59TACD2019

BETWEEN/

A. LIMITED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against excise duty assessments in accordance with sections 145 of the Finance Act 2001, in the total sum of €2,116,055. The details of the assessments are as follows;

    - Notice of assessment to excise duty dated 23 October 2014 for the period 4 June 2011 to 6 December 2011 in the sum of €358,078.

    - Notice of assessment to excise duty dated 23 October 2014 for the period 7 December 2011 to 30 April 2012 in the sum of €265,679.

    - Notice of assessment to excise duty dated 23 October 2014 for the period 1 May 2012 to 16 December 2013, in the sum of €1,492,298.

2. The Appellant duly appealed.

Background

3. The Appellant company, A. Limited is a limited liability company engaged in the sale of mineral oil. The company traded in oil, including marked mineral oil ('MMO') for approximately twenty-five years. The Directors of the company at all material times were Mr. X and his spouse, Ms. Y.

4. In the course of an audit of the Appellant company, in November 2013, a Revenue Officer identified that there were a significant number of invoices for the sale of MMO for amounts less than 2,000 litres where the completion of one delivery and the commencement of another were just seconds or minutes apart. It was noted that typically, one single payment was received to cover all of these invoices. This gave rise to the question of whether these invoices were separate deliveries or whether they related to one single delivery of MMO.

5. At a meeting between the Revenue Officer and Mr. X in February 2014, Mr. X, accepted that the invoices had been prepared to circumvent the requirement to make a return of oil movement (ROM1) in relation to these deliveries and to conceal the identities of the customers. Mr. X accepted that the names on these deliveries were falsified by him. A sample of invoices was put to Mr. X who confirmed that the details contained on them were false.

6. In September 2014, at a meeting between Mr. X and a Revenue Officer, Mr. X undertook to furnish details of the transactions routed through all of the false accounts operated by the company relating to the sale of MMO. Shortly thereafter, the Revenue Officer was furnished with a handwritten note setting out the details of the false accounts and the quantity of marked mineral oil supplied in relation to each. This note was furnished in evidence at the hearing.

Submissions

- The Respondent submitted that where the requirements of section 99(10)(b) FA 2001 were not satisfied, fuel falls to have been supplied as road diesel and excise duty at the standard rate applies. The Respondent submitted that as the Appellant failed to

comply with the Mineral Oil Tax Regulations and with the conditions governing applicability of the reduced rate, he is liable to pay excise duty at the standard rate.

- The Appellant submitted that section 99(10)(b) was not invoked and that the Appellant was not liable to pay excise at the standard rate. In addition, the Appellant submitted *inter alia* that section 99(10) FA 2001 was incompatible with EU Law and the European Convention on Human Rights Act 2003. In particular, the Appellant submitted that the provision infringed the principle of proportionality and resulted in an undue reversal of the burden of proof. In the alternative, the Appellant sought that the Tax Appeals Commission accede to the Appellant's request for a preliminary reference to the Court of Justice of the European Union ('CJEU') in relation to the question of the compatibility of section 99(10)(b) with European law.

Legislation

7. Section 99(10) of the Finance Act 2001– Liability of persons

(10) where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –

a) Such requirement has not been satisfied, or
b) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,

Then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment tor lower rate.

8. Other relevant legislation includes;

- Sections 94, 95, 96, 97, 104 and Schedule 2 of the Finance Act 1999
- Mineral Oil Tax Regulations 2001 - S.I. 442/2001

- Mineral Oil Tax Regulations 2012 - S.I. 231/2012
- Council Directive 2003/96/EC
- Council Directive 2008/118/EC
- Council Directive 95/60/EC

Evidence

9. Evidence on behalf of the Appellant was provided by Mr. X, director of the Appellant company

10. Evidence on behalf of the Respondent was provided by Customs officials Ms. .J and Mr. K.

11. Documentation furnished in evidence included a booklet of invoices and a booklet of *inter-partes* correspondence and other documentation from the Appellant company including, *inter alia*, sales listings and customer ledgers.

Mr. X, Director of the Appellant company

12. In evidence, Mr. X acknowledged that he broke down single deliveries of fuel into multiple separate consignments of less than 2,000 litres to avoid the ROM1 reporting requirements and that he returned false information on some of the ROM1 returns. In direct examination, the following exchange occurred;

Q. *Mr.* [X], *this is the case being advanced by the Revenue Commissioners as against you. At paragraph 3 there it is stated: 'Many invoices issued by the company show the metre reading from the pump on the tanker that delivered the fuel. The reading shows the time when the pumping of the fuel commenced, the time when the pumping of the fuel finished and the volume of the fuel delivered.'*

Is that an accurate statement?

A. *Yes it is.*

Q. *"In the course of the audit the Revenue Officer noted that there were a significant number of invoices for the sale of marked mineral oil for the amounts of less than 2,000 litres where the end of one delivery and the commencement of another were only seconds or at most minutes apart.*

--Is that correct?

A. That is correct.

Q. Okay. Can you tell me why that was and what, if any, customers, were at issue according to Revenue?

A. That was the way the customer requested it to be done. They would have requested a driver to do that or they would have requested me to instruct a driver to do that when the fuel was being delivered. They asked for a specific amount of oil or ordered a specific amount of oil, maybe 10, 15 thousand litres. Then they would have, they asked that the invoice is made out to certain names. In some cases, we received payments from those names but they gave us names and addresses and they said they wanted the invoice made out to those particular names.

