TAX APPEALS COMMISSION

27TACD2020

NAME REDACTED

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. On 22nd October 2014, the Appellant was notified of a revenue audit into its affairs for the period 1st April 2012 to 31st March 2013. The audit was extended by letter dated 11th December 2014 to cover the years ended 31st March 2012, 31st March 2014 and the period to 11th December 2014.

2. During the course of the audit, it emerged that the Appellant had sold 3,746,000 litres of Low Sulphur Gas Oil (LSGO) to one particular customer, Name Redacted from 1st April 2011 to 31st March 2013. Payments from the customer, 'Name Redacted' were either by cash, in advance or on collection, and that customer collected the product at the Location Redacted site himself. The Appellant retained no records of his address and processed his orders over the telephone and was unable to provide details of the vehicle registration number used by 'Name Redacted'.

3. The Respondent informed the Appellant by letter dated 15th July 2015 that it was in breach of Regulation 31 of the Mineral Oil Regulations, 2001 which requires any person selling or delivering mineral oil other than in the course of fueling the tank of any vehicle, at the time of each such sale or delivery to give to the purchaser, or person taking delivery of such oil, an invoice or other document, numbered in consecutive series and referred to in the Regulations as a 'movement document'. Regulation 31(2) obliges any person selling or delivering mineral oil to keep at their place of business a true copy of each movement document which should show particulars including name and address of purchaser/recipient of the product.

4. Furthermore, the Appellant failed to satisfy the Respondent that the excisable product was used for a '*specific purpose*' as required by Finance Act, 1999, section 99(10).

5. A Notice of Assessment for Excise Duty issued on 21st December 2015 in the amount of €1,350,507.12. This was calculated on the difference between excise duty returned at the reduced rate on 3,746,000 litres of LSGO and at the standard rate. The Appellant appealed the assessment by letter of appeal dated 19th January 2016.

Legislation

6. Section 95 *Finance Act 1999 (No. 2) - Charge of Tax*

> *(1) Subject to the provisions of this Chapter, and any regulations made under it, a duty of excise, to be known as mineral oil tax, shall be charged, levied and paid –*
>
> *(a) on all mineral oil –*
>
> *(i) released for consumption in the State, or*
> *(ii) released for consumption in another Member State and brought into the State, and*
>
> *(b) on all coal that is brought into, or produced in, the State*
>
> *(2) Liability to mineral oil tax on mineral oil shall arise at the time when that mineral oil is–*
>
> *(a) released for consumption in the State, or*
>
> *(b) following release for consumption in another Member State, brought into the State.*

7. *Section 97 Finance Act 1999 (No. 2) - Rates lower than standard rates*

> *(2) The standard rate in relation to light oils means the appropriate rate for petrol and in relation to any other mineral oil product means the rate for that product when it is used as propellant.*
>
> *(3) The application of a rate lower than the standard rate concerned may be subject to the satisfaction of the Commissioners as to the use or intended use of the mineral oil concerned, and they may, accordingly, prescribe or otherwise impose conditions for –*
>
> *(a) the keeping for sale or selling, or*
>
> *(b) the delivery or keeping for delivery,*

of such mineral oil

8. *Section 104 Finance Act 1999 (No. 2) – Regulations*

(1) The Commissioners may, for the purposes of managing, securing and collecting mineral oil tax or for the protection of the revenue derived from that tax, make regulations.

(1A) Without prejudice to the generality of subsection (1), regulations made under this section may contain such incidental, supplementary and consequential provisions as appear to the Commissioners to be necessary for the purposes of giving full effect to the Directive, Council Directive NO. 95/60/EC of 27 November 1995 and Commission Decision No. 2001/574/EC of 13 July 2001.

(2) In particular, but without prejudice to the generality of subsection (1), regulations made under this section may—

(a) govern the production, movement, importation, treatment, sale, delivery, warehousing, keeping, storage, removal to and from storage, exportation and use of mineral oil;

(b) provide for securing, paying, collecting, remitting and repaying mineral oil tax;

(c) regulate the issue of licences granted under section 101 ;

(d) require a person who produces, imports, treats, sells, delivers, keeps, stores, deals in, exports or uses mineral oil to keep in a specified manner, and to preserve for a specified period, such accounts and records relating to such mineral oil as may be specified and any other books, documents, accounts or other records (including records in a machine readable form) relating to the production, importation, treatment, purchase, receipt, sale, delivery, keeping, storage, removal to or from storage, disposal, exportation or use of mineral oil and to allow any officer to inspect and take copies of, or extracts from, such books, documents, accounts and other records (including, in the case of records in a machine readable form, copies in a readable form);

(e) ….

