[2017] UKFTT 766 (TC)

TC06174

Appeal number: TC/2015/05247

EXCISE DUTY – use of rebated fuel in commercial vehicles – whether sufficient evidence to rebut best judgment assessment – yes – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

K&M FENCING **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK
MR DAVID BATTEN

Sitting in public at Southampton Magistrates' Court, The Avenue, Southampton on 28 July 2017

Mr Marc Povey for the Appellant

Daniel Steinberg, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

INTRODUCTION

1. This is an appeal by K&M Fencing ("K&M") from a decision of the Commissioners for Her Majesty's Revenue & Customs ("HMRC") dated 10 August 2015.

2. The decision was a review of an assessment by HMRC dated 2 May 2014 for excise duty in the amount of £13,864 under section 13(1A) of the Hydrocarbon Oil Duties Act 1979 ("HODA") for the period 1 May 2010 to 7 June 2013. The decision upheld the previous assessment.

THE HEARING AND EVIDENCE

3. HMRC produced a bundle of documents for the hearing. We accepted these documents in evidence. In addition, Mr Povey produced some email correspondence between the appellant and the Tribunal and HMRC produced further email correspondence. We accepted these additional documents in evidence.

4. The documentary evidence included a witness statement of Mr Stuart Heath, an officer of HMRC. Mr Heath also gave witness evidence in relation to the main issue.

5. The appellant sought to adduce witness evidence of Mr Povey and Mrs Angela Grant, an employee of the appellant. HMRC objected to this evidence and, as a preliminary issue, made an application for a direction that the appellant should not be permitted to call witness evidence. We heard arguments on the preliminary issue in advance of the main substantive issue.

THE PRELIMINARY ISSUE

Background

6. The Tribunal issued directions on 10 August 2016 which, in paragraph 2, required that:

> "Not later than 23 September 2016, both parties shall provide to the Tribunal and each other a statement detailing:
>
> a. whether or not witnesses are to be called and if so their names…"

The appellant did not provide a list of witnesses before the date specified in the directions.

7. On 12 January 2017, the Tribunal sent a letter to the parties asking for their listing information and the names of the witnesses that they intended to call. The parties were allowed 21 days to provide that information. HMRC complied with this direction and subsequently served a witness statement of Mr Heath, together with its exhibits.

8. On 25 January 2017, Mr Povey sent an email to the Tribunal to provide dates to avoid. His email also stated:

> "With regards to the witnesses, the subcontractors who worked for us at the time of the finding of the fuel no longer work for K&M Fencing and we would have to get them to take time from their current work commitments to be witnesses, again is this something we can provide at a later date after the hearing or are they required to be at this hearing?"

9. The Tribunal replied to Mr Povey on 14 February 2017. The Tribunal's reply noted that the appellant had not complied with the direction in relation to witnesses and stated:

> "Please note that if you do not give the Tribunal the names of your witnesses, the Judge at the hearing may rule that you cannot call any witnesses."

10. On 27 February 2017, Mrs Grant sent an email stating:

> "Thank you for the confirmation of the procedure, can I confirm that you have Mr Mark Povey and myself, Mrs Angela Grant, as being present at the hearing and the dates to avoid are April 2017 please?"

11. No further communication was received by the Tribunal from the appellant regarding the evidence of witnesses. Mr Povey and Mrs Grant attended the hearing. Both of them intended to give witness evidence.

The parties' submissions

12. Mr Steinberg, for HMRC, makes the following points:

(1) The appellant has not complied with the Tribunal's directions of 10 August 2016 and 12 January 2017 in respect of identifying witnesses.

(2) In particular, the email of 27 February 2017 sent by Mrs Grant did not state whether or not Mr Povey or Mrs Grant would give evidence at the hearing. Nor did it state whether or not the appellant would call any other witnesses.

(3) No witness statements have been served by the appellant in support of its case.

(4) The Tribunal's directions are intended to provide for the efficient conduct and preparation of appeals. The appellant was warned of the consequences of failing to comply with the Tribunal's directions. No good reason has been given by the appellant for its failure to comply with the directions.

(5) Following the decision of the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55, it was incumbent upon the Tribunal to adopt a stricter approach to failures to comply with directions. The appropriate sanction was to prohibit the appellant from calling any witness evidence.