Q. Can you pinpoint when and at what stage documentation would be drawn up in relation to those names that you said you were provided with?

A. They would be done at the point of delivery.

Q. Where would the point of delivery be? Would that be at the collection point or at your address or at another address or at the customer's address?

A. No, I would say in the case of these here probably, not probably, almost 99% of those were at the customer's address.

Q. I am just quoting further from Paragraph 3:

"It was further noted that typically one single payment was received to cover all these invoices issued seconds or minutes apart."

Is that a correct statement by Revenue?

A. That is correct, yes

Q. The payments that you received, how typically would those customers at issue in these proceedings pay you?

A. A mixture of cash and third party cheques.

Q. Can you, what is a third party cheque?

A. A third party cheque is a cheque that is not made out to the payee necessarily. It's usually used - - we would receive them quite often. We would have asked Revenue when we had [Ms. J.], *when we had the two customs inspections if there was anything wrong with third party cheques because in our dealing we would historically have always taken third party cheques, small business towns do. You would have a farmer perhaps who had sold cattle. He may come in with a livestock cheque to pay for coal or pay for oil. In some cases, and they would be quite open about it, they will tell you that if they give it to the bank or lodge it in the bank if perhaps they are well overdrawn on their account, that they wouldn't get anything back out of it. You could have a creamery cheque in the same situation. You could have somebody in with a wage cheque.*

Q. I understand that, Mr. [X], *but just in relation to these particular customers - -*

A. Okay.

Q. - - were third party cheques a regular or an irregular part of the payment pattern?

A. No, they were a regular part of the payment pattern.

Q. Was there any particular reason for that to your knowledge?

A. None that we are aware of.

Q. Okay. Now Revenue, I quote again from Paragraph 3:

"This gave rise to the suspicion that these were not separate deliveries but were in fact all one delivery of marked mineral oil."

What do you say to that?

A. *That is correct.*

13. On day one of the hearing, the following exchange occurred while Mr. X was under cross-examination by counsel for the Respondent;

> *'Q: We know as a matter of fact that you were facilitated and organised the issuing of multiple dockets to achieve that goal so that it would not come within the ROM 1 and/or be detected by Revenue, isn't that right?*
>
> *A: We certainly facilitated it, yes, we did, we did it under an instruction, under the request of customers, yes, we did.*
>
> *Q: So you put the request of your customer above the obligation that you had pursuant to Revenue Law and the Mineral Oil Regulations governing your license, isn't that right?*
>
> *A: We did, yes I have to say we did.'*

14. Mr. X admitted that he made efforts to circumvent the ROM1 movement of oil returns by breaking down the consignments of fuel into smaller deliveries.

15. Mr. X accepted that the delivery dockets and invoices were not in compliance with the regulations.

16. In evidence Mr. X admitted that he used accounts with false names. One such exchange in relation to this issue arose under cross examination by Counsel for the Respondent, as follows;

> *'Q. Of course accounts exist, the issue is whether or not the account, the name on it is and if the account that you reopened was an old dormant account then it was not being used by the holder of the old dormant account. It was actually* [person 1] *but you attached the original holder of the dormant account to that account, isn't that right?*
>
> *A. That is correct.*
>
> *Q. So that is a name on the account?*
>
> *A. From that purpose, yes, it is. …*

Q. Well you said you did one or two transactions. We know as a matter of fact that there were 201,600 litres of MGO between the 5th June 2011 and the 6th December 2011 sold by you through this account of [person 2]*?*

A. Okay.'

17. Mr. X also accepted that he falsified names on invoices in respect of some of those to whom he supplied fuel.

18. Mr. X admitted that of the third-party cheques he received, the vast majority of them were from haulage companies. Counsel for the Appellant argued that as they were third party cheques they were not received directly from haulage companies. Counsel submitted that there was no admission that the Appellant sold fuel to hauliers so that hauliers could use that fuel on the road. On day one of the hearing, the following exchange occurred between Counsel for the Respondent and Mr. X;

'Q. *We'll see that there are, all of the third party cheques appear to be from haulage companies, isn't that right?*

A. Yes, the vast majority of those, yes.

Q. And [Haulage company D] *is one of those companies, isn't that right?*

A. Correct and right, yes.

Q. So when you were selling off the green diesel?

A. Yes.

Q. was there ever any curiosity in your mind as to how it was that the payment for the green diesel was coming from Road Haulage Companies?

A. Well there was concern with the actual cheque. Road Haulage Companies by their nature tend to be run on a very tight margin. You know a lot of them wouldn't have great bone fides. I did explain I think to [Revenue official] *at the time that it wouldn't be unknown for haulage companies to purchase large amounts of green, sometimes they use directly in their trucks. Some they use in conjunction with machinery. Some of them plant hire operators, some of them associated bits and pieces*

but you know it is not unknown. I am sure the statute books are - - the record books are full of haulage companies who have been fined for using green diesel in their trucks.

Q. *I see. So it wasn't a concern of yours?*

A. *It was a concern of ours to a point. I know - -*

Q. *How was it a concern, how did you act on that concern if you had a concern?*

A. *How did I act on that concern? Again going back to that particular meeting with* [Ms. J] *with regard to* [Haulage Company D] and the inquiry with [Haulage Company D], *I explained that we didn't deal directly with them. We had never issued them any fuel directly. That we had dealt with* [Mr. O], *that we had taken their cheques and there was various other parties we had taken cheques from and I showed her a sample of that cheque, the cheque I had there that day, to lodge in my account* [A Limited's] *account, from* [Haulage Company D] *that was presented from* [Mr. O].

