[2018] UKFTT 677 (TC)

TC06823

Appeal number:TC/2016/00063

EXCISE DUTY – misuse of rebated fuel – assessment – penalty – whether deliberate misuse – quantum of assessment and penalty – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DANIEL JEMMETT **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS MARY AINSWORTH

Sitting in public in Manchester on 18, 19 January 2018 and 25 April 2018

Mr Nigel Gibbon instructed by Omnis VAT Consultants Ltd for the Appellant

Ms Joanna Vicary instructed by the Solicitor's Office and Legal Services of HM Revenue & Customs for the Respondents

DECISION

Background

1. The appellant is involved in the haulage business. On 11 August 2013 HMRC's Road Fuel Testing Unit ("RFTU") stopped a Scania articulated lorry registration number Y409 XRM being driven by the appellant. The vehicle tested positive for rebated fuel. It was seized and restored without any restoration fee.

2. The respondents subsequently conducted a road fuel audit of vehicles which they believed were owned and operated by the appellant. They identified what they considered to be a shortfall in legitimate fuel purchases. On 26 February 2015 an assessment was issued to the appellant in relation to rebated fuel allegedly misused by the appellant. The amount of excise duty assessed was £112,234 covering the period 24 February 2011 to 11 August 2013. The sum assessed was subsequently reduced to £111,012 which is the assessment under appeal ("the Assessment").

3. At the same time the respondents also notified a penalty to the appellant pursuant to Schedule 41 Finance Act 2008 in the sum of £66,779. It was imposed on the basis that the appellant had deliberately used rebated oil as fuel for road vehicles. The penalty was subsequently reduced to £66,052 which is the amount under appeal ("the Penalty").

4. By a notice of appeal dated 6 January 2016 the appellant appealed both the Assessment and the Penalty. The grounds of appeal may be summarised as follows:

(1) There was no deliberate behaviour on the part of the appellant.

(2) The Assessment and the Penalty based on the Assessment are excessive.

5. In amended grounds of appeal first advanced in May 2017 the appellant also relies on the following additional grounds of appeal:

> That the Assessment and the Penalty were wrongly addressed to the appellant, whereas the business and vehicles were operated by Perfect Solutions (NW) Ltd ("PSL")

6. There was no real issue between the parties in relation to the relevant law. It is well known that it is unlawful to use rebated fuel in the fuel tank of a road vehicle, save in respect of certain excepted vehicles. Where such fuel is used unlawfully, the respondents can assess an amount of excise duty equivalent to the amount of the rebate pursuant to section 13(1A) Hydrocarbon Oil Duties Act 1979 ("HODA 1979"). In certain circumstances the respondents can also assess a penalty pursuant to Schedule 41 Finance Act 2008 ("FA 2008") up to a maximum of 100% of the potential lost revenue depending on the level of culpability.

7. Section 13(1A) HODA 1979 provides as follows:

> " 13(1A) Where oil is used, or is taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may —

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

8. The persons who may be assessed therefore are any person who "used" the oil and any person who was "liable for the oil being taken into the road vehicle". Both parties agreed that in this context someone was liable for oil being taken into a road vehicle if that person was culpable or responsible for the act. Further, both parties acknowledged that various people could fit that description depending on the circumstances.

9. The Penalty in the present case was assessed on the basis that the Appellant deliberately used rebated fuel in his vehicles although he did not seek to conceal that act. Credit was given for disclosure by the appellant during the respondents' enquiries and the penalty was calculated at 59.5% of the potential lost revenue.

10. The evidence necessary to support an assessment or to challenge an assessment will depend on the facts of the particular case. As Mann J stated at [31] in *Thomas Corneill v HM Revenue & Customs [2007] EWHC 715 (Ch)*:

> " 31. … There has to be a sufficient evidential linkage between rebated oil and use in a vehicle to give rise to an inference that oil in a provable quantity has been placed into a vehicle. Sometimes a great degree of particularity will be available, sometimes it will not. I can see no legislative purpose in defining some sharp cut-off line in a degree of particularity which is required. What is required is appropriate proof and evidence of the facts."

11. It is clear that the evidence as to use of rebated fuel must be considered in the context of the particular case. Findings of fact must be made by reference to the balance of probabilities. Thomas Corneill was a case where the only direct evidence of the use of rebated fuel in road vehicles was the one lorry which was actually tested, and which tested positive for red diesel. No other rebated fuel was found in tanks on the premises or in other road vehicles tested at the premises. However, there was sufficient indirect evidence in relation to supplies of red diesel and an absence of any evidence of supplies of legitimate duty paid diesel commonly known as "white diesel".

12. It is clear that there must be some evidential basis for the Assessment and in many cases an exercise of judgment by the respondents. In Thomas Corneill, Mann J stated as follows:

> 32. ⋯ It seems to me to be inevitable in the real world, and in many cases, unless a culprit is caught red-handed, that some element of judgment or assessment is going to be necessary to make the section work. I do not see why it should be confined to the red-handed. A recalcitrant haulier may mix red and white diesel from time to time in a manner which makes it impossible to say for certain that a specified quantity was used in a given lorry or lorries at a given time which would enable HMRC to show extremely clearly that over a period of time a given quantity of red diesel was used in

> unspecified lorries, even if none of them are caught with red diesel in the tanks. I can see no legislative purpose in excluding that situation from the operation of Section 13 and there is nothing in the working of the section which requires it. The reasons of Mr Gilmore in the present case contains a greater degree of assessment and estimation that might be required in my example, but I can see no reason why such a process should be excluded.
>
> 33. I therefore consider that [counsel for the appellants] is wrong in his submission that no element of estimation, or no significant element of estimation, is permitted under Section 13. What is required under Section 13 is appropriate evidence. Inferences can be drawn from primary facts. That is a standard process in many walks of life and is appropriate to assessments under Section 13. Estimation in this context is merely one way of describing a process of inference. If it is said that HMRC have got the primary facts or the inference wrong, then an appeal mechanism exits."

13. In this appeal there is an issue as to whether rebated fuel was used in the appellant's vehicles and if so whether the respondents have correctly assessed the appellant rather than PSL. The appellant contends that the Assessment is excessive and that any assessment ought to have been addressed to PSL. The burden is on the appellant to satisfy us that it is excessive and that PSL is the proper party to be assessed. The principal issue in relation to the Penalty is whether and to what extent the appellant deliberately put rebated fuel into the tanks of road vehicles. The burden is on the respondents to satisfy us that the appellant acted deliberately.

14. It is convenient here to deal with a submission by Mr Gibbon that the initial burden was on the respondents to establish the necessary evidential linkage to raise an inference of use of rebated fuel in a provable quantity in the appellant's vehicles. If they do so, then the burden is on the appellant to establish that the assessment is excessive. We do not consider that Mr Gibbon is correct as a matter of law. The legal burden on an appeal against an assessment is at all times on the appellant. The appellant can raise a factual case that the necessary evidential linkage is not made out, at which stage an evidential burden may fall on the respondents, which Ms Vicary accepted. In the final analysis the question for us is whether we are satisfied on the evidence and on the balance of probabilities that the Assessment is excessive. If we were not satisfied that there had been misuse of rebated fuel, or that the extent of that misuse was as alleged by the respondents then the Assessment would be excessive.

15. Mr Gibbon also submitted that the burden is on the respondents to establish the quantum of the penalty as well as deliberate behaviour on the part of the appellant. We were not referred to any authority but we accept Ms Vicary's submission that the position in relation to the potential lost revenue is the same as in relation to the quantum of the Assessment. The burden is on the appellant to show that the potential lost revenue on which the penalty is based is excessive.

16. In any event, in this appeal these points are academic. It has not been necessary for us to resort to the burden of proof in reaching our decision.