13. Mr Povey simply reiterates the point made in his letter of 25 January 2017 that it would be difficult for the appellant to call any of the subcontractors as witnesses given that they would have other work commitments at the time.

Decision

5 14. We decided to refuse HMRC's application for a direction to prohibit the appellant from adducing witness evidence.

15. Our reasons were as follows:

(1) Mrs Grant had identified in her email of 27 February 2017 that Mr Povey and Mrs Grant would attend the hearing. Although it was not couched in 10 technical terms, given the nature and context of the correspondence as a whole, her email could be read as intended to convey the message that both she and Mr Povey would participate fully in the hearing, including giving witness evidence.

(2) The only witness evidence on which the appellant was seeking to rely was the evidence of Mr Povey and Mrs Grant. This was not a case where the 15 appellant was seeking to gain an advantage by producing unknown witness evidence at a late stage. There was no material prejudice to HMRC.

(3) The Tribunal's directions at no stage required the parties to produce witness statements. It would be wrong to criticise the appellant for having failed to do so.

20 (4) Mrs Grant's response was given as part of the continuum of correspondence between the Tribunal and the appellant. Whilst the notification may have been given a few weeks after the date originally set by the Tribunal in its letter of 12 January 2017 for the submission of lists of witnesses, the breach was not serious.

25 16. For all of these reasons, and taking into account the Tribunal's obligation, when it exercises its powers, to give effect to the overriding objective to deal with cases fairly and justly, we decided that it was in the interests of justice to allow Mr Povey and Mrs Grant to give their evidence.

THE SUBSTANTIVE ISSUE

30 17. The main issue in this case relates to an assessment for excise duty for the use of rebated fuel ("red diesel") in commercial vehicles under section 13(1A) HODA. The assessment was in the amount of £13,864.

Background

18. The background facts leading to the assessments are largely undisputed. We have 35 set them out below. We have sought to identify in the following paragraphs any circumstances where the facts are in dispute.

19. The appellant is based in Southampton. It carries on business supplying and erecting fences. It has a fleet of vehicles.

20. On 8 June 2013, officers from HMRC's Road Vehicle Testing Unit visited the appellant's premises in Southampton. The fuel in two of the vehicles on the site tested positive for traces of red diesel. Those vehicles had registration numbers M3POV and N11ARX. (At the time, the appellant had nine vehicles in use in the business. The number of other vehicles that were tested during the visit by HMRC officers on 8 June 2013 is subject to dispute. We refer to this issue in our discussion of the witness evidence.)

21. The two vehicles that had tested positive were seized as liable to forfeiture under section 139 of the Customs and Excise Management Act 1979 ("CEMA").

22. On the same day, HMRC offered to restore the vehicles to the appellant for a sum of £1,111. The restoration fee was made up of penalties of £1,000 and arrears of duty in the sum of £111. The penalties and arrears of duty were paid and the vehicles were restored. The legality of the seizure of the two vehicles was not challenged by the appellant at the time and has not been subsequently challenged.

23. The restoration agreement contained the following statement:

> "This is without prejudice to any further action that HM Revenue & Customs may take against you in connection with this seizure, including collection of duty arrears."

24. The HMRC officers also questioned the office manager. He stated that:

(1) there were four or five people employed by the business who had fuel cards for any or all of the vehicles;

(2) there were five further subcontractors who were responsible for their own fuelling and could use any of the company's vehicles;

(3) the business had a 2000 litre stock tank on the site. 1,000 litres of fuel were delivered to the site every few months.

25. On 8 October 2013, HMRC wrote to the appellant to notify the appellant that it intended to carry out a fuel audit of the business. HMRC requested records of fuel purchases and information regarding all vehicles to be supplied by 4 November 2013. The appellant did not respond to this request. HMRC sent out a reminder letter on 13 January 2014 requesting a response by 3 February 2014. No response was received from the appellant.

26. On 7 February 2014, HMRC wrote to the appellant stating that, as it had not provided any information or records, HMRC would assume that all of its vehicles were run on red diesel.

27. HMRC issued various other documents to the appellant concerning the potential assessment and related penalties and then, on 2 May 2014, HMRC issued an

assessment to the appellant for unpaid arrears of excise duty for the period 1 May 2010 to 7 June 2013 in the amount of £17,649.