Q. *So really as far as you were concerned, so long as* [Mr. O], *acted as an intermediary between you and the haulage companies you were satisfied that that was fine. Look it is of no concern to me that they are using the green diesel either for laundering purposes or for other purposes?*

A. *I wouldn't say it was of no concern. I wouldn't say I was unconcerned about it at all.*

Q. *Well if you were concerned than what did you do to act upon that concern?*

A. *I probably didn't make a conscious - -*

Q. *Because you didn't make contact with* [the Revenue official]. *She came to you on what you say, on the basis of a truck that had been stopped?*

A. *Yes.*

Q. *With documentation. You didn't come to Revenue saying look I am in a pickle here. I am supplying fuel to loads of different parties who I believe are involved in laundering fuel. I have been doing it since X and I'm continuing to do it, what will I do. That's not what occurred?*

A. *No, well I've never said that that's what occurred. I have never made any - -*

Q. *No, but you've suggested that you've been upfront with Revenue and you told them who you were dealing with and they effectively gave you like a clean bill of health to keep trading with these people. That's what you are suggesting in evidence and in your submissions?*

A. *Yes.*

Q. *Quite specifically.*

A. *Well that is what happened.*

Q. *That's untrue?*

A. *No, it is not untrue. On those call outs and there is one meeting there that is not recorded, the* [Haulage Company D] *one, I did show* [Ms. J.] *and the colleague that was with her, the copy of the cheque I had. I explained the workings, who I was dealing with,* [Mr. O.], *what they were purchasing from us. There was no concerns raised.*

Q. *Do you believe it is a matter for them to go check your clients and tell you whether or not they are not they are bone fide. Why do you feel that it is for Revenue to do your checking?*

A. *It's not that I believe it is for Revenue to do my checking but I do believe they are there to inform you and enforce the law and if they felt at that particular time that there was something that we were either breaking or had a possibility of breaking, that we should have been informed. The matter of excise never occurred until* [Revenue Official] *did his audit.*

Q. *Yes, but I mean it may very well be* [Mr. X] *that you know you felt that maybe your exposure in relation to all these sales was possibly in relation to VAT. It is quite possible that you never bothered to think or have any regard for the excise duties but that's your own prerogative, isn't that right?*

A. *It is not that it is our own prerogative. We dealt with these customers. We didn't make a conscious decision at any particular time that we were going to set out to sell X*

amount of litres to X customer, take third party cheques. In hindsight and looking back was it a wrong decision. it wasn't wrong, it was completely and utterly crazy.

19. Under cross-examination Counsel for the Respondent put it to Mr. X that*: ' ... it was clear to you what the end use of what the fuel was being used. It was being used for the propulsion of vehicles on the roads'* to which Mr. X responded '*Well certainly we draw that inference from that'.*

20. In re-examination, the following exchange occurred between Mr. X and his Counsel:

'Q. Have you ever during the periods sold direct to a haulage company?

A. Sold the - -

Q. Sold marked oil directly to a haulage company?

A. We have.

Q. Can you tell us the circumstances of that?

A. It was ordered by the haulage company. I was, they look for the ultra-low-sulfur green or green diesel. They didn't specifically look for ultra-low-sulphur green but green diesel and we did deliver it into their storage tank. We invoice as green and paid for it as green.

Q. What do your knowledge, rules and regulations, if any, were you breaking just by what you have just said?

A. Well, I didn't think we were breaking any rules and regulations by just delivering that. We didn't put in a tank of mechanically propelled, to use the garda term, vehicle, we put it into a storage tank. There are terms and conditions on our invoice/movement document that it must not be used for the combustion engine of a motor vehicle with the expectation of agricultural vehicles. So if it was subsequently used in a vehicle in those haulage situations it was done in contravention of that but we didn't, we put it in the storage tank.'

21. The Respondent, in submissions, contended that Mr. X was aware therefore, that MMO he supplied, was being used in road vehicles. Counsel for the Appellant in response,

contended that there was no admission on the part of Mr. X or the Appellant that Mr. X gave fuel to hauliers so that hauliers could use that fuel on the road.

22. Mr. X admitted that he was in breach of the regulations. He accepted that he did not provide all names and addresses on the movement documents as required under the 2001 regulations.

23. Under cross-examination by the Respondent the following exchange occurred;

> *'Q: … the Revenue are firmly of the view ….. that you didn't comply with the Regulations set out and provided for by the statute, the mineral oil regulations and perhaps if you had complied we wouldn't be here today but you didn't?*
>
> *A: There is no doubt about it and my wife has said it to* [sic] *several times, you are correct and right. If we had complied fully we wouldn't be here today.'*

Ms. Ms. J., Revenue officer

24. Ms. J., customs and excise officer with the Respondent, was not involved in the audit in November 2013. Ms. J. stated that she was called to give evidence on three discrete issues, namely;

- The incident on 5 July 2012 re Fuel Company L
- The incidence on 12 February2014 re an ADR document
- The interview on 11 June 2014 re Waste Company

25. On 5 July 2012, Ms. J. was requested to follow up on an invoice (number 27100) from the Appellant. The request came from enforcement officers who had stopped a lorry in Dublin and who had obtained an invoice. Mr. X stated that the oil had been collected at the Appellant's yard in [address redacted]. He stated that the invoice was paid with a combination of cash and third party cheques. Ms. J. stated that she did not have an interaction with Mr. X prior to 5 July 2012 and this fact was accepted by Mr. X.