Background Facts

17. We find the following background facts which are not in dispute.

18. The appellant was randomly stopped by RFTU officers on 11 August 2013 at Todhills in Carlisle. He was driving a Scania articulated lorry registration Y409 XRM. A sample from the fuel tank was black in colour and tested positive for Euromarker indicating that it contained rebated fuel produced in the EU. The appellant told the officers that the vehicle had been mistakenly fuelled with rebated gas oil over 2 years ago but it had since been tested by HMRC officers and no traces of rebated fuel had been found. The appellant was then interviewed under caution.

19. Shortly after this, the fuel sample was sent for analysis by the Laboratory of the Government Chemist. The sample tested positive for the following markers:

> 1% Coumarin – a marker for kerosene
> Traces of Quinizarin – a marker for rebated gasoil.
> 1% Solvent Blue – a marker for Irish rebated gasoil
> 1% Solvent Red – a marker for UK rebated gasoil
> 2% Euromarker – a marker for EU rebated gasoil

20. Mr Ewan Villiers is an experienced road fuel audit officer of HMRC who carried out a road fuel audit of the appellant's vehicles following the random test on 11 August 2013. Mr Villiers commenced his fuel audit in about January 2014. At this stage he thought that the trader was PSL, although he noted that the appellant had a dormant self assessment account with HMRC. He wrote to PSL on 22 January 2014 seeking copies of records for the purposes of his audit. There was no response to the request but the appellant's father, Peter Jemmett telephoned Mr Villiers to say that the appellant was no longer a director of PSL and that PSL was going into liquidation.

21. Mr Villiers wrote separately to the appellant and PSL on 20 February 2014 seeking an explanation as to who owned and operated the haulage business and copies of the records that had previously been requested. There was a response from Peter Jemmett, and in an email dated 5 March 2014 Peter Jemmett stated that he was endeavouring to compile the information requested. He said "I do not work for Daniel's company full time so may need a little longer to gain the information".

22. On 27 March 2014 Peter Jemmett emailed Mr Villiers asking how Mr Villiers would prefer to receive copies of fuel bills, and due to circumstances beyond his control asking for an extension of time to provide further information.

23. Further information was subsequently provided including fuel card statements and receipts, tachograph information and other records. Using this information Mr Villiers identified that there were references to a very large number of vehicles and using DVLA and operator licence material he narrowed those vehicles down to 12 vehicles which he believed were owned and/or operated by the appellant. He looked at a period from 24 February 2011, which was the first date covered by the records provided, to 11 August 2013 ("the Assessment Period"). The 12 vehicles identified

were as follows, and in this decision we shall refer to each vehicle using the reference number in this table. So, for example the vehicle which was stopped and tested positive for various markers is Vehicle 1.

Ref	Vehicle Registration	Owner
1	Y409 XRM	Appellant
2	DK08 BHJ	Appellant
3	MX56 FLR	Appellant
4	MX56 LYH	Appellant
5	YX51 KEK	Appellant
6	RF02 XKH	Appellant
7	AD57 WRX	Appellant
8	YF55 SYE	Appellant
9	DK07 CTY	Alliance VM Ltd
10	CN54 BVX	Alliance VM Ltd
11	DK07 CTZ	Alliance VM Ltd
12	WX06 VSG	Alliance VM Ltd

24. Using information available to him Mr Villiers identified or where necessary estimated the mileage travelled by each vehicle in the Assessment Period and also estimated their fuel consumption in miles per gallon. Based on those estimates, Mr Villiers calculated that the appellant's vehicles would have required 486,717 litres of diesel to cover their mileage in the Assessment Period. Fuel records suggested to Mr Villiers that there was a shortfall in the fuel purchased in that period of 239,747 litres. The rebate on that volume of gas oil in the Assessment Period would have been £112,234. This calculation was said to be advantageous to the appellant because gas oil is a partially rebated fuel. No account was taken of the presence of kerosene, on which a full rebate is given, or of Irish diesel on which no excise duty would have been paid in the UK.

25. Mr Villiers issued a pre-assessment letter to the appellant on 3 December 2014 setting out the basis on which he calculated the amount of the Assessment and the Penalty. Peter Jemmett asked for some time to respond to these calculations which he was given. However, no response was provided, and the Assessment and Penalty were issued on 26 February 2015. The appellant requested a review of the Assessment and the Penalty and they were confirmed in a letter from a review officer dated 25 November 2015.

26. Subsequently, Mr Villiers accepted that Vehicle 7 was a Mercedes people carrier used by the appellant personally. It was removed from the Assessment and we do not need to consider it further. We are concerned in this appeal with the remaining 11 vehicles.

Findings of Fact

27. We heard evidence on behalf of the respondents from Mr Villiers. On behalf of the appellant we heard evidence from the appellant himself, from his father Mr Peter Jemmett and from two drivers, Mr Graham Mansell and Mr Davidson Watson. All witnesses provided witness statements and gave oral evidence.

28. We should record that the appellant is dyslexic and has difficulty dealing with paperwork. He has also found the process of dealing with Mr Villiers' road fuel audit difficult. We have taken those difficulties into account when assessing the evidence and making our findings of fact. Peter Jemmett assisted the appellant on the administrative side of the business and in dealing with the road fuel audit. Peter Jemmett is himself experienced in the haulage industry. He holds an HGV licence and also does occasional consultancy work for the Department for Transport.

29. We found Mr Villiers to be a conscientious officer and a reliable witness. He sought to obtain reliable evidence and explanations from which he could make an informed judgment as to whether there had been misuse of rebated fuel in the appellant's vehicles, and from which he could make an estimate of the extent of any misuse. For the purposes of this appeal we must carefully scrutinise the assumptions and estimates made by Mr Villiers and consider whether in the light of the evidence as a whole we can properly draw inferences as to whether there was misuse of rebated fuel by the appellant and if so the extent of that misuse.

30. We treat the evidence of the appellant with considerable caution. In a number of key respects the appellant's evidence was vague and unclear and raised as many questions as it answered. We take into account the difficulties described above. The reliance we could place on the appellant's evidence in relation to a number of issues was affected by the absence of supporting documentary evidence, including records the appellant was required to maintain for the purpose of his operator's licence. Overall, we had considerable reservations as to the truth and accuracy of the appellant's evidence in relation to a number of issues.

31. Some of the appellant's evidence was supported by the evidence of his father. Peter Jemmett came across as a more reliable and credible witness. However, in relation to some aspects of his evidence there was again a lack of supporting documentary evidence. We also take into account his close family relationship to the appellant which may, consciously or sub-consciously cause him to give evidence unduly favourable to the appellant.

32. The evidence of the drivers, Mr Mansell and Mr Watson was short and to a large extent not challenged.

33. We make our findings of fact by reference to the factual issues which lie at the heart of this appeal, and which may be summarised as follows:

(1) The extent to which, if at all, rebated fuel was used in the 11 vehicles.

(2) The nature of the relationship between the appellant and PSL and how the business operated.

(3) Whether the appellant was liable for any rebated fuel being used in the 11 vehicles.

(4) Whether the appellant deliberately used rebated fuel as fuel for the vehicles.

(1) To what extent, if at all, was rebated fuel used in the vehicles?

34. Mr Gibbon submitted that the respondents have taken the reasoning in Thomas Corneill to an unjustifiable extreme. The assumptions and estimates made by Mr Villiers are not sufficient to establish the necessary evidential linkage between rebated oil and use in the appellant's vehicles. In the circumstances he submitted that we cannot draw an inference that oil in a provable quantity has been placed into the appellant's vehicles. We take into account what was said in Thomas Corneill as to the requirement for appropriate evidence and the extent to which inferences can be drawn from that evidence when making our findings of fact under this heading.