28. On 13 May 2014, Mrs Grant wrote to HMRC. She stated that since the seizure of the vehicles, two members of staff had been dismissed for the misuse of fuel. She also stated that half of the staff were self-employed subcontractors who were entitled to use the appellant's vehicles and fuelled those vehicles themselves.

29. On 19 May 2014 HMRC made a further request for the information that it had previously sought. Mrs Grant provided vehicle registration certificates, invoices showing details of fuel purchases and further information on 24 and 27 June 2014. Further correspondence ensued between HMRC and the appellant.

30. In the light of the information that had been received, Mr Heath wrote to the appellant on 17 September 2014. In his letter, Mr Heath set out a revised calculation of the arrears of excise duty for the period from 1 May 2010 to 7 June 2013. That calculation was built up as follows:

(1) for each of the nine vehicles: Mr Heath estimated its mileage in the assessment period by reference to its MOT history;

(2) using the manufacturers' published figures for fuel usage, he calculated the fuel that each vehicle would have used to achieve the estimated mileage;

(3) he then aggregated the amount of fuel that would have been used by each of the nine vehicles to obtain a total amount of fuel that would have been used by the appellant and deducted from that total amount, the amount of non-rebated fuel ("white diesel") for which invoices had been received from the appellant;

(4) on the assumption that the appellant had used red diesel evenly throughout the assessment period to fuel commercial vehicles, he then estimated the arrears of duty by reference to the differences in rates at which duty was charged on red diesel and white diesel in the assessment period.

On his calculation, the arrears of duty were £15,398. HMRC reduced the assessment to this amount.

31. On 19 September 2014, Mrs Grant wrote to Mr Heath by email. She informed Mr Heath that the calculations were not correct because they did not take into account the purchase of fuel by subcontractors. The subcontractors had access to and fuelled the vehicles. They kept their own invoices and receipts and so those invoices and receipts could not be sent to HMRC.

32. On 3 October 2014 and 24 October 2014, HMRC requested details of the members of staff who had been dismissed. Mr Povey replied by email on 7 November 2014. He raised various issues relating to the assessment, but he did not provide details of the members of staff. He said that he did not have the details as these were usually requested at the end of week before the workers were paid, but the members of staff in question were new members of staff who had left without pay

before the end of the week. He suggested that it would not be worth seeking to track them down because "they would only deny it and cause serious repercussions".

33. In his email, Mr Povey raised the question of the negative tests on other vehicles. Mr Heath made enquiries of relevant Road Fuel Testing Units within HMRC. On 24 December 2014, Mr Heath wrote to Mr Povey. In that letter he stated that he had spoken to the local Road Fuel Testing Units who had no record of the negative tests. He asked for further details of the relevant tests and, once again, asked for details of the staff who had been dismissed.

34. There was further correspondence between HMRC and the appellant in which HMRC sought to obtain further information. Following those enquiries, Mr Heath wrote to Mr Povey on 13 February 2015 advising him that the assessment of £15,398 would stand and that the appellant should request an appeal or a review if it contested this decision.

35. The appellant requested a review of the assessment on 24 February 2015.

36. The reviewing officer, Ms Pauline Loughridge, requested additional evidence in a letter dated 26 March 2015. There followed an exchange of correspondence in which the appellant provided additional information including further invoices showing the purchase of fuel, declarations made by sub-contractors confirming that they fuelled the vehicles themselves and construction industry scheme monthly returns giving the names and numbers of subcontractors.

37. Ms Loughridge issued her review decision on 10 August 2015. She reduced the assessment to £13,864 in the light of the additional information that had been received and certain technical errors in the initial assessment. In all other respects, she upheld the original assessment.

38. By a Notice of Appeal dated 2 September 2015, the appellant appealed to the Tribunal.

The relevant legislation

39. The relevant legislative provisions are found in HODA and the Finance Act 1994 ("FA 1994").

40. HODA imposes duty on hydrocarbon oil. Section 6 provides:

> **6. Excise duty on hydrocarbon oil**
>
> (1) Subject to subsections (2) … and (3) below there shall be charged on hydrocarbon oil—
>
> (a) imported into the United Kingdom; or

(b) produced in the United Kingdom and delivered for home use from a refinery or from other premises used for the production of hydrocarbon oil, or from any bonded storage for hydrocarbon oil not being hydrocarbon oil chargeable with duty under paragraph (a) above

a duty of excise at the rate specified in subsection (1A) below.