26. On 12 February 2014, Ms. J. interviewed Mr. X in relation to an oil tanker carrying 19.000 litres of diesel. The ADR document showed it had been loaded in the Appellant's premises but the driver stated that it did not come from the Appellant and that the tanker was already loaded when he collected it. Mr. X stated that the document was not a true copy

of a document issued by the Appellant and that the Appellant did not supply the fuel. It was established that the truck carrying the oil had regularly drawn fuel from the Appellant's yard. The truck was seized by the Respondent. No claim to ownership was made in respect of the truck.

27. On 11 June 2014, Ms. J. interviewed Mr. X in relation to a purchase of 1,000 litres of DERV by Waste Company. The lorry containing the fuel had a contamination of green diesel. The driver informed the officer that the fuel had been bought from the Appellant. It transpired and was accepted by the Respondent, that there was no contamination by or on behalf of the Appellant but that the bowser had previously been used by Waste Co. for green diesel and that this had contaminated the white diesel which was subsequently supplied by the Appellant.

28. Ms. J. stated that Mr. X had been co-operative in relation to her enquiries and that he always provided invoices and documentation.

Mr. K, Revenue officer

29. Mr K, customs official with the Respondent confirmed that he accompanied Ms. J. on 12 February 2014. He stated that he did not have any interaction with Mr. X in Autumn 2012.

ANALYSIS

Admissions of the Appellant

30. Mr. X, director of the Appellant, made the following admissions

    a. He acknowledged that he broke down single deliveries of fuel into multiple separate consignments of less than 2,000 litres to avoid the ROM1 reporting requirements and that he returned false information on some of the ROM1 returns
    b. He admitted that he used accounts with fictitious names.
    c. He accepted that he falsified names on invoices in respect of some of those to whom he supplied fuel.
    d. He accepted that the delivery dockets and invoices were not in compliance with the regulations and that he had defaulted on compliance with the regulations.

e. He accepted that in some instances, he sold MMO directly to hauliers.

Regulatory Contravention

31. The contraventions by the Appellant of the Mineral Oil Tax Regulations were detailed in the Respondent's statement of case and submissions and in the *inter partes* correspondence between the Respondent's officials and the Appellant including a letter dated 10 October 2014 from a Revenue Customs official.

32. Having considered the issue of regulatory breach and, taking into account the evidence, the submissions, the documentation furnished and the admissions made by Mr. X, director of the Appellant that he affected multiple and repeated contraventions of the regulations and did so knowingly, I find that for the period assessed namely, 4 June 2011 to 16 December 2013, the Appellant was in breach of the Mineral Oil Tax Regulations 2001 and the Mineral Oil Tax Regulations 2012 and in particular, the Appellant was in breach of the following regulations over the period of the assessments, namely;

- Regulation 23 of the Mineral Oil Tax Regulations 2001
- Regulation 24 of the Mineral Oil Tax Regulations 2001
- Regulation 31 of the Mineral Oil Tax Regulations 2001
- Regulation 18(1)(c) of the Mineral Oil Tax Regulations 2012
- Regulation 18(2)(d) of the Mineral Oil Tax Regulations 2012
- Regulation 18(2)(e) of the Mineral Oil Tax Regulations 2012
- Regulation 23 of the Mineral Oil Tax Regulations 2012
- Regulation 25 of the Mineral Oil Tax Regulations 2012

33. The aforesaid regulatory contraventions together with the admissions of the Appellant's director, Mr. X, constituted the basis for the Respondent's decision that the Appellant had not complied with the requirements of excise law for the purpose of section 99(10) of the Finance Act and that he had thereby failed to satisfy the Respondent that the mineral oil products the subject of the assessments for additional excise duty were held for a specific purpose justifying the application thereto of excise duty at a rate lower than the appropriate standard rate.

34. The matter of the application of s.99(10) of the Finance Act 2001, as amended, is dealt with hereunder.

Application of s.99(10) of the Finance Act 2001, as amended.

35. At hearing, the parties confirmed that it was not in dispute that the Appellant is a body who had received excisable products *'on which excise duty has been relieved, rebated, repaid or charged at a rate lower than the appropriate standard rate'* pursuant to section 99(10). The matter at issue between the parties was whether sub-section (b) of section 99(10) applied. Section 99(10) provides;

> *(10) where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –*
>
> > *(a) Such requirement has not been satisfied, or*
> >
> > *(b) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,*
>
> *Then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment or lower rate.*

36. Mr. X admitted *inter alia*, that he operated numerous false accounts to circumvent the mineral oil tax regulations, that he falsified the quantum of fuel received per delivery in order to circumvent the requirements of the ROM1 returns, that the delivery dockets and invoices were not in compliance with the regulations and that he failed or omitted to return information required by the regulations.

37. In relation to the first limb of section 99(10)(b), having considered the evidence and submissions of both parties and the admissions made by Mr. X, director of the Appellant, that he affected multiple and repeated contraventions of the regulations and did so knowingly, I have found that the Appellant was in regulatory contravention of the Mineral Oil Tax Regulations 2001 and of the Mineral Oil Tax Regulations 2012 and the contraventions are listed above.