(3) Regulations made under this section may make different provisions for persons, premises or products of different classes or descriptions, for different circumstances and for different cases.

9. *Section 99(10) of the Finance Act 2001, as amended by section 93(1)(d) of the Finance Act 2010 – Liability of persons*

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."

Mineral Oil Tax Regulations 2001 - S.I. 442/2001

10. *Regulation 31 – Movement document.*

(1) Any person selling or delivering mineral oil (including recycled mineral oil) other than in the course of fuelling the fuel tank of any vehicle, shall at the time of each such sale or delivery give to the purchaser or the person taking delivery of such oil an invoice or other document, numbered in a consecutive series and referred to in these Regulations as a "movement document", showing the particulars specified in paragraph (4).

(2) A person referred to in paragraph (1) of this Regulation shall keep at his or her place of business a true copy of each movement document issued by him or her under this Regulation.

(3) A person in charge of any vehicle which is transporting mineral oil otherwise than in the standard fuel tank of the vehicle—

(a) shall have in his or her possession or custody at all times during the course of such transportation a movement document showing the particulars specified in paragraph (4) relating to the mineral oil being transported, and

(b) shall produce the movement document, or a true copy thereof, on demand to an officer.

(4) The movement document referred to in this Regulation shall include:

(a) the name and address of the consignor of the mineral oil and the address of the premises or place from which such oil was removed;

(b) the name and address of the person to whom the mineral oil was sold or delivered and the address of the premises or place to which such oil was delivered;

(c) the date of such sale or delivery;

(d) the full quantity of each specified description of mineral oil so removed;

(e) the registration number, or other identification number, of the vehicle being used for the purpose of such movement;

(f) in the case of mineral oil supplied at a reduced rate of tax, the following statement indelibly written or printed on the movement document:-

"This mineral oil product is delivered at a reduced rate of tax and must not be used as a propellant or kept in the fuel tank of a motor vehicle."

and

(g) such other particulars as may be required by any other Regulation in relation to any specified description of mineral oil.

11. *Regulation 33 – Marking Requirements*

(1) The application of a reduced rate of tax shall not be allowed on gas oil or kerosene unless the Commissioners are satisfied that—

(a) such gas oil or kerosene is intended for use other than as a propellant,

(b) the markers prescribed in Regulation No. 34 have been added in the proportions prescribed in Regulation 34(2)(a) or 34(2)(b), as appropriate, and

(c) a written declaration that the gas oil or kerosene has been so marked is furnished to the Commissioners by the importer or authorised

warehousekeeper, as appropriate, at the time of release for consumption in the State or such other time as the Commissioners may allow.

(2) *Notwithstanding paragraph (1) the requirement as to marking may be dispensed with, in the case of gas oil or kerosene delivered to persons authorised in writing by the Commissioners to receive it unmarked, subject to such conditions (including the giving of security) as the Commissioners may impose*.

Mineral Oil Tax Regulations 2012 - S.I. 231/2012

12. *Regulation 18 – Records to be kept by mineral oil traders*

(1) A mineral oil trader shall for mineral oil tax purposes, in addition to any other records required under section 886 of the Taxes Consolidation Act 1997 and section 84 of the Value-Added Tax Consolidation Act 2010 , keep in respect of each specified description of mineral oil a record of—

(a) the selling or dealing in, receiving, keeping for sale or delivery, or delivery,

(b) the financing or facilitation of any transactions or activities (whether or not those transactions or activities are carried on by the mineral oil trader), and

(c) any supplies of goods or services received, to enable the undertaking of such transactions or activities or in connection with such transactions or activities,

by that mineral oil trader.

(2) The records required under paragraph (1) shall be kept in such form as the Commissioners may require, and, subject to paragraph (3)(b), shall show for each purchase, sale, supply and delivery of mineral oil—

(a) the nature and date of such purchase, sale, delivery or supply, and the quantity of mineral oil concerned,

(b) for purchases and sales, the name and address of the person from whom the mineral oil was purchased or to whom it was sold,

(c) for all supplies and deliveries made by the mineral oil trader, the name and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned,

(d) for deliveries of mineral oil received by the mineral oil trader, the name, and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person from whom the delivery was received, and the address of the premises or place from which that delivery was dispatched,

(e) a record of every payment made or received, with a clear reference to the transaction concerned.

(3) Any mineral oil trader who is not an authorised warehousekeeper shall keep a record of—

(a) daily measurements or meter readings of the volume of mineral oil of each specified description held by that mineral oil trader in a storage tank or other vessel, and

(b) the aggregate quantities of each specified description of mineral oil supplied on each day in the course of fuelling the fuel tanks of vehicles, and paragraph (2) shall not apply to such supplies.