41. The rates of duty specified in subsection (1A) were set at different levels for different parts of the assessment period. They are not in dispute in this case. There is no definition of the term "home use" in HODA. However, it was common ground in *Thomas Corneill & Co Limited v. Revenue & Customs Commissioners* [2007] EWHC 715 (Ch) ("*Corneill*"), that "home use" in section 6 means use in the UK market (*Corneill*: [8]) and there was no dispute on that point in this case.

42. Section 11 HODA allows a rebate against duty charged under section 6. So far as relevant, it states as follows.

11 Rebate on heavy oil

Subject to subsections 12, 13, 13AA and 13AB below, where heavy oil charged with the excise duty on hydrocarbon oil is delivered for home use, there shall be allowed on the oil at the time of delivery a rebate of duty at a rate …"

Then various rates are set out.

43. Section 12 provides that the rebate does not apply to fuel which is used or to be used in road vehicles, and so re-imposes duty at the full rate. Section 12, so far as relevant, reads as follows:

12 Rebate not allowed on fuel for road vehicles

(1) If, on the delivery of heavy oil for home use, it is intended to use the oil as fuel for a road vehicle, a declaration shall be made to that effect in the entry for home use, and thereupon no rebate under Section 11 above shall be allowed in respect of that oil.

(2) No heavy oil on whose delivery for home use rebate has been allowed whether under Section 11 above or 13AA below, shall -

(a) be used as fuel for a road vehicle; or

(b) be taken into a road vehicle as fuel

unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under Section 24(1) below for the purposes of this section.

44. Section 13(1A) permits HMRC to assess for arrears of duty where rebated oil (red diesel) is used in a road vehicle in contravention of section 12(2). It reads 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 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.

45. The assessment on K&M in this case was made under section 13(1A).

46. The powers of the Tribunal in relation an appeal against an assessment under section 13(1A) HODA are set out in section 16 FA 1994. Sub-sections (4) and (5) provide as follows:

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

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

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

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

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

47. An appeal against an assessment under section 13(1A) HODA is not a decision in relation to an "ancillary matter" (as defined in section 16(8) FA 1994). As result, the powers of the Tribunal are not limited to those in section 16(4). The Tribunal has power to quash or vary any decision and power to substitute its own decision for any decision quashed on appeal as provided by section 16(5).

48. By virtue of section 16(6) FA 1994, the burden of proof lies with the appellant to show that the grounds on which any appeal is brought have been established.

Grounds of appeal

49. The Notice of Appeal set out four grounds of appeal. In summary, they were as follows.

(1) The assessment raised by HMRC relates to an amount of fuel that exceeds the total fuel purchased by the appellant in the assessment period.

(2) The shortfall in fuel was assessed on all vehicles, including the vehicles which the subcontractors fuel themselves. Traces of red diesel were found only in two vehicles.

(3) Two members of staff were responsible for the wrongdoing. They have been dismissed. This was the only time at which vehicles were tested and the tests proved positive. There had been other tests, but all of them proved negative.

(4) The appellant paid the penalties and arrears of duty on 10 June 2013 and believed that that was the end of the matter.

The issues before the Tribunal

50. The main issue in this case relates to the reasonableness of the assumptions and estimates made by HMRC in arriving at the assessment of duty.

51. At the hearing, and in their evidence, Mr Povey and Mrs Grant raised various objections to the assessment. These objections broadly followed the grounds set out in the Notice of Appeal. However, in this decision notice, we have described the categories slightly differently in order to reflect the points as raised at the hearing.

HMRC's position

52. HMRC's position is that the assessment is justified. Mr Steinberg for HMRC says that there is no dispute that traces of red diesel were found in the tanks of the two vehicles at the time of the inspection on 8 June 2013. He says that, due to the failures of the appellant to provide information when requested, it was reasonable for HMRC to make an assessment based on estimates and best judgment.