35. Peter Jemmett described the business as a medium sized profitable business which has about 9 drivers at any point in time and a seven figure turnover. It was based at an industrial estate at Shields Drive, Wardley near Manchester. The appellant owns his own vehicles, but also leases and borrows vehicles where necessary. The appellant was a full time driver in the business. On the appellant's evidence there were 9 other drivers. He denies ever having used rebated fuel of any description in his vehicles, subject to one incident more than two years prior to the testing when he accidentally put rebated gasoil into Vehicle 1 when refuelling in Ireland.

36. Most of the fuel recorded as purchased for the 11 vehicles was by fuel cards in the name of the appellant, either European Fuel Cards Limited or UK Fuels Ltd. The balance was fuel purchased on fuel cards supplied by a contractor where PSL was a sub-contractor, either James Kemball Ltd ("Kemballs") or Heyton Coulthard Ltd ("Coulthards"). Peter Jemmett said that there were other instances of subcontracting where the contractor provided a fuel card but where he had not been able to obtain any evidence as to fuel card usage.

37. We are satisfied that when PSL acted as a subcontractor for Kemballs or Coulthards, fuel for the vehicles was charged to their fuel cards and was then recharged by Kemballs and Coulthards to PSL.

38. Before dealing with Mr Villiers calculation of what he said was a shortfall in the purchase of legitimate fuel, it is convenient to consider the appellant's use and fuelling of Vehicle 1.

39. The test results for the fuel in Vehicle 1 show that the vehicle fuel tank contained a mixture of rebated kerosene, UK rebated gasoil and Irish rebated gasoil. The appellant did not challenge the test results. Those results suggest that either various rebated oils had separately been put into the fuel tank, or that laundered fuel had been put into the fuel tank. Laundered fuel is a mixture of rebated oils where an

attempt has been made to remove the chemical markers and dyes present in those rebated oils.

40. Mr Villiers evidence was that the test results and in particular the ratios of the various markers found in the fuels to one another indicated that it was likely to contain at least some laundered fuel. For example, the fuel in the tank contained 1% Solvent Blue and 1% Solvent Red. He would therefore expect to see 2% Quinizarin. However, there was only a trace of Quinizarin suggesting that the fuel had been laundered. Mr Villiers acknowledged that a test of the sulphur content would have helped to confirm whether all the fuel was laundered or not but no sulphur test had been obtained. We accept on the basis of Mr Villiers evidence that the fuel in the tank of Vehicle 1 was either laundered fuel or a combination of laundered fuel, rebated fuel and legitimate white diesel, rather than legitimate fuel cut with rebated fuel.

41. Mr Villiers looked at the fuelling of Vehicle 1 in the periods before and after 11 August 2013, the date on which it was stopped and tested by the RFTU. Using available records Mr Villiers tabulated the mileage done by Vehicle 1 on various dates when fuel was purchased for the vehicle between 9 July 2013 and 6 September 2013. We can summarise this evidence and put it into a format which we consider is more readily understandable as follows:

Date	Km covered since last refuelling	Litres of diesel required*	Litres bought	Litres in tank after refuelling
09/07/13			235	500 *
15/07/13	1,020	379	279	400
17/07/13	1,000	372	272	300
30/07/13	1,640	610	263	(47)
11/08/13	591	220	-	(267)
13/08/13			437	500 *
15/08/13	1,095	407	220	313
29/08/13	560	208	225	330
03/09/13	613	228	355	457
06/09/13	1,136	422	258	293

* The table assumes a fuel consumption figure of 7.6 mpg and that the vehicle tank was full after it was refuelled on 9 July 2013 and on the first refuelling after the vehicle was stopped and tested.

42. The appellant accepted that it was likely he had refuelled Vehicle 1 during this period, and we find that to be the case. He maintained that he did not change the pattern of his refuelling, but suggested that he might have lost his fuel card. When refuelling Vehicle 1 he said that he might fill it to the top or if it was raining he might only put in as much as he could get away with. If there was not much work on for the

next week or so he would leave the fuel level low. He said that because Vehicle 1 was a "show vehicle" he did not tend to do a lot of mileage in it. Vehicle 1 is the only vehicle he tended to drive. However, it is not permitted in London so on occasions he might use another vehicle.

43. There was conflicting evidence from the appellant and Peter Jemmett as to the capacity of the fuel tank of Vehicle 1. In his interview under caution the appellant stated that it was 500 litres. In correspondence Peter Jemmett stated that it was about 450 litres. It seems likely that the appellant would have been right about the capacity being 500 litres. It was his vehicle and he was driving it so he would know. He did not suggest the capacity was any greater than 500 litres, excluding a second tank referred to below. The fuelling records from August 2012 indicate that on one occasion 673 litres was put into the tank. It is likely that the appellant was right when he suggested that this included fuel for another of his vehicles parked alongside with the same card used to fill both vehicles.

44. We are satisfied from tachograph records that the table correctly states the mileage of this vehicle at the times of refuelling. We are also satisfied that throughout the period covered by the table the appellant was the only driver of the vehicle. The respondents say that the table shows that for the period prior to 11 August 2013 the appellant was purchasing less legitimate diesel for Vehicle 1 than he needed. On 11 August 2013 there was a shortfall of 267 litres. For the period after 11 August 2013 he was purchasing sufficient diesel for his needs. The respondents contend that this change in behaviour indicates that the appellant had deliberately been using rebated fuel in Vehicle 1 prior to being stopped and tested, but had ceased using rebated fuel following the test.

45. The appellant contends:

(1) This calculation does not take into account fuel in the vehicle's tank at the start date of the exercise on 9 July 2013.

(2) The estimate of fuel consumption is lower than that actually achieved, namely 11 mpg.

46. The appellant says that taking these factors into account there would have been no shortfall in relation to Vehicle 1.

47. The calculation clearly does take into account fuel in the tank of Vehicle 1 as at 9 July 2013. The appellant purchased 235 litres on that date and Mr Villiers assumed that the tank was filled to the top. That assumption favours the appellant, because if the tank contained less than 500 litres following that refuelling then the shortfall indicated on later dates would be greater.

48. Mr Gibbon did not seek to show what effect altering the assumption as to fuel consumption would have on the table, for example by way of a sensitivity analysis. In relation to the Assessment generally, Mr Gibbon in his closing submissions asserted a fuel consumption figure of 10 mpg. By our calculation, if Vehicle 1 had achieved a

fuel consumption of 9 mpg then the shortfall as at 11 August 2013 would have been negligible, approximately 20 litres.

49. Peter Jemmett said that Vehicle 1 had a 540 horsepower V8 engine. If it was pulling 44 tons it would not be working very hard. In fact the jobs it was doing were for a retailer called T J Hughes where the loads would be much less than 33 tons, and one leg of the trip would be empty. Based on these facts Peter Jemmett estimated that Vehicle 1 would achieve 11 mpg. He said that in the past he had calculated fuel consumption figures using time sheets, tachographs and details of fuel drawn. He had done that calculation every now and again and said that the variation was generally 9-11 mpg. However, there was no evidence of such calculations before us, either carried out historically or for the purposes of this appeal. We do not accept Peter Jemmett's evidence as to the actual fuel consumption of Vehicle 1.

50. Mr Villiers used Department of Transport haulage industry averages as the best evidence of the fuel consumption achieved by the vehicles. Mr Villiers also gave evidence that in his experience of carrying out audits of compliant hauliers, anything over 8 mpg was considered good. The appellant contends that the Department of Transport figures are unlikely to be reliable because they are not specific to any particular make or model and do not take into account that the appellant generally transported loads of retail goods which were lighter than the haulage industry generally and had a large number of return trips where the vehicles were empty, thus increasing fuel efficiency.

51. We are satisfied that the Department of Transport figures do take into account trips where vehicles are running empty, approximately 28% of the time. We are not satisfied on the evidence before us that the appellant's vehicles ran empty for any more than this. The appellant has not attempted to provide any support for his father's assertion that fuel consumption of 9 – 11 mpg was likely to be achieved by the appellant's vehicles.