38. The Respondent argued that the admissions of Mr. X, together with the breadth of regulatory contravention, meant that the Appellant could not overcome the second limb of section 99(10)(b) as he was unable to show that the excisable products were '*used, or held for use, for such purpose or in such manner'* i.e. as marked mineral oil.

39. On an ordinary literal interpretation, the meaning and import of section 99(10(b) is clear: the person who has received the excisable products on which a reduced rate has been charged subject to a requirement that they be used for a specific purpose (i.e. as MMO) must, under section 99(10)(b) comply with '*any requirement of excise law in relation to the holding or delivery of such excisable products'* and must show '*to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner'*. The subsection provides that if the Appellant is in contravention of excise law requirements, that the burden of proving that '*the excisable products have been used, or are held for use'* as MMO, falls to the Appellant under s.99(10)(b) FA 2001.

40. There is no ambiguity in the requirement to satisfy the Respondent as to the ongoing entitlement to benefit from the reduced rate of excise duty paid in relation to the mineral oil in question as it is clear from section 99(10) that absent such entitlement being shown, the supply of mineral oil is chargeable at the standard rate.

41. The Appellant in its written submissions contended that '*…the person who has received such excisable products…'* is the person who received the excisable products for final use - i.e. not the trader in the oils. On consideration of the statutory wording used in the provision, I do not accept this interpretation. The provision provides that '*where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate..'* then that is the person who may be liable to lose the rebated rate, where certain conditions have not been met. It is clear that the Appellant is such a person within the meaning of the provision. Similarly, the Appellant is a '*person who has received such excisable products…'* in accordance with the provision. The Respondent contended that if section 99(10) bore the meaning contended for by the Appellant, there would have been no requirement for the inclusion of subsection (11) which provides that: *'Where under subsections (1) to (10) more than one person is, in a particular case, liable for payment of an excise duty liability, such persons are jointly and severally liable.'*

42. In conclusion on this point I do not accept the Appellant's submission that '…*the person who has received such excisable products…'* is necessarily the end user. As I understand it, this point was not pursued at hearing, though it is contained in the Appellant's written legal submissions.

43. Based on the evidence and submissions and in particular, the admissions of Mr. X, I am satisfied that the Appellant has not shown that the excisable products were '*used, or held for use, for such purpose or in such manner*' namely, as marked mineral oil, in accordance with section 99(10)(b) FA 2001 and as a result, I find that the Appellant is liable for payment of the excise duty on such products at the standard excise rate in accordance with section 99(10) FA 2001.

The Treaty on the Functioning of the European Union

44. Article 110 of the TFEU provides; *'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*'

45. Article 111 of the Treaty prohibits Member States from '*any repayment of internal taxation'* where products are exported to other Member States that exceeds '*the internal taxation imposed on them whether directly or indirectly*'.

46. Article 112 is not relevant as it expressly does not apply, *inter alia*, to excise duties.

47. Article 113 sets out the framework for the taxation by Member States of energy products, including mineral oil and provides; *'The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'* The Appellant submitted that incompatibility arose as between Article 113 of the Treaty and section 99(10) FA 2001 however, no coherent basis for this submission was advanced.

48. In consideration of the above, I am satisfied that there is no breach of Articles 110-113 of the Treaty in relation to the operation of section 99(10) FA 2001, which merely deals with the circumstances in which the right to continue to benefit from a reduced rate of excise duty is or may be taken away, where those circumstances apply equally, regardless of the origin of the fuel. Thus, I am satisfied that there is no incompatibility between these Treaty provisions and section 99(10) FA 2001, as amended.

Council Directives

49. The Appellant submitted that the following question of EU arose for consideration; 'does the provision of Article 2 of the TFEU and the presence of Directive 2008/118/EC preclude the operation of Section 99(10) of the Finance Act 2001 as amended or is Section 99(10) incompatible with Directive 2008/118/EC.'

50. Separately, the Appellant submitted that section 99(10) FA 2001 is precluded by Article 21.4 of Directive 2003/96.

51. Article 2 TFEU provides;

> '*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.'*

52. Section 104 of Finance Act 1999 (no. 2) provides that regulations may be made for the purpose of giving full effect to Council Directive (Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils) and 95/60/EC (Directive on fiscal marking of gas oils and kerosene).

53. Council Directive 2003/96/EC in relation to restructuring the Community framework for the taxation of energy products and electricity, sets out the framework for the taxation by Member States of energy products, including mineral oil. It provides at recital 9:
> *'Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances'.*

54. The decision in *ROZ-ŚWIT Zakład Produkcyjno and ors*, Case C-418/14 dealt with a request for a preliminary ruling concerning Council Directive 2003/96/EC. At paragraph 23 of the judgment the Court found that:

> *'Since Directive 2003/96 does not specify any particular control mechanism for the use of heating fuel nor measures to combat tax evasion connected with the sale of heating fuel, it is for Member States to provide such mechanisms and such measures in their national legislation, in conformity with EU law. In that regard, it follows from recital 9 of that directive that the Member States have discretion in the definition and implementation of policies appropriate to their national circumstances.'*

55. At paragraph 25 the Court stated:

> *'Having regard to the discretion which Member States have as to the measures and mechanisms to adopt in order to prevent tax avoidance and evasion connected with the sale of heating fuels and since a requirement to submit to the competent authorities a list of statements from purchasers is not manifestly disproportionate, it must be held that such a requirement is an appropriate measure to achieve such an objective and does not go beyond what is necessary to attain it.'*

56. In that case, the Court found that there was an infringement of the proportionality principle however, it was the automaticity of the higher rate (where there was default in furnishing purchaser statements within a specified time limit *notwithstanding* that the fuel was heating fuel) that the Court held infringed the principle of proportionality.