53. In support of this position, Mr Steinberg referred to the decision of Mr Justice Mann in *Corneill*. He says that the decision in *Corneill* is authority for the propositions that:

(1) although no reference is made in section 13 HODA to the use of best judgment in arriving at an assessment, it is appropriate to use that method of assessment when inferences need to be drawn from primary facts;

(2) when making such an assessment, it is reasonable to extrapolate results of vehicles that have been tested to the fleet of vehicles operated by the same taxpayer.

54. Mr Steinberg says that the assumptions made by HMRC were reasonable, that it was for K&M to show that the assessment was excessive and that K&M had not provided sufficient evidence to demonstrate that the assessment was excessive.

The appellant's criticisms of the assessment

5 55. The appellant raised various criticisms of the assessment and of the estimates and assumptions which underlie it. We have dealt with each of these criticisms below. In each case, we have summarized the issue raised by the appellant, the evidence produced by the parties and given our views on that evidence. Our overall conclusions are set out in the discussion towards the end of this decision notice.

10 *The assessment relates to an amount of fuel that is greater than the amount used in the business in the period*

56. Mr Povey's first point is that the assessment assumes that the business used an amount of fuel that is greater than the amount actually used in the business in the period.

15 57. In support of this submission Mr Povey and Mrs Grant referred to a number of invoices for purchases of red diesel and white diesel. The invoices for white diesel were more than sufficient to cover the mileage of the yard vehicles in the period of assessment in question.

58. HMRC say that the appellant has had ample opportunity to produce invoices for
20 all fuel purchases. The invoices do not show sufficient fuel purchased to cover the mileage of all the relevant vehicles. Mr Heath's calculation took account of legitimate fuel purchases.

59. Having considered the evidence, we think that the differences between the parties on this point are explained by some of the other issues to which we refer below. This
25 applies in particular to the fuelling of vehicles by subcontractors.

The subcontractors fuel vehicles themselves

60. Mr Povey's second point is that the subcontractors fuel their own vehicles and so it was unreasonable to expect the appellant to have invoices in respect of all legitimate purchases of fuel in the period.

30 61. In his evidence, Mr Povey described in some detail the manner in which his business operated. He made the following points.

(1) The appellant purchases red diesel for legitimate uses. These include the operation of forklift trucks and fuel for the on-site generator. Red diesel is kept on-site. No white diesel is kept on-site.

35 (2) The appellant also purchases white diesel for the operation of road vehicles. Mr Povey referred to these vehicles as "yard vehicles".

(3) The business only employs two people. All of the other workers are sub-contractors. In cases where a sub-contractor is engaged to undertake a job, he will be paid a fixed price for the job. The subcontractor may use one of the appellant's vehicles. But in such cases, the subcontractor is expected to fuel the vehicle himself. The subcontractor will keep the receipts for the fuel for his own tax records.

(4) In addition to the yard vehicles, the business has a number of other vehicles which are used for offsite jobs. These are the vehicles that are used by the subcontractors.

62. In her evidence, Mrs Grant confirmed that subcontractors fuelled their own vehicles. She described some of the difficulties in obtaining further evidence in this respect.

63. First, the subcontractors required the receipts for their own self-assessment returns. She had obtained a copy of a self-assessment return from one subcontractor, Mr Mason. A copy of the return of Mr Mason, was provided in evidence. It showed fuel as an expense of his business. Mrs Grant said that the return had been provided to HMRC. However, HMRC rejected the self-assessment return because it did not relate to the period covered by the excise duty assessment.

64. The difficulties in obtaining evidence were compounded due to the level of staff turnover in the business. There was only one contractor who was working for the business during the assessment period who continued to be engaged in the business at the time that HMRC was making its enquiries. He had only worked for the business for part of the period under review. Given HMRC's rejection of the evidence relating to the other subcontractor, Mrs Grant had not pursued the one continuing subcontractor to obtain details of his self-assessment return.

65. Mr Povey and Mrs Grant also referred to the evidence that they had obtained from subcontractors in the form of written statements confirming that subcontractors fuelled their own vehicles. These statements confirmed that vehicles were provided to the subcontractors by K&M. They were insured by K&M, but fuel and some maintenance costs were borne by the subcontractors. The statements had been drafted by Mr Povey and typed by Mrs Grant, but then signed by the relevant subcontractors.

66. Mr Steinberg for HMRC pointed out that Mr Povey and Mrs Grant had not provided any invoices relating to the fuelling of vehicles by subcontractors, although they had been given the opportunity to do so.