52. In closing submissions the respondents pointed to vehicle DK07 CTU. This vehicle was said by Mr Mansell to have been one of the vehicles which he drove in the business, but which was not one of the 11 vehicles. It had travelled 9,673 km between 2 July 2013 and 31 July 2013 and had used 3,514 litres of diesel. This is equivalent to 7.8 mpg and it is one of the newer vehicles operated in the business. This was not put to the appellant but also it was not challenged by Mr Gibbon in his closing submissions. It is evidence which supports Mr Villiers' estimate.

53. The respondents also suggest that the table showing the fuelling and mileage of Vehicle 1 from 13 August 2013 onwards is consistent with 7.6 mpg. The evidence shows that the appellant put 1,237 litres of fuel into the vehicle and that the vehicle travelled 3,404 km. Assuming the tank was empty at the start and empty at the end then that would equate to approximately 7.6 mpg. However, it does depend on assumptions as to how much fuel was in the tank at the start and the end of the period and it is not clear to what extent these assumptions would affect the calculation. For that reason we do not take it into account.

54. We are satisfied that the fuel consumption achieved by Vehicle 1 and the other vehicles was 7.6 mpg. We accept the basis on which Mr Villiers calculated the figures shown in the table. The table provides at least prima facie evidence that the appellant purchased insufficient legitimate diesel for the mileage covered by Vehicle 1 in the period 9 July 2013 to 11 August 2013. Further, that in the period 13 August 2013 to 6 September 2013 the appellant purchased sufficient legitimate diesel for the mileage covered. This supports the respondents' contention that there as a change in the appellant's behaviour after he was stopped by the RFTU.

55. The appellant has suggested various reasons as to why rebated fuel was found in the tank of Vehicle 1 and why it should be treated as an isolated incident:

(1) In the interview under caution the appellant suggested that it may have been caused by a pump contamination. Fuel had been removed from a refrigeration unit using a pump and it was possible the same pump had been used to draw fuel from Vehicle 1.

(2) In the interview under caution the appellant also suggested that it may have been caused when a second hand fuel tank purchased on eBay was fitted to the vehicle.

(3) In an email dated 30 May 2014 Peter Jemmett suggested that it may have been contaminated fuel purchased from a fuel supplier called Goodwins in Knowsley.

(4) In his first witness statement, dated 27 April 2017 the appellant said that Vehicle 1 was "loaned out in June 2013 for two weeks and rebated fuel must have been put in during that period".

56. We consider each of these possible explanations in turn.

57. In oral evidence the appellant stated that it was a long time ago that he ran refrigerated trailers and it is not clear why that was in his mind at the time of the interview as a possible source of the contamination. There was no explanation as to why fuel might have been drawn from Vehicle 1. We find that this is an unlikely explanation for the presence of rebated fuel.

58. There was conflicting evidence as to the second fuel tank. During the course of the fuel audit, on 3 April 2014 Peter Jemmett told Mr Villiers that a second fuel tank was fitted to Vehicle 1 over 12 months previously with a view to "doing long range". He also said that it was never used and was closed off. Later in an email dated 30 May 2014 he suggested this may have been the source of the contamination.

59. The appellant stated in cross-examination that the second tank was used. He said it was switched on and off when it was needed and he also said for the first time that a sample of fuel had been taken from the second tank by the RFTU when the vehicle was stopped. Fuel was kept in the second tank because it did not draw all the way down, hence it always contained a couple of hundred litres of fuel. He tried to fill it on one occasion and that fuel would be sat in it for months.

60. This was not an explanation suggested prior to cross-examination and we do not find it credible. The only reason given by the appellant in his two witness statements was the fact that Vehicle 1 had been loaned out. There was no clear explanation as to how the second tank could have been the source of the rebated fuel

61. The appellant's oral evidence was that the fuel suppliers which he used most often were Goodwins in Knowsley and Lymm Truck Stop. We accept that evidence. At the time Vehicle 1 was tested, the last refuelling had taken place at Goodwins. The appellant also mentioned in the interview that the last refuelling was in Knowsley.

62. In his oral evidence the appellant described Goodwins as "a dump". It had large fuel tanks above ground which took fuel cards. The fuel pump looks like a normal garage pump with a card reading device into which the fuel card is inserted. Once inserted the user picks which pump to switch on. There are diesel, red diesel and other options.

63. In his oral evidence the appellant stated that a couple of days after he was stopped he became convinced the rebated fuel was from Goodwins. He said that the set up there was "dodgy" and that the fuel "smelled funny". It is true that in an email to Mr Villiers dated 30 May 2014 Peter Jemmett stated that the appellant had asked the RFTU testing officer to check Goodwins.

64. We do not accept the appellant's account that Goodwins was "dodgy" and that he had become convinced shortly after the RFTU test that it was the source of rebated fuel. If the appellant had been convinced that Goodwins was the source he would have said as much in his witness statements. There was no reliable evidence that Goodwins might have been the source.

65. The tachograph records for Vehicle 1 show a gap in the period 20 June 2013 to 8 July 2013. During that period the vehicle covered 2,469 km but there is no independent evidence as to the identity of the driver or drivers. The appellant produced a "Prohibition Notice" issued to the driver of Vehicle 1 by the Vehicle & Operator Services Agency ("VOSA") following a roadside inspection on 28 June 2013 at the A34 Marcham Interchange in Oxfordshire. At that time the vehicle was being driven by a Mr Stephen Ferrer who the appellant stated was not one of his drivers. The appellant was given notice that a fixed penalty had been issued to Mr Ferrer for failing to keep a record of work. The notice stated "enquiries indicate that you were the vehicle operator and the driver was acting on your instructions at the time". If during this period the vehicle was not under the control of the appellant then he should have ensured that the operator's licence was not on display in the vehicle.

66. In his oral evidence the appellant gave much more detail about the circumstances in which Vehicle 1 had allegedly been "loaned out". He said that Vehicle 1 had been sent to a Mr John Farnworth who owned a mechanical workshop where vehicles were repaired. He had sent Vehicle 1 for repair, although he could not recall what the fault was. The appellant stated that Mr Farnworth also operated his own haulage business and had a vehicle which had broken down in Southampton. Mr Farnworth had asked the appellant whether he could use Vehicle 1 to retrieve his own

vehicle and at the same time road test Vehicle 1. Mr Ferrer was a mechanic and driver who worked for Mr Farnworth although the appellant did not know and had never met Mr Ferrer. The appellant left his operator's licence on the windscreen of Vehicle 1 whilst it was with Mr Farnworth for repair and he did not think to take it off. He had no information as to when or how Vehicle 1 was fuelled when it was with Mr Farnworth.

67. The prohibition notice described Mr Ferrer's journey as being from Southampton to Manchester "unladen". The appellant had no explanation for this and there is no evidence he challenged Mr Farnworth over the prohibition notice, the fact the vehicle was unladen and the excessive mileage done in the 2 weeks. Manchester to Southampton return is only 720 km whereas the vehicle travelled 2,469 km whilst it was supposedly with Mr Farnworth for repair.

68. The appellant described Vehicle 1 as a "show vehicle" and as being a "rare" Skania and Mr Farnworth as a Skania expert. The appellant said that he would have been given an invoice for work done by Mr Farnworth and that the invoice would have been given to his father or his accountant. The appellant stated that he did not have evidence from Mr Farnworth to corroborate this account because Mr Farnworth was in Manchester Prison.

69. Peter Jemmett also provided detailed evidence orally in relation to Vehicle 1. He recalled that someone had "jacked the cab up and bent the floor of the hydraulic system". That was why it was taken to Mr Farnworth who had it for a week or 10 days. Peter Jemmett said he had been angry with the appellant for allowing Mr Farnworth to use Vehicle 1 to pull a low loader trailer loaded with another vehicle. He said that there would be no invoice for the work done by Mr Farnworth because he would generally do the work without charge if he could use the vehicle for a day.