57. Recital 18 of the Directive provides;

> *'Energy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant.*'

58. Article 1 provides that Member States are obliged to impose taxation on energy products '*in accordance with this Directive'.* Under Article 2 it is clear that energy products intended for use as motor fuel are to be taxed at the rate applicable for motor fuel.

59. Article 21.4 provides;

'Member States may also provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled.'

60. Council Directive 2008/118/EC concerning the general arrangements for excise duty and repealing Directive 92/12/EEC provides, at recital 20:

'It is necessary, in order to ensure the collection of taxes at the rates laid down by Member States, for the competent authorities to be in a position to follow the movements of excise goods and provision should therefore be made for a monitoring system for such goods.'

61. Article 1 provides; *'This article lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods'* referred to as 'excise goods' and which include at indent (a) '*energy products …. covered by Directive 2003/96/EC*'

62. Article 7(1) of the 2008 Directive [to which effect is given by section 95 of the Finance Act 1999] provides; *'Excise duty shall become chargeable at the time, and in the Member State, of release for consumption*.'

63. Article 7(2)(b) of the 2008 Directive provides;

'For the purposes of this Directive, 'release for consumption' shall mean any of the following; the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;'

64. The Respondent submitted that the duty levied on the Appellant was not levied properly because it was levied at the lower marked gas oil level in circumstances where the evidence was that Mr. X, director of the Appellant, made a series of admissions regarding regulatory contraventions which took place and he stated that in some instances, he sold MMO directly to hauliers.

65. Article 8(1)(b) of the 2008 Directive provides:

'*The person liable to pay the excise duty that has become chargeable shall be 'in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;'*

66. In terms of domestic legislation, the relevant statutory provisions governing excise duty on Mineral Oil are contained within Chapter 1 of Part 2 of the Finance Act 1999 comprising sections 94(1) to 109. Chapter 1 of Part 2 of the FA 2001 as amended (comprising sections 96 to 153) relates to all excisable products including mineral oil. Section 99 of the FA 2001, as amended, deals with the liability of persons. In this regard, a charge to excise duty arises when mineral oil is released for consumption in the State. That charge will be at the standard rate unless the conditions for the application of a reduced rate are satisfied.

67. Regulation 28 of the Mineral Oil Tax Regulations 2012 deals with the 'Application of a reduced rate' of excise duty and provides that the reduced rate *'shall only be allowed'* in accordance with Regulation 28(1) where the Respondent is *'satisfied'* that such fuel;

(a) is intended for use other than as a propellant,
(b) has been marked in accordance with Regulation 29,
(c) is at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of these Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of marked gas oil and marked kerosene,
(d) where it has been consigned to the State from another Member State or from outside the territory of the European Union, has been declared in writing to a proper officer as being for use other than as a propellant, and marked in accordance with Regulation 29.

68. Where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, in particular Regulation 28, are not satisfied, mineral oil falls to have been supplied as road diesel, and excise duty at the standard rate applies.

69. Based on the Council Directives and their relevant provisions as set out above, I do not accept the submission of the Appellant that the provision of Article 2 of the TFEU and the presence of Directive 2008/118/EC preclude the operation of Section 99(10) of the Finance Act 2001 as amended and I do not accept the submission either that section 99(10) is incompatible with Directive 2008/118/EC or that section 99(10) FA 2001 is precluded by Article 21.4 of Directive 2003/96.

Section 99(10)– Alleged reversal of the burden of proof

70. The Appellant submitted that the joined cases of *Mahagében* and *Dávid, Cases C-80/11 and C-142/11*, which arise in the context of VAT and which concern the fundamental right to deduct under the VAT legislation, required the Respondent in this appeal to establish by objective evidence that the Appellant knew or ought to have known that the activity of other traders in the chain was connected with fraud. The Appellant submitted that these principles which arise in the VAT context, should be applied in an excise law context and that the CJEU case law on the matter in relation to the reversal of the burden of proof in matters of indirect taxation also applied.

71. The cases of *Mahagében* and *Dávid*, concerned traders who were disallowed deductions because of the non-compliance of taxpayers further up the supply chain. In addition, in *Mahagében* and *Dávid* the Appellants acted in accordance with their obligations and were not in default and there was no dispute in relation to that. Their cases turned on the fact that they could not have known that the other party who they were transacting with had not complied with their VAT obligations. In this appeal however, there were admissions made by Mr. X, director of the Appellant, that he affected multiple and repeated contraventions of the regulations and did so knowingly, with a view to circumventing the regulations. Mr. X also provided supporting documentation in relation to these contraventions.

72. In addition, a significant factual distinction arises namely, the body in default and in contravention of the regulations is the Appellant. It is the Appellant's default (and not the default of other traders) which led to the contraventions of the regulations, and the raising of the assessments in this appeal.

