cannot produce documents that it does not have. The Appellant has been investigated by HMRC three times, and has been told by HMRC how good its record keeping was. HMRC have not taken into account fairly all of the material placed before it, and the HMRC decisions contain statements that are factually incorrect.

RESPONDENT'S SUBMISSIONS

40. The Appellant has not discharged the burden of proving that it did not operate an LPG road fuel supplying business during (and before) the period of assessment. The Appellant has failed to produce evidence to support its alleged usage of LPG, despite having had four years to do so, despite a number of requests from the Respondents, and despite its legal obligation to keep records. Mere assertions by an appellant that LPG was used in a particular way are not credible evidence that this was the case. It is not credible in any event that the Appellant would be unable to evidence usage of such a large volume of valuable LPG if it was really used for non-chargeable purposes. The Appellant's position has changed over time as to how the LPG was used, which further undermines the credibility of its account. A large number of matters discovered in the investigation undermine the Appellant's account.

FINDINGS

Standard of appellate review

41. At the hearing, Mr Holton confirmed that the Appellant does not appeal against the third of the HMRC findings referred to in paragraph 16 above (the quantum of the assessment). He accepted that if, contrary to the Appellant's submissions, the Tribunal were to find that excise duty was due and that there was a default within s 12(2) FA 1994, then it was open to HMRC to conclude, as they did, that 100% of the LPG purchased by him was sold for use as road fuel and was liable to excise duty on that basis. The Appellant accepts the HMRC computation of the quantum of the assessment in that event.

42. Rather, Mr Holton's challenge is to the first two of the HMRC findings referred to in paragraph 16 above. He contends that:

- (1) HMRC were not entitled to find that any amount of excise duty is due from the Appellant, and therefore no assessment should have been made at all; and
- (2) there has been no default by the Appellant falling within s 12(2) FA 1994.

43. In the present case, these first two findings of HMRC are in effect a single finding. HMRC accept that if the Appellant sold no LPG for use as road fuel, and that if the Appellant used the LPG solely for the purposes for which Mr Holton claims it was used, then:

- (1) the LPG purchased by the Appellant would not be subject to excise duty; and
- (2) the Appellant would not be a "revenue trader" within the meaning of s 1 CEMA and therefore would not be obliged by regulation 4 of the 1992 Regulations to keep the records prescribed by that provision, such that there would be no default by the Appellant falling within s 12(2)(a) FA 1994.

44. Thus, the sole question to be determined by the Tribunal is whether the Appellant sold the LPG for use as road fuel, and whether the Appellant used the LPG solely for the purposes for which Mr Holton claims it was used.

45. Because the answer to this question is equally determinative of both the first and the second findings of HMRC referred to in paragraph 16 above, the Tribunal applies the standard of appellate review relevant to the latter. The Tribunal will determine this question itself, based on the evidence before it, on a balance of probability. The burden of proof is on the Appellant. That is to say, the Appellant must prove that it did not sell the LPG for use as road fuel, and the Appellant must prove that it used the LPG solely for the purposes for which Mr Holton claims it was used.

Consideration of the evidence

46. Mr Holton challenges the fairness of the HMRC decision and the correctness of the HMRC decision making process. However, because the Tribunal is applying the standard of review referred to in paragraphs 18 and 45 above, rather than the standard of review in either paragraph 17 or 19 above, these arguments do not fall for consideration.

47. The Appellant has presented no evidence of how the LPG acquired by Northern Energy was used, apart from the oral evidence of Mr Holton at the hearing, and statements made by Mr Holton in correspondence he sent to HMRC.

48. The fact that the Appellant has not presented other evidence is not of itself treated as counting negatively against the Appellant. However, the Tribunal can in this decision take into account only the evidence that has been provided to it. It must determine whether the evidence that has been presented is sufficient to discharge the Appellant's burden of proof.

49. The evidence of Mr Holton is very general and lacking in detail. He says that the LPG purchased in 2012-2016 was used for various purposes, such as to partially charge LPG tanks supplied by the Appellant, to heat the Appellant's premises in Halifax, to fuel forklifts used in the Appellant's premises in Halifax, and to make deliveries to domestic premises pursuant to call-out arrangements. However, no details are given of exactly how much LPG was used for each of these purposes. From the evidence given by the Appellant, it is impossible to form any view as to how much LPG might reasonably have been required for each of these purposes. There is for instance no evidence of the amounts of LPG consumed by the heaters at the Halifax

premises, or by the forklifts at that premises, and no details of how often the Appellant did domestic call outs.

50. The witness statement of Officer Marsden indicates that she used the tank capacity information provided by Mr Holton to calculate the total volume of all the new and used tanks he had supplied during the period in question, and that on her analysis if all of these tanks had been charged to 5% capacity this would have used only 40% of the LPG purchased. At the hearing, Mr Holton suggested that there were other tanks that were filled to 5% capacity that Officer Marsden had not taken into account. However, the fact remains that there is no clear evidence as to how much of the LPG was used for which purposes. Mr Holton clearly acknowledges that even on the Appellant's own case, not all of the LPG was used for filling tanks to 5% capacity, and there remains even now no clear statement of exactly what quantities of it are said by the Appellant to have been used for this purpose.

51. This generality and lack of detail in the Appellant's evidence significantly limits the weight that can be attached to it, in the absence of any further supporting evidence.