(4) A mineral oil trader shall keep separate records for each premises or place at which mineral oil is sold, dealt in or kept for sale or delivery."

13. *Regulation 28 - Application of a reduced rate*

(1) The application of a reduced rate to gas oil or kerosene shall only be allowed where the Commissioners are satisfied that such gas oil or kerosene—

(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.

(2) Without prejudice to the generality of paragraph (1)(b), the Commissioners may permit the use of unmarked gas oil or kerosene at a reduced rate, by a person authorised by them in writing to receive such gas oil or kerosene for such use, subject to such conditions, including the giving of security, as the Commissioners may require in any particular case.

14. *Regulation 41 – Keeping and furnishing of records*

(1) In this Part, "record" means any record that is required to be kept under these Regulations.

(2) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept for a period of not less than six years from the date of the last entry in that record.

(3) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept—

(a) in the case of a record to be kept by an authorised warehousekeeper who is the proprietor of a mineral oil tax warehouse, at the mineral oil tax warehouse concerned,

(b) in the case of a record to be kept by an authorised warehousekeeper who is a tenant in a mineral oil tax warehouse, either at that mineral oil tax warehouse or at the registered place of business of that authorised warehousekeeper,

(c) in the case of a record to be kept by any other mineral oil trader, or by a coal trader, at the premises or place where, as the case may be, mineral oil or coal is sold or dealt in, or kept for sale or delivery, by that mineral oil trader or coal trader,

(d) in the case of a record to be kept by a liable coal user, at the place where Value-Added Tax records are required to be kept by that liable coal user.

(4) In the case of any record that is kept by a mineral oil trader or coal trader in accordance with paragraph (3), at a premises or place outside the State, that mineral oil trader or coal trader shall, where required to do so by a proper officer, produce that record for examination by a proper officer—

(a) in the case of a record that is kept in an electronic form, immediately on notification of that requirement by a proper officer, and

(b) in any other case, at a Revenue office or such other place as the proper officer may allow, within ten working days of a notification.

(5) Except where the Commissioners may otherwise require, a record may be kept by any electronic or other process that—

(a) ensures the integrity of that record, and

(b) allows that record to be produced in a legible form, or reproduced in a permanent legible form when so required by a proper officer.

COUNCIL DIRECTIVE 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity

15. *Article 21*

1. In addition to the general provisions defining the chargeable event and the provisions for payment set out in Directive 92/12/EEC, the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2(3).

2. For the purpose of this Directive, the word 'production' in Article 4(c) and 5(1) of Directive 92/12/EEC shall be deemed to include 'extraction', when appropriate.

3. The consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consist of energy products produced within the curtilage of the establishment. Member States may also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event. Where the consumption is for purposes not related to the production of energy products and in particular for the propulsion of vehicles, this shall be considered a chargeable event, giving rise to taxation.

4. 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."

Evidence - Witness for the Appellant – Director Redacted

16. Director's Name Redacted employed by the Appellant gave evidence as follows:

(a) He deals with the administrative aspect of the business, that includes managing the day to day running of the office, staff rosters, wages and accounts. The business has been in operation for [redacted] years, dealing primarily with fuel oil distribution that includes road diesel, tractor diesel, kerosene, petrol, coal, briquettes and gas cylinders with fuel depots in Locations Redacted.

(b) The business has 20,000 customers of which 85% are heating, domestic oils users, houses, factories, schools and churches. There is also a delivery service to customers within a 35-mile radius of Location Redacted and Location Redacted. In addition, he stated that the business has [redacted] pumps in the yard in [redacted], with a constant flow of people coming and going.

(c) His brother Name Redacted deals [redacted], looking after sales, deliveries and the logistics of the truck movement [redacted]

(d) ** staff members are employed of which [redacted] are full time and [redacted] part-time. The majority of these staff have been with the business for over ** years.

(e) The Appellant had a turnover of just over €[redacted] million at the year end of 31 March 2013, and that the profit on ordinary activities before tax was €[redacted], and the operating profit on a percentage basis was zero.

Purchase and storage of fuel

(f) Oil is purchased from Oil Distributor Redacted in Dublin and comes in marked. [redacted]

Cash Traders / Cash operations

(g) In the period 2011 – 2012, 35% of the Appellant's sales were in cash. There were other traders buying substantial amounts of fuel. In relation to the cash business, the money was recorded in the cashbooks, lodgments were completed twice daily, and that there was