73. However, an important distinction arises between *Mahagében* and *Dávid* and the within appeal which is that this appeal is based not on a denial of excise duty paid on preceding purchases (such payments having been fully credited in the excise assessments) but that the assessments merely recalculate the excise duty payable based on the standard rate, while providing a credit for the excise duty previously paid by the Appellant at the reduced rate. This is to be contrasted with the position in *Mahagében* where the fundamental right to deduct VAT input credit was denied even though the occurrence of

the purchases in question on which VAT had been charged to *Mahagében* was not in dispute.

74. The Appellant sought by reference to EU law to contest the Respondent's entitlement to assess excise duty on the supplies in question at the standard rate, in circumstances where the contraventions of the Mineral Oil Tax Regulations 2012 were themselves the subject of admissions by the Appellant's director, Mr. X. This is so in circumstances where full compliance with the 2012 regulations is a requirement to claiming an entitlement to the reduced, rather than the standard rate of excise. Section 99(10) FA 2001 provides that if the Appellant is in contravention of excise law requirements, the burden of proving the ultimate use to which the mineral oil is put, falls to the Appellant under s.99(10)(b) FA 2001. The Respondent stated that Ireland would be in default of its obligations if it permitted non-compliance with s.99(10).

75. Further, I accept the submission of the Respondent that the principles contained in *Mahagében* and *Dávid* are not transposable to the assessment to excise duty at issue in this appeal, since no right to deduct arises in relation to excise duty as it is not a turnover tax. In this regard, the Respondent relied on *Netto Supermarket*, Case C-271/06 where a comparable argument was rejected, namely, that it was not possible to transpose the findings of the court in a customs context to a taxable person under the VAT system.

76. Another case relied on by the Appellant was the case of *Weber's Wine* Case C-147/01. In *Weber's Wine,* the domestic tax authorities imposed a tax which was incompatible with Union Law where this tax was subsequently passed on.

77. The assessment challenged by the Appellant in this appeal is not based on any domestic legal provision that seeks to deny to the Appellant a right to recover from the State, duties levied in breach of EU law.

78. The matter in issue in this appeal is the amount of excise duty applicable, not the fact of its applicability. There was no contest on the fact that excise duty in this appeal *was* applicable. In addition, the issue of unjust enrichment did not arise in this appeal and for that reason, I do not consider *Weber's Wine* to be relevant to the matters under consideration in this appeal. Similarly, as regards the reliance placed by the Appellant on the cases of *San Giorgio,* Case C-199/82 and *Michailidis,* Case C-441/98 and Case C 442/98, I do not consider these cases to be relevant as no provision of Irish law upon

which the contested additional excise duty assessment is based, has been declared to be incompatible with the TFEU.

79. As regards reliance by the Appellant in relation to the doctrine of supremacy of EU law, in accordance with *Simmenthal,* Case C-106/77, there has not been established an incompatibility between Irish law and EU law and, as a result, the application of the doctrine of supremacy in the context of this appeal does not arise.

80. In relation to the excise duty assessments in the aggregate sum of €2,116,055, I am satisfied that the European cases relied on by the Appellant do not support the Appellant's submission and that the Appellant's reliance on these authorities is misconceived.

The principle of proportionality

81. It is well established that national rules which are intended, *inter alia*, to transpose the provisions of a Directive into the domestic legal order of the Member State concerned, must be consistent with the principle of proportionality.

82. The Respondent submitted that section 99(10) did not infringe the principle of proportionality and that there was no basis advanced by the Appellant that would support the disapplication of section 99(10)(b) FA 2001. Further, the Respondent submitted that no such basis existed.

83. The Appellant cited *Daly v Revenue Commissioners* [1995] 3 IR 1 in support of his submission in relation to proportionality however, the *Daly* case arose in relation to the adjustment of the tax year and to the year into which deductions fell. In this appeal, the Appellant has not been denied the opportunity of claiming credit in relation to the excise duty paid and thus I do not consider the *Daly* case to be relevant to this appeal.

84. The case of *ROZ-ŚWIT Zakład Produkcyjno and ors*, Case C-418/14 involved proceedings between the company *ROZ-ŚWIT* and the Director of the Wrocław Customs Chamber ('the Director') concerning the refusal of the Director to grant ROZ-ŚWIT the benefit of the rate of excise duty applicable to heating fuel because of its failure to submit within the specified period, a list of statements that the fuel purchased was for heating purposes.

85. In effect, the Polish legislation made a trader liable for excise duty where the relevant Polish excise regulations had not been complied with, even in circumstances where there was no loss of duty.

86. The Court, at paragraph 33 of the *ROZ-ŚWIT* case, Case C-418/14 stated: *'it follows that both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed in accordance with their actual use.'*

87. In that case, under the Polish national legislation, first sellers of heating fuel were required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased were for heating purposes and secondly, where such a list was not submitted within the prescribed time limit, the excise duty rate laid down for motor fuel was applied to the heating fuel sold even though the intended use of that product for heating purposes had been established and was not in doubt. Paragraphs 34 and 35 of the judgment provides;

> *'Consequently, a provision of national law, such as Article 89(16) of the Law on excise duty, under which, in the event of failure to submit a list of statements from purchasers within the time limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if, as was found in the dispute in the main proceedings, those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96. In the second place, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality.'*

88. It is clear that the Polish legislation differs from section 99(10) of the Finance Act 2001. Section 99(10) FA 2001 permits the Respondent to form a view based on infringements and contraventions of the Mineral Oil Regulations by the trader, that they are not satisfied that the use requirement of the fuel has been met. It was the automaticity of the higher rate (where there was default in furnishing purchaser statements within a specified time limit *notwithstanding* that the fuel was heating fuel) that the Court held infringed the principle of proportionality.