70. We do not consider that the appellant's explanation as to the circumstances in which Mr Farnworth used Vehicle 1 prior to 11 August 2013 provides a reliable or likely explanation as to why it tested positive for rebated fuel markers when stopped by the RFTU. The first time this was suggested as a possible cause of the rebated fuel was in the appellant's witness statement dated 27 April 2017. If the appellant really believed that this was the cause it is surprising that he did not inform the interviewing officer on 13 August 2013 that Vehicle 1 had been used by a third party to drive to Southampton some six weeks prior to the interview, or inform Mr Villiers during the course of his audit.

71. Another possibility canvassed in the cross examination of Mr Villiers was a line contamination at a fuel supplier which supplied both rebated fuel and white diesel. The principal suppliers of fuel for the vehicles were Lymm Truck Stop and Goodwins. However such a line contamination would not explain the presence of markers for Irish diesel.

72. The evidence in relation to Vehicle 1 tends to suggest that the presence of rebated fuel in the fuel tank was not an isolated incident.

73. We turn now to consider the other 10 vehicles owned and/or operated by the appellant, in particular whether there was a shortfall in the purchase of legitimate diesel to fuel the appellant's vehicles generally.

74. Mr Villiers estimated that the 12 vehicles originally thought to be used in the business would have required 486,717 litres of diesel during the Assessment Period. This was based on tachograph records and fuel records used to identify or estimate mileages covered, and an estimate of 7.6 miles per gallon.

75. Mr Villiers identified purchases of legitimate diesel amounting to 487,878 litres. However, he considered that of that total, 194,443 litres were used in vehicles other than the 12 vehicles. Further, there was a total of 94,059 litres where due to lack of records he could not identify which vehicle had been fuelled. He estimated that 50.6% of that fuel amounting to 47,594 litres had been used for the 12 vehicles. The basis for that estimate was that the 12 vehicles identified represented 50.6% of the total number of vehicles identified as fuelled in the appellant's records of fuel purchases.

76. Mr Villiers calculated the shortfall in relation to the original 12 vehicles as follows:

	Litres	**Litres**
Estimate of Diesel Required		486,717
Total Diesel Purchased:	487,878	
Identified for Other Vehicles	(194,443)	
Assumed to be for Other Vehicles	(46,465)	
		(246,970)
Shortfall		239,747

77. The appellant criticised Mr Villiers' calculation as follows:

(1) The respondents' estimate of the shortfall of legitimate fuel purchases does not give credit for fuel purchases which cannot now be evidenced.

(2) The respondents have not given credit for fuel purchased using the fuel cards of Kemballs and Coulthards.

(3) The respondent's estimates of fuel consumption are too low.

(4) Vehicle 3 was only in use for 232 days during the Assessment Period rather than the 714 days assumed by the respondents. It had broken down and was off the road for the remaining 482 days.

78. The fuel purchases which the appellant says were made but which cannot now be evidenced relate to fuel cards belonging to customers Wincanton, OOCL Containers and Kingbrook. The appellant says it has not been possible to obtain

evidence of these purchases. Mr Gibbon submitted that fuel supplied in this way should reduce the shortfall by 10%. We have seen no evidence to support the submission that fuel cards belonging to those customers were used to fuel any of the 11 vehicles. The suggestion of a 10% allowance is arbitrary and we do not accept that any allowance should be made.

79. Invoices from Kemballs to PSL show purchases of 129,838 litres of legitimate fuel on Kemballs' fuel cards in the Assessment Period. There is secondary evidence of invoices for a further 7,223 litres of fuel from Kemballs to PSL. The appellant has also produced three invoices from Coulthards totalling 15,645 litres of fuel. The appellant contends therefore that a further 152,707 should be treated as having been legitimately purchased reducing the shortfall to 87,040 litres.

80. Peter Jemmett stated that at any one time two vehicles and latterly one vehicle would be used on the Kemballs contract. He said that virtually every vehicle and driver would at some time work on the Kemballs contract.

81. We were taken to a sample list of Kemballs transactions charged to its fuel card with Key Fuels for June, July and August 2013. The list shows that the vehicle being refuelled on the vast majority of occasions was PO56 OUF. The appellant accepted that he used this vehicle for the Kemballs contract. There are over 40 entries representing separate refuelling transactions. The mileages recorded at the time of each refuelling commence at 643,900 on 1 June 2013 and increase steadily to 678,700 at 28 August 2013. There are a small number of mileages which do not fit the pattern but these seem to represent occasions when the mileage was incorrectly recorded, usually with one digit being incorrect. This cannot have been vehicle PO56 OUF or any of the 11 vehicles because none of them had that mileage at the relevant time. For example, tachograph records show that PO56 OUF had a mileage of 620,342 on 5 June 2013 and in June 2013 it covered only 94 miles.

82. Despite requests the appellant has never provided information as to which vehicles were used to service the Kemballs contract in addition to PO56 OUF. The majority of the invoices from Kemballs are available, but not the supporting paperwork showing which vehicles were being used. Where that paperwork is available it does not show any of the 11 vehicles being used on the Kemballs contract. Vehicle PO56 OUF is not one of the 11 vehicles.

83. In oral evidence the appellant stated that vehicle PO56 OUF was a vehicle which he had hired for one or two weeks and it must have been the first vehicle which was used on the Kemballs contract. He further stated that if a card has a vehicle associated with it, it is not possible to enter another registration when obtaining fuel using a card reader, although such information would be provided if the card was used at a forecourt shop.

84. In his witness statement, Peter Jemmett took issue principally with the failure to give credit for fuel paid for by Kemballs. He maintained that more than one vehicle was used on the Kemballs contract and they were fuelled using a Kemballs fuel card. As such, more legitimate fuel had been purchased than Mr Villiers had given credit

for. By way of aside, it is surprising that Peter Jemmett's witness statement was so limited considering all the issues upon which he gave oral evidence during the hearing.

85. Overall, we are not satisfied from the evidence that any of the assessed vehicles were used on the Kemballs contract.

86. A similar exercise was carried out in relation to subcontract work for Coulthards. Information obtained from Coulthards evidences only one vehicle used on the contract, GM56 HTX which again is not one of the 11 vehicles and is not apparently linked to the appellant. The appellant stated in cross examination that he has no documents which identify which vehicles were used on the Coulthards contract, but that he drove on the contract with Vehicle 1. In the absence of any supporting documentation we do not accept that evidence.

87. We do not accept that any further allowance should be made for fuel supplied using fuel cards provided by Kemballs or Coulthards.

88. The appellant contends that Mr Villiers wrongly assumed that the fuel consumption achieved by vehicles used in the business was 7.6 mpg, whereas the vehicles achieved a fuel consumption of approximately 10 mpg. We acknowledge that if the fuel consumption achieved was 10 mpg then the shortfall would be reduced to 171,038 litres. We note that this would still be a significant shortfall. However, for the reasons already given we are satisfied that the fuel consumption for all the vehicles was 7.6 mpg.

89. Vehicle 3 was assumed to be on the road and being fuelled by the appellant for the period 19 May 2011 to 1 May 2013 when a statutory off road notification (SORN) was made. Mr Villiers says that records the appellant ought to have had available for his operator's licence should show when it was covered by the operator's licence and its mileage. The appellant did not provide those records or any tachograph records for this vehicle. It is shown as being fuelled by the appellant between 24 May 2011 and 21 May 2012. It is shown as being on Christine Vella's operator's licence from 9 January 2012 to 11 November 2012.

90. We accept that taking Vehicle 3 out of the calculations for 482 days would reduce the shortfall by 55,795 litres. Also the fuelling records show it being fuelled until January 2012 with an isolated refuelling thereafter in May 2012.