67. As regards the evidence contained in the subcontractors' statements, most of the subcontractors who had signed statements were not engaged in the business in the period in question. There was only one such subcontractor who had been engaged by the business in the relevant period and he was not engaged throughout the period of assessment.

68. The same applied to the evidence in the self-assessment return of Mr Mason that had been provided by the appellant. It did not relate to the correct period.

69. On this issue, we accept the evidence of Mr Povey and Mrs Grant. We find as a fact that the subcontractors did fuel the vehicles themselves. This partly explains why Mr Povey and Mrs Grant were unable to provide invoices for all the fuel used in the business in the assessment period as determined by Mr Heath's estimates. The evidence of Mr Povey and Mrs Grant was entirely consistent in this respect.

70. We accept the difficulties that the level of the staff turnover posed in obtaining evidence from subcontractors in relation to the correct period. However, the evidence that they did provide was not completely irrelevant. It did not relate to the correct period, but it did support Mr Povey and Mrs Grant's evidence as to the manner in which the business was operated.

Negative test results

71. Mr Povey's third point was that it was not appropriate to extrapolate the results of the two vehicles that tested positive for red diesel to the remainder of the fleet of nine vehicles when other test results were negative.

72. In his evidence, Mr Povey said that, on 8 June 2013, there were six vehicles in his yard at the time of the inspection. The HMRC officers tested all of the vehicles in the yard. Only two of the vehicles were found to have traces of red diesel in their fuel tanks. The tests on the other four vehicles were all negative.

73. Mr Povey also referred to other checks made by HMRC before the tests that were made on 8 June 2013 and to one test which took place after 8 June 2013. All of the other tests had been negative.

74. In his evidence, Mr Heath confirmed that it would have been normal practice for HMRC to test all the vehicles that were present at a particular location. It was also normal practice to record all positive and negative tests. He had made enquiries of the Road Fuel Testing Units at Uxbridge and Southampton. These were the only Units that were likely to have tested vehicles in the area. The Road Fuel Testing Units at Uxbridge and Southampton had confirmed that they had no record of negative tests on the other vehicles either on 8 June 2013 or at any other time.

75. Mr Heath produced email correspondence with the Road Fuel Testing Unit as evidence of the enquiries that he had made. That correspondence confirmed that HMRC did not have records of any negative tests. However, it was also apparent from that correspondence that HMRC's records may not be complete and, and in particular, that records of negative tests were more likely not to be recorded.

76. Furthermore, the evidence from the notebooks of the officers that made the tests on 8 June 2013, which were included in the documentary evidence, appeared to show that at least one other vehicle (with registration number HV02 PHY) was tested on 8 June 2013. That test was negative.

77. We have considered the available evidence on this issue. On balance, we accept Mr Povey's evidence regarding other negative tests, albeit we note that one of those tests would have taken place outside the assessment period.

78. HMRC's evidence was inconsistent. Mr Heath confirmed that the usual practice would be to test all of the vehicles on the site. Mr Povey's evidence is that there were four other vehicles on the site on the date of the inspection and that they were also tested. However, there is no record of any other tests in HMRC's central records. Yet there is evidence of at least one negative test in the note books of the officers who undertook the inspection.

79. Furthermore the exchange of correspondence between Mr Heath and his colleagues at the Road Fuel Testing Unit suggests that there was no consistent record of negative tests.

80. We can only conclude HMRC's records in this respect are unreliable.

The two members of staff responsible were dismissed

81. Mr Povey also noted that the two members of staff, who were considered responsible for fuelling vehicles with red diesel, had been promptly dismissed.

82. In his evidence, Mr Heath said that he had asked for details of the staff, who had been regarded as responsible for fuelling the vehicles. No evidence had been provided. In response to his enquiries, Mr Povey had said that he was unable to provide details "for fear of repercussions".

83. Mr Povey was unable to elaborate further on this response. He claimed that he had no details of the subcontractors responsible because of the informal way in which they were engaged. In particular, it was not unusual to engage the subcontractors at the beginning of one week and to pay them at the end of the following week. It would only be at the end of the following week that Mr Povey would obtain details for completion of relevant documentation. In the interim, the only check that was made was to confirm details on the relevant subcontractor's driving licence.