52. The weight of this evidence is further diminished by additional considerations.

53. Mr Holton's evidence is that for the use of the Rotherham site, the Appellant paid £40 to £75 per week in cash to someone who did not own it and was probably not meant to be renting it to the Appellant. Mr Holton further said that he knew this person by first name only. This was clearly a very uncommercial arrangement, that does not bear the features of a legitimate business dealing.

54. At the hearing, Mr Holton said that during the period that the Appellant had the Rotherham site, most of the new tank work was done in Halifax and most of the refurbishment work was done in Rotherham. However, Mr Holton said that the Rotherham site had no electricity. The Tribunal finds it inherently implausible that any significant commercial work could realistically be undertaken from a site without electricity.

55. Mr Holton also said that the Rotherham site was acquired in case anything happened to the Halifax site because the Appellant was having difficulties paying the mortgage on the Halifax site. However, the Tribunal finds it inherently implausible that the Rotherham site could be considered a possible substitute premises for the Halifax site, given that it had no electricity or apparent legitimacy or security of tenure.

56. The question also arises as to why the LPG was purchased in the name of "Green Gas", rather than in the Appellant's own name. Mr Holton has suggested that at one point he had intended to set up a business with this name and that this had not worked out, but no details are provided. If the "Green Gas" business did not work out, it is difficult to explain why the Appellant continued to purchase LPG over an extended period in the name of "Green Gas".

57. A further question arises as to why the Appellant suddenly began purchasing LPG in 2012, and equally suddenly ceased purchasing it in 2016. There is no obvious reason why, in 2012, the Appellant's business would suddenly have required significant quantities of LPG that it had previously not needed. Similarly, there is no obvious reason why, in 2016, the Appellant's business would have suddenly ceased to require the significant quantities of LPG that it *had* previously needed. Mr Holton offered some general explanations at the hearing. In particular, he said that the Appellant stopped including the 5% charge of gas in the tanks it supplied, began using air compressors instead of LPG for pressure testing, and acquired a vapour recovery system. However, no further details or evidence have been provided of these matters. In particular, no details are given of the precise times at which the Appellant began using air compressors instead of LPG for pressure testing, and acquired a vapour recovery

system. It seems implausible that all its LPG needs would disappear altogether from one day to the next.

58. Furthermore, HMRC point out that the last delivery of LPG from Northern Energy to the Appellant was on 23 March 2016, one day before HMRC contacted Northern Gas's accountant for further details about the Rotherham site. HMRC suggest that the Appellant ended the LPG purchases because it learned of the HMRC inquiries.

59. Whether or not this is the case, no clear details are given of the precise circumstances in which the Appellant gave up the Rotherham site and ceased receiving supplies of LPG. Mr Holton at the hearing indicated that the two events were connected. He says that LPG was acquired from Northern Gas at a low price precisely because Northern Energy could deliver it to the Appellant in Rotherham at times when deliveries were being made to a large customer in that town, and that this was no longer possible once the Appellant gave up the Rotherham site. However, it is unclear from the evidence whether the Appellant gave up the Rotherham site because it no longer wanted to take deliveries of LPG, or if it had to cease taking delivery of LPG because it had given up the Rotherham site. If the former is correct, this would suggest that true purpose of the Rotherham site was to take delivery of LPG. If the latter is correct, no clear explanation is given of why the Appellant wanted to or was required to give up the Rotherham site at that particular time.

60. Mr Holton says that the Appellant was able to purchase the LPG at a low price if it took delivery in Rotherham. However, there is no other evidence to show that the price charged by Northern Energy was low, or that Northern Energy or another supplier would not have supplied the LPG at a similar price to the Appellant's premises in Halifax.

61. The street view photographs from Google Maps also raise questions. These indicate that in July 2012 and July 2015 LPG was being sold in the vicinity of the Rotherham premises for use as fuel in road vehicles. The "landlord" of the Rotherham site confirmed to HMRC that the Appellant was renting that site from July 2012. Mr Holton says that this is wrong, and that Appellant only began renting the Rotherham site from October 2012. He says that the July 2012 Google Maps photographs are therefore evidence that the sign advertising LPG sales was already there before the Appellant acquired the Rotherham site. However, no other evidence has been provided of the precise time at which the Appellant took over the Rotherham site. Mr Holton also suggests that there was a garage nearby that might have been selling LPG, but no evidence has been provided of this. On the Google Maps photographs, no garage or filling station can be seen in the area.

62. Mr Holton says that the Appellant cannot be criticised for not producing evidence that it does not have. However, the Tribunal considers that there is further evidence that could have been provided. Mr Holton himself could have provided far more detailed witness evidence, and witness evidence could have been provided from his employees. Evidence could have been provided of the LPG consumption of the heating at the Halifax premises and of the forklifts at that premises, and details could have been provided of the vapour recovery system acquired by the Appellant, and so forth.

63. In any event, regardless of whether the Appellant is capable of producing further evidence or not, the Tribunal must decide the appeal on the basis of the evidence before it. Given the considerations above, the Tribunal finds that the evidence of Mr Holton is by itself insufficient to discharge the Appellant's burden of proof.

Conclusion

64. The Tribunal finds that the Appellant has not discharged its burden of proving that the LPG was used solely for the purposes for which the Appellant claims it was used. The Tribunal finds on the evidence that the Appellant sold the LPG for use as road fuel.

DISPOSITION

65. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 29 JULY 2021