91. Peter Jemmett stated that Vehicle 3 probably broke down in January 2012 and that the later fuelling was an attempt to test the vehicle. In oral evidence he apparently had a good recollection that the gearbox had been sent to a company in Yorkshire. They had charged £1,000 to inspect it and advised that it needed a replacement gearbox. It was then traded in for another vehicle with A & M Commercials in Warrington. However, there was no documentary evidence at all to support this evidence and we are unable to accept it.

92. We are satisfied on the evidence that Mr Villiers was right to treat Vehicle 3 as being in use between 19 May 2011 and 1 May 2013.

93. Having considered the appellant's specific criticisms of Mr Villiers' calculation of the shortfall we must now consider whether the evidence as a whole provides sufficient evidential linkage to establish use of rebated oil in a provable quantity in the 11 vehicles. In addition to the evidence and findings described above there are other aspects of the evidence which we must consider

94. Peter Jemmett stated that he had never seen any evidence of rebated fuel being used to fuel the appellant's vehicles, no fuel stocks were held at the premises and the amount of rebated fuel said by HMRC to have been used in the business would have required collusion by the drivers.

95. It was put to Mr Villiers that on the day he was stopped the appellant invited the RFTU to test all his vehicles. This is not recorded in the RFTU officer's notebook but Mr Villiers accepted that it would have been good practice for the testing officer to go to the appellant's premises to check all vehicles. It is unfortunate therefore that this did not happen. However, we must determine this appeal on the evidence before us.

96. In closing submissions the respondents pointed out that in the period March 2011 to 11 August 2013 the business records showed average purchases of 16,555 litres per month and in the period after 11 August 2013 to December 2013 the average purchases were 25,156 litres per month. This is an increase in fuel purchases of 52% across the fleet of vehicles. A similar exercise for the 8 weeks before and 8 weeks after 11 August 2013 showed average purchases of 4,229 litres per week compared to 6,166 litres per week. This is an increase in fuel purchases of 46% across the fleet of vehicles.

97. This evidence was not put to the appellant in cross examination. We do not know what other explanation there might be for the increases and therefore we discount it.

98. The appellant contends that no allowance has been made for days when the vehicles might have been off the road through lack of work or for repairs. We are satisfied that the Assessment is made by reference to actual mileages or estimated mileages based on actual mileages for certain periods and that it does take into account weekends, low work periods, and periods when vehicles are off the road.

99. The appellant contends that the business did not have its own fuel storage tank and fuel was purchased using the appellant's fuel cards and fuel cards supplied by customers. The allegation therefore must be that rebated fuel was purchased "off record", but there is no evidence to support such a conclusion. In particular the appellant submits that there is no evidence of widespread use of rebated fuel in the vehicles and no evidence that drivers ever used rebated fuel. The most likely explanation for the supposed shortfall in purchases of legitimate fuel is that the respondents' estimates and assumptions in calculating the shortfall are unreliable.

100. The respondents' case suggests that all the vehicles were fuelled using rebated fuel for 50% of the time, meaning that every driver must have been involved on a regular and frequent basis. Further, fuel must have been purchased off-record and for

cash and there is no evidence as to where such a large amount of cash (said to be £9,400 per month) would come from. Mr Gibbon submitted that the evidence does not support such a widespread and systematic fraud. Indeed, there is evidence from two drivers that vehicles were not fuelled using rebated fuel. The only real evidence of misuse of rebated fuel was in relation to Vehicle 1, and even there the evidence was only of a trace of such fuel.

101. Taking into account the evidence as a whole we do not accept Mr Gibbon's submissions. It is clear from Thomas Corneill that it is not necessary to have direct evidence of the use of specific amounts of rebated fuel in specific vehicles. The absence of any direct evidence as to how rebated fuel was paid for and how it was put into the vehicles does not mean that it is not possible to make any inference as to the extent to which rebated fuel was used. We are entitled to draw inferences from the evidence as a whole, and in doing so we take into account the absence of direct evidence on these matters.

102. There was evidence before us from two drivers. Mr Mansell worked as a driver in the business. He gave the registration numbers of four vehicles he had driven between March 2011 and August 2013. One of the vehicles identified was DK07 CTY which was Vehicle 9. However, in cross examination Mr Mansell accepted this was a typographical error and it should have read DK07 CTU. That vehicle was not one of the 11 vehicles.

103. Mr Mansell described the process of refuelling when he was driving for the Kemballs contract. He would use a Kemballs fuel card including one with the registration number PO56 OUF on it. However he regarded the PIN number as more important than the vehicle registration number on the card.

104. Mr Mansell described the process of using a fuel card. The card is placed in a reader which asks for a PIN number and the mileage of the vehicle. The registration number is pre-programmed into the card. On sites with a retail shop he would go to the shop and present the card before fuelling. The shop swipes the card and asks for the registration number and the mileage.

105. Mr Mansell also stated that he had never refuelled using red diesel and had never seen anyone else doing so. He also confirmed that when he drove on the TJ Hughes contract the return journey was generally empty. Vehicles on that contract were generally loaded up to a maximum of 24 tons, which was light in HGV terms.

106. Mr Mansell's evidence was not challenged and we accept it.

107. Mr Watson was another driver and gave similar evidence to Mr Mansell. He gave the registration numbers of five vehicles he had driven between March 2011 and August 2013. Two of those vehicles had also been driven by Mr Mansell. In cross examination he accepted that he had driven a sixth vehicle which was not one of the 11 vehicles.

108. We note that the Assessment does not include fuel used by 2 of the vehicles which Mr Mansell and Mr Watson said that they drove on behalf of the Appellant in

the Assessment Period. Similarly, it does not include fuel used by vehicle PO56 OUF said by the appellant to have been used on the Kemballs contract. The appellant has at no stage informed Mr Villiers that these were vehicles which had been used on PSL contracts, or indeed given Mr Villiers a full list of vehicles used.

109. Taking into account all the evidence and our findings set out above we are satisfied that significant amounts of laundered or rebated fuel were used in the 11 vehicles. The best estimate of the volume of such fuel used in the vehicles is the calculation performed by Mr Villiers.

(2) The Relationship between the Appellant and PSL

110. PSL was incorporated on 27 August 2008. The appellant was its sole director and shareholder. It operated as a road haulier contracting with customers to provide haulage services. It had some large customers including Lewis Home Retail Ltd (trading as TJ Hughes). PSL also acted as a sub-contractor for other haulage contractors, in particular Kemballs and Coulthards. PSL did not own its own vehicles and it did not have its own operator's licence.

111. PSL was VAT registered with effect from 18 November 2008 until it de-registered retrospectively with effect from 1 July 2013. Its trade class was "freight transport by road". The appellant was himself VAT registered as a sole trader with effect from 1 August 2007, until he deregistered on 11 June 2014. His trade class was "employment placement agency". The circumstances of these VAT registrations and de-registrations were not explored in the evidence.

112. It was common ground that there was an arrangement whereby the appellant provided PSL with the wherewithal to operate as a haulage contractor. PSL contracted with and was paid by customers without itself owning or operating any vehicles. Invoices from Kemballs and Coulthards for fuel used on sub-contract work were all addressed to PSL. It was the appellant who owned and leased the vehicles which were used in PSL's business, who paid the drivers wages and who paid for the fuel. There was considerable informality in relation to this arrangement. Such informality is not uncommon in the arrangements between small companies and their directors and we draw no adverse inference from the informality itself.

113. The appellant stated that he did not regard himself as being in business on his own account supplying services to PSL. He regarded himself as permitting PSL to use his facilities such as his vehicles and his banking facilities. He did not invoice PSL. PSL was running the business, although if asked he would say it was his business. It was his case that the financial arrangements between himself and PSL were reflected in a director's loan account. However, there is no evidence that a director's loan account was maintained as such.