84. On this issue, we found Mr Povey's explanation lacked credibility. We agree with HMRC that it would be reasonable to expect Mr Povey to have at least some details of the staff responsible if they were permitted to drive the appellant's vehicles.

85. We did consider whether Mr Povey's evasiveness on this issue called into question his evidence on other matters to which we have referred above. On balance, we concluded that it should not do so given the other evidence available in relation to those matters.

The payment of the restoration fee

86. Mr Povey also referred to the payment of duty and penalties which was made at the time of restoration of the two vehicles which had been seized at the time of the

inspection. He said that the appellant had expected that the payment of the duty and penalties would be the end of the matter.

87. On this point, Mr Steinberg said that the assessment made immediately following the inspection related only to the fuel that had been found in the two vehicles at the date of the inspection. The notice that was contained in the restoration agreement provided to the appellant at the time of the restoration of the two vehicles made it clear that the payment of duty and penalties was without prejudice to any further action which HMRC may feel was necessary in respect of the matter including the collection of arrears of duty.

88. On this point, we agreed with Mr Steinberg. The notice contained in the restoration agreement was explicit about the potential consequences. It was clear to the appellant from that notice that further action may be taken.

Discussion

89. We were referred by Mr Steinberg to the decision of Mr Justice Mann in *Corneill*. In that case, a lorry belonging to the taxpayer, Thomas Corneill & Co Limited, was tested and found to have traces of red diesel in its fuel tanks. HMRC sought to raise an assessment for arrears of duty under section 13 HODA. The assessment was based on various estimates and assumptions and extended to arrears of duty for fuel in all of the lorries operated by the taxpayer and was not limited to arrears of duty in relation to the vehicle that had been tested.

90. In his judgment, Mr Justice Mann considered the relevant provision under which an assessment for arrears of duty could be made. That is not an issue in this case. It is accepted that the assessment is and can be made under section 13 HODA. However, Mr Justice Mann also expressed the view that it was permissible for HMRC to raise an assessment under section 13 HODA involving some exercise of judgment notwithstanding the absence of a reference to "best judgment" in section 13.

91. At [32] and [33], Mr Justice Mann said:

> "32 Nothing can be read into the absence of a reference to "best judgment" in Section 13. It is true that the expression is used in Section 12 of [FA 1994], but its absence from Section 13 of HODA is, in my view, not a bar to the exercise of some judgment in the assessment which HMRC is entitled to make under Section 13. 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 Mr Barlow 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."

92. In the *Corneill* case, the First-tier Tribunal ("FTT") had also come to the view that an assessment in relation to all of the vehicles of the taxpayer was justified in the circumstances of the case. Those circumstances included that the taxpayer company had produced a series of demonstrably false invoices showing purchases of white diesel in an attempt to show that the estimated assessment was excessive. Mr Justice Mann found that the FTT was entitled to reach that conclusion on the evidence before it.

93. At [40] – [43], he said this:

"40 The point boils down to one of whether or not the Tribunal was entitled to reach the final conclusion that it did on the basis of the evidence that it had. The only direct evidence of use of red diesel in the lorries was that of the lorry which was actually tested. No other red diesel was found on the premises or in lorries.

41 However, there was indirect evidence. There was evidence that persons known to supply mainly red diesel had received payment. One of the actual alleged suppliers was known to supply red diesel. If legitimate white diesel had been delivered and used one would have expected Thomas Corneill to have been able to demonstrate that clearly. Instead it produced a series of demonstrably false invoices and was unable to supply details of its contacts at the alleged suppliers. The Tribunal was obviously very unimpressed with the quality of evidence from Thomas Corneill, and in particular with the missing evidence.

42 Of course Customs & Excise had to justify its position and it clearly demonstrated that the documentary evidence did not show a clear and legitimate source of white diesel and left many questions which Thomas Corneill had failed to answer.

43 The Tribunal heard the evidence and it assessed the witnesses, particularly Mr Corneill and his explanations. From a starting point of some red diesel found in the tank of one lorry, for reasons which Mr Corneill could not explain, it was clearly entitled, via the rest of the evidence, to reach the conclusion that it did as a matter of inference. It was, therefore, entitled to uphold the assessment. Its decision is not one with which I should interfere even if I had misgivings about it, which I record I do not."