89. The within appeal is factually distinct in that in the Polish case, it was established that the intended use of that product was for heating purposes and that was not in doubt. In

this appeal however, the Appellant company contravened the regulations on multiple occasions and admissions in this regard were made by Mr. X, director of the Appellant that he affected multiple and repeated contraventions of the regulations and did so knowingly, with a view to circumventing the regulations.

90. In conclusion, I am satisfied that there is no infringement of the principle of proportionality where the Respondent has formed a view, based on the admissions of a director of the Appellant company and based on a deficiency of documentation to indicate otherwise, the Appellant company has not shown that the excisable products were '*used, or held for use, for such purpose or in such manner*' namely, as marked mineral oil in accordance with section 99(10)(b) FA 2001 that the Appellant.

Alleged incompatibility of section 99(10) with the European Convention on Human Rights Act 2003

91. Insofar as the Appellant contended that section 99(10)(b) FA 2001 was incompatible with the European Convention on Human Rights Act 2003 ('ECHRA') this is not a claim which may be advanced before the Tax Appeals Commission as the jurisdiction to make such declarations is limited to the Superior Courts in accordance with section 5(1) of the ECHRA.

Statutory Interpretation

92. The Appellant claimed that section 99(10) FA 2001 was ambiguous and that the ambiguity should be resolved in favour of the taxpayer pursuant to the *contra proferentem* approach to statutory interpretation referenced by the High Court in *McGarry v Revenue Commissioners* [2009] ITR 133. However, I find no such ambiguity in the provision. On an ordinary literal interpretation, the meaning and import of the provision is clear: the person who has received the excisable products on which a reduced rate has been charged subject to a requirement that they be used for a specific purpose (i.e. as MMO) must, under section 99(10)(b) comply with '*any requirement of excise law in relation to the holding or delivery of such excisable products*' and must show '*to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner*'. The subsection provides that if the Appellant is in contravention of excise law requirements, that the burden of proving the ultimate use to which the mineral oil is put, falls to the Appellant under s.99(10)(b) FA

2001. Therefore, I do not accept the Appellant's submission on the matter of statutory interpretation.

Constitutionality

93. There was no challenge to the constitutionality of section 99(10) FA 2001. The question of the constitutionality of a statutory provision is a matter beyond the remit of the Tax Appeals Commission. The Respondent emphasised however, that the presumption of constitutionality applies to all enacted legislation.

Reference to the CJEU

94. On the issue of whether the Tax Appeals Commission should refer a question to the CJEU pursuant to Article 267 of the TFEU, the Appellant proposed four questions in the following terms;

1. Whether section 99(10) FA 2001 is consistent with the principle of proportionality.
2. Whether Article 2 of the TFEU and the presence of Directive 2008/118/EC preclude the operation of Section 99(10) of the Finance Act 2001 as amended or is Section 99(10) incompatible with Directive 2008/118/EC.
3. Whether section 99(10) FA 2001 is repugnant to EU law because of the reversal of the burden of proof.
4. Whether section 99(10) FA 2001 is precluded by Article 21.4 of Directive 2003/96

94. My determination in respect of each of these questions is set out above. As a result, I am satisfied that it would not be appropriate to refer a question to the CJEU pursuant to Article 267.

Conclusion

95. For the reasons set out above and based on the evidence and submissions and in particular, the admissions of Mr. X, director of the Appellant, that as director of the Appellant company he affected multiple and repeated contraventions of the regulations and did so knowingly, I am satisfied that the Appellant was in contravention of the regulations (specified at paragraph 33 above) and that Appellant has not shown that the excisable products were '*used, or held for use, for such purpose or in such manner*' namely, as marked mineral oil, in accordance with section 99(10)(b) FA 2001. As a result, I find

that the Appellant is liable for payment of the excise duty on such products at the standard excise rate in accordance with section 99(10) FA 2001.

96. Further, for the reasons set out above, I am satisfied that there is no basis upon which section 99(10) FA 2001, should be disapplied for incompatibility with EU law in accordance with Case C-378/17, *Minister for Justice v Workplace Relations Commission.*

97. On the issue of whether the Tax Appeals Commission should refer a question to the CJEU pursuant to Article 267 of the TFEU, I have addressed the submissions of the Appellant above and I am satisfied that no question arises.

Burden of proof

98. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments are incorrect. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayer to demonstrate that it falls within the relief, see *Revenue Commissioners v Doorley* [1933] 1 IR 750 and *McGarry v Revenue Commissioners* [2009] ITR 131.

99. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'

100. Having considered the evidence and facts, the relevant legislation and related case law, I determine that the Appellant did not succeed in discharging the burden of proof in this appeal.

Determination

101. For the reasons set out above:

I. I determine that the Notice of assessment to excise duty dated 23 October 2014 for the period 4 June 2011 to 6 December 2011 in the sum of €358,078, shall stand.

II. I determine that the Notice of assessment to excise duty dated 23 October 2014 for the period 7 December 2011 to 30 April 2012 in the sum of €265,679, shall stand.

III. I determine that the Notice of assessment to excise duty dated 23 October 2014 for the period 1 May 2012 to 16 December 2013, in the sum of €1,492,298, shall stand.

This appeal is determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

September 2019

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.