114. The respondents' case was that PSL was operating a haulage business, contracting with customers to carry out haulage services. The appellant was a sole trader providing PSL with fuelled vehicles which he owned or leased together with

drivers which he paid. If the respondents are correct in their analysis of the position then, as Mr Gibbon pointed out, the appellant should have accounted for VAT on supplies of services to PSL. He did not do so and the respondents have never challenged the appellant's VAT position.

115. When the appellant was interviewed under caution on 11 August 2013 he stated that he owned Vehicle 1 and that he was a self-employed haulier trading under the name Perfect Solutions and was VAT registered. He stated that he had three tractor units and a Ford transit van. This is consistent with his evidence for the purposes of this appeal that by 11 August 2013 his involvement with PSL had ceased.

116. The evidence as to the relationship between the appellant and PSL and as to the circumstances in which the appellant came to cut his links with PSL was in many respects confusing, vague and unclear. The position has not been helped by the piecemeal way in which evidence as to the relationship has been adduced, partly in the appellant's second witness statement but more particularly in his oral evidence and that of his father.

117. We do at least know and find that Companies House was notified on 7 November 2013 that the appellant had resigned as a director with effect from 18 July 2013, which was the month before the RFTU stopped the appellant's vehicle. An annual return to Companies House was made on 7 November 2013 which showed that as at 27 August 2013 the appellant remained the sole shareholder. Companies House was also notified on 20 December 2013 that a Mr Mark Vella had been appointed as a director with effect from 1 June 2013. PSL was subsequently dissolved on 18 August 2015.

118. There are two aspects to the appellant's arrangements with Mr Vella and PSL which have significance for this appeal. Firstly, the appellant contends that PSL was liable for any rebated fuel used in the 11 vehicles during the Assessment Period. Secondly, the appellant and Peter Jemmett stated for the first time in oral evidence that Mr Vella had refused to give them access to the records of PSL for the purposes of Mr Villiers road fuel audit. This was not something that Mr Villiers was told during the course of his audit.

119. The appellant's case in his second witness statement dated 19 June 2017 was that he conducted his business through PSL until 13 July 2013. The transport manager of PSL was identified as Mr Mark Vella. The appellant stated that PSL had no overdraft facility but that he had a personal business account with an overdraft facility of £18,000 secured against his house. He commenced trading through PSL on the advice of his accountant, but he acted as a source of funds for PSL. PSL contracted with customers and issued invoices to those customers. Most trade debts were factored with Silverburn Finance, although payments from some customers were paid into the appellant's account. Sums payable by Kemballs and TJ Hughes were paid into PSL's account without being factored. All costs were paid by the appellant though his business bank account. The appellant recouped this money by transfers from PSL. The bank account of PSL was used so that it would build up financial credibility and the appellant was trying to build up this account so that it could satisfy

the requirement for a certain credit balance if PSL was to obtain its own vehicle operator's licence.

120. The appellant produced bank statements for an account in the name of PSL and for two personal accounts in which he was described as "Daniel Jemmett trading as Perfect" and "Daniel Jemmett trading as Perfect Solutions".

121. During the course of his oral evidence the appellant stated that PSL was in fact a joint venture for the appellant and Mark Vella. Originally the appellant and Mr Vella had separate businesses and they both serviced Kemballs. PSL was set up in 2008 by an accountant called Mr McGuinness, who was Mr Vella's accountant. The appellant understood that Mr Vella was also a director and shareholder of PSL. In fact it does not appear that Mr Vella was ever appointed as a director and never held shares in PSL. The appellant was the sole director and sole shareholder. There was no explanation as to why that was the case.

122. In his oral evidence the appellant provided considerable detail about his relationship with Mark Vella. He said that they were neighbours in the yard, which was occupied by various businesses. They were both haulage contractors. On occasions Mr Vella had hired vehicles from the appellant. They had done bits of work together before PSL commenced trading. Mr Vella worked for PSL and was responsible for the yard and the office. He looked after PSL's records and organised the drivers. The appellant was a driver and looked after the mechanical side of the vehicles. He described it as "not an easy relationship" and said that they did not get on in many ways. They had arguments and things went missing from the yard. The appellant therefore decided that it would be better if they ceased working together.

123. The appellant stated in his witness statement that PSL lost the TJ Hughes contract. As a result, plans to expand the business were not feasible and that caused him to resign as a director of PSL and transfer his shares to Mark Vella. He said that he was also concerned that some of the business vehicles which were covered by an operator's licence of Christine Vella would not be available to PSL. Christine Vella was Mark Vella's mother and we understand that Vehicle 3 and Vehicle 4 were on her operator's licence at least for part of the Assessment Period. We note that the contact details for Christine Vella for the purposes of her operator's licence included Peter Jemmett's email address. Peter Jemmett was unable to explain why that was the case. There was no reliable evidence to explain why vehicles owned by the appellant were operated on Christine Vella's operator's licence. It is consistent with PSL effectively being a joint venture company between the appellant and Mr Vella, but there was no evidence as to the financial arrangements between Mr Vella on the one hand and the appellant and PSL on the other.

124. We understand that HGV vehicles operated under an operator's licence must be notified to the Transport Commissioner and entered in the operator's records within 28 days. The two vehicles on Christine Vella's operator's licence were put on her operator's licence on 9 January 2012. Prior to that they were not on the appellant's operator's licence but they were fuelled on the appellant's fuel cards between May 2011 and September 2012.

125. The appellant had an operators licence for 5 vehicles at any one time. The trading name of the appellant was given as "Perfect" and the address of the operating centre was the Wardley Premises. Mr Mark Bates was identified as the transport manager.

126. The appellant's case is that he transferred PSL to Mark Vella in or about June 2013 and that Mr Vella did not pay him anything for PSL. The appellant simply wanted to walk away with his vehicles to do his own thing, although they remained neighbours in the yard. Eventually Mr Vella moved out of the yard and since then the appellant says that he has not been able to get hold of him to obtain company records relevant to this appeal.

127. The appellant stated that when he left PSL he wanted out of haulage contracting altogether. It was too much for him and he didn't want to do it anymore. Mr Vella would not provide any information to the appellant for the purposes of Mr Villiers enquiries. The appellant says that he pressed Mr Vella quite a lot but he was hard to get hold of and was often in Malta.

128. Peter Jemmett's witness statement was silent as to the relationship between the appellant, PSL and Mr Vella. He stated in his oral evidence that from the beginning he did not trust Mr Vella. When PSL lost the TJ Hughes contract he advised the appellant to part company with Mr Vella and that Mr Vella wanted to keep PSL. He said that the accountant Mr McGuinness did the paperwork to transfer PSL to Mr Vella. The paperwork was not in evidence and we heard no evidence from Mr Vella or from Mr McGuinness.

129. We have commented above on the absence of certain documents and records which hampered Mr Villiers in conducting his fuel audit. For example, at a very basic level the appellant was asked to provide a list of all vehicles which he and/or PSL operated but no such list was ever provided. Peter Jemmett stated for the first time in his oral evidence that he had personally tried to get the information and records from Mr Vella, such as driver's time sheets, mileage records and fuel records.

130. If the evidence of the appellant and his father is true then it is surprising that Peter Jemmett never told Mr Villiers that he was having difficulties getting information from Mr Vella. The only reference during the audit to difficulties in obtaining paperwork was to a break-in at the appellant's premises on 25 May 2014. During cross-examination Peter Jemmett stated that he knew that there had been a break-in at the appellant's portacabin at the yard but otherwise didn't know anything about it. However, he had referred to the break-in in an email to Mr Villiers dated 30 May 2014 where he put it forward as a reason why he was having difficulty supplying the information required by Mr Villiers. Peter Jemmett said in his email that three vehicles, a laptop and some paperwork had been stolen. In his oral evidence he said that he must have forgotten those details, which we did not find credible.