94. The principles that we take from the *Corneill* case are therefore that:

(1) first, in the context of an assessment under section 13 HODA, the absence of a reference to the use of best judgment in section 13 does not prevent HMRC from exercising a degree of judgment in raising an assessment;

5 (2) second, what is required under section 13 is appropriate evidence: inferences can be drawn from primary facts, and estimates can be made by reference to them, provided that they are based on appropriate evidence.

95. In the present case, the appellant has raised various objections to the estimates and assumptions underlying the assessment that has been made by HMRC. As we have 10 discussed, the appellant says:

(1) that it has produced legitimate invoices for the fuel that has been used by yard vehicles which demonstrate that it purchased more than enough white diesel to fuel the yard vehicles;

(2) that the vehicles that had been used offsite were fuelled by the sub- 15 contractors themselves; and

(3) that the appellant's vehicles had been subject to various other tests, all of which proved negative for red diesel.

96. For the reasons that we have given above, we accept the taxpayer's evidence in relation to each of these issues. In our view, the appellant has demonstrated that the 20 assessment raised by HMRC was excessive in circumstances of this case. In particular, we are persuaded by the evidence produced by the appellant in relation to the fuelling of vehicles by sub-contractors and the negative tests on other vehicles that the evidence does not support the extrapolation of the results of the tests on the two vehicles to all of the other vehicles owned by the appellant.

25 97. Mr Steinberg referred us to the *Corneill* case in support of his argument that it was reasonable for HMRC to extrapolate the test results of one vehicle to other vehicles owned by the taxpayer. In that case, as we have discussed above, Mr Justice Mann came to the view that the FTT was entitled to uphold an assessment for duty for fuel for several vehicles based on the test of one vehicle. However, it is clear from Mr 30 Justice Mann's judgment (see the extract from *Corneill* [40] – [43] to which we have referred at [93] above) that he was not setting out a general principle applicable in all cases. Whether or not an assessment for fuel for several vehicles can appropriately be made by reference to a test on one or more (but not all) of them is a question of whether that inference is justified on the basis of the evidence. In our view, in this 35 case, it was not.

98. The other two issues which the appellant raised do not go to the reasonableness or otherwise of the assessment made by HMRC. HMRC is not estopped from taking further action as a result of the restoration agreement. As we have discussed above, it is clear to us that the appellant was informed at the time that the restoration of the 40 vehicles that HMRC may take further action which may include collection of the arrears of duty.

99. As regards the issues surrounding the dismissal of the staff that the appellant alleges were responsible for fuelling the vehicles with red diesel, the evidence produced by the appellant was vague and inconclusive. We have not taken it into account except to the extent referred to at [85] above.

5 **Conclusion**

100. We agree that the assessment is excessive. In these circumstances, the Tribunal has power to quash or vary any decision and to substitute its own decision for any decision quashed on appeal.

101. We have decided that the assessment cannot be allowed to stand. We therefore need to determine the decision that we would substitute for that made by HMRC based on the evidence that has been presented to us.

102. We have decided that we should reduce the assessment to an amount which is equal to two-ninths of the amount assessed. This amount reflects our conclusion that the evidence does not support the extrapolation of the results of two tests to all nine vehicles that are owned by the appellant. We have settled on this amount notwithstanding the evidence that we have heard concerning the fuelling of vehicles by subcontractors and the documents showing some legitimate purchases of white diesel by the appellant. This is because, while we accept that as a matter of general practice the subcontractors fuelled vehicles themselves and the difficulties that the appellant has in providing evidence of their purchases, the fact remains that the presence of red diesel was found in two vehicles. The appellant has not produced evidence that would allow us more accurately to determine the split of use of the various vehicles between use by subcontractors, who are fuelling the vehicles themselves, and use by the appellant and the appellant's employees (and so to refine our estimate of the arrears of duty further). There is therefore an element of rough justice in our approach. However, we believe that it is the most appropriate result on the evidence that is before us.

Decision

103. We allow this appeal in part.

104. We quash the original assessment and substitute an assessment in the amount of £3,080.89 being an amount equal to two-ninths of the amount originally assessed.

RIGHTS OF APPEAL

105. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

5 **RELEASE DATE: 12 OCTOBER 2017**