131. The appellant produced what purport to be employee payslips for himself relating to four weeks in 2011. We understand that the payslips were produced to show that the appellant was employed by PSL. The payslips show the appellant being

paid basic pay of £100 per week, with tax at 20% being deducted. The appellant stated that his accountant or Mark Vella had produced them, but he did not know whether he had received them at the time. There was no evidence that the individual sums were paid by PSL to the appellant. The appellant did not know what wage he received from PSL. When asked how much he earned each year he did not know, and just said that his father sorted it out. There is no evidence that these sums were paid into the appellant's bank accounts. The bank statement evidence was incomplete, but there was evidence of regular payments being received by the appellant into his personal business account t/a Perfect of £600 per week in April 2011 and £700 per week in January, February, November and December 2012. The appellant accepted that sounded about right. However, there was no evidence that the appellant accounted for tax on those payments, either through PAYE or through self-assessment. His self-assessment account was dormant.

132. We accept that the appellant has difficulties with such matters. We are left with a very confused picture as to the relationship between the appellant and PSL. What is clear however and what we find is that the appellant was responsible for providing vehicles, fuel and drivers for use by PSL on its contracts.

(3) Was the appellant liable for rebated fuel being used in the vehicles?

133. The appellant contends that the persons who used the oil for the purposes of section 13(1A) HODA 1979 were the drivers who fuelled the vehicles. Further, the person who was liable for any rebated fuel being taken into the fuel tanks was PSL. PSL was operating the business in which the vehicles were used. It was irrelevant that it was the appellant who paid for any fuel prior to being reimbursed and who held the operator's licence. It was PSL which benefitted from use of the vehicles. It could not have fulfilled its contracts without the vehicles. It was both using the oil and liable for the oil being taken into the vehicles.

134. The respondents contend that PSL operated a haulage business, contracting with customers to carry out haulage services. The appellant was a sole trader providing vehicles which it owned or leased to PSL together with drivers which he paid. As such they contend that the appellant was liable for rebated fuel being used in the vehicles.

135. For the reasons given above we cannot make any finding as to the precise nature of the relationship between the appellant and PSL. In particular we cannot say whether the appellant was in business on his own account supplying services to PSL or whether he was simply permitting PSL to use his assets and providing the wherewithal for it to operate its business as a haulage contractor. It is however clear that the dealings of PSL and the appellant were closely intertwined. The appellant provided the vehicles and made provision for them to be fuelled and driven to carry out PSL's haulage contracts. He held the fuel cards and paid for the fuel supplied by virtue of those fuel cards, save in respect of the Kemballs and Coulthards contracts. On any view of the relationship between the appellant and PSL we are satisfied that the appellant was responsible for rebated fuel being used in the 11 vehicles and is "liable" for the purposes of section 13(1A) HODA 1979.

136. We acknowledge that initially Mr Villiers road fuel audit was targeted at PSL. However we consider that Mr Villiers was right to pursue the appellant as a person liable under section 13(1A) HODA 1979.

137. Mr Gibbon submitted that the test was who benefited from the use of the road vehicles, and by implication who would benefit if rebated fuel were used as road fuel in the vehicles. We do not accept that submission. In our view the real question is who is responsible for rebated fuel being used in the vehicle. That may be a person who benefits financially from the use of rebated fuel but is not limited to such persons. We are satisfied that the appellant must have been aware that rebated fuel was being used in the vehicles. They were his vehicles and were being provided by him with fuel for use by PSL. He had overall responsibility for fuelling the vehicles. He would also benefit, if only indirectly as the sole shareholder of PSL.

(4) Did the appellant deliberately use rebated fuel as fuel for the vehicles?

138. In his oral evidence the appellant was asked whether he had ever put rebated fuel into his vehicles. He stated that he had done so once by accident when in Ireland, when he was confused with the pump colours. This was well before 11 August 2013 and was not the cause of the positive test from Vehicle 1.

139. We do not accept the appellant's evidence. We have found large scale use of laundered and/or rebated fuel in the 11 vehicles. We are satisfied from the extent such fuel was used that it was used deliberately. Whilst there is no evidence to identify the precise means by which the appellant caused such fuel to be used and paid for, we are satisfied that he was responsible. It was in his financial interests to use laundered or rebated fuel.

140. The evidence as a whole and our findings of fact based on that evidence lead us to conclude that the appellant deliberately used laundered and/or rebated fuel in the 11 vehicles.

The Penalty

141. The penalty in the present case was imposed pursuant to Schedule 41 FA 2008. Paragraph 3 Schedule 41 provides that a penalty is payable where someone does an act which enables HMRC to assess an amount as duty due from that person under various provisions, including section 13(1A) HODA 1979. Paragraph 5(3) then sets out varying degrees of culpability where the act may be described as "deliberate and concealed" or "deliberate but not concealed". In the present case HMRC contend that the appellant's act of using rebated fuel was deliberate but not concealed. They accept that the appellant did not make arrangements to conceal the use of rebated fuel.

142. The penalty payable pursuant to paragraph 3 Schedule 41 is 100% of the potential lost revenue ("PLR") for a deliberate and concealed act, 70% of the PLR for a deliberate but not concealed act and in any other case 30% of the PLR. Paragraph 9 provides that the PLR is the amount of duty which may be assessed as due.

143. Paragraphs 12 and 13 provide that if a person liable to a 70% penalty has made a disclosure then HMRC must reduce the percentage to one which reflects the quality of the disclosure. The reduction applies where the person discloses the relevant act, which in the present case is the act of using rebated fuel in the fuel tanks of the 11 vehicles. A person discloses the relevant act by telling HMRC about it, giving HMRC reasonable help in quantifying the unpaid duty and allowing HMRC access to records for the purpose of checking how much duty has been unpaid.

144. A reduction for disclosure cannot reduce the penalty below certain minimum levels. The minimum penalty is 35% in the case of a "prompted disclosure" and 20% in the case of an unprompted disclosure. A prompted disclosure is one which is made at a time when the person making it has reason to believe that HMRC have discovered or are about to discover the relevant act.

145. There are also provisions to reduce a penalty in the case of special circumstances, but it has not been suggested that there are any special circumstances in the present case.

146. Mr Villiers considered that the act of putting rebated fuel into the appellant's vehicles was deliberate. Further, the appellant's disclosure in the sense of telling HMRC about it, helping to quantify the unpaid duty and providing access to records for the purpose of checking the amount of unpaid duty was prompted. In accordance with the respondents' policy he gave a reduction of 5% out of a maximum 30% for telling the respondents about use of rebated fuel, 10% out of a maximum of 40% for helping to quantify the unpaid duty and 15% out of a maximum of 30% for giving access to records to quantify the unpaid duty. The total reduction was therefore 30%.

147. In accordance with HMRC policy, Mr Villiers reduced the difference between a 70% penalty and a 35% penalty by 30%. The reduction from the maximum penalty was therefore 10.5% giving a penalty of 59.5% of the PLR. We should say that the maximum reduction for each element of disclosure, and the way in which the overall reduction is calculated reflects the respondents' policy but it does not bind us as such.

148. The appellant does not take issue with the rate of penalty. However he does contend that it has been addressed to the wrong person. It ought to have been addressed to PSL. He also takes issue with the PLR relying on the same issues identified in connection with the quantum of the Assessment. The appellant also argues that the burden of establishing the PLR lies on the respondents and that there is no burden on the appellant to establish that the PLR is excessive.

149. For all the reasons given above we are satisfied that the penalty is payable and that it has properly been notified to the appellant. Further, we are satisfied that the PLR is the amount of the Assessment and that it is not excessive.

Conclusion

150. In the light of our findings of fact and for the reasons given above we must dismiss the appeal against the Assessment and against the Penalty.

151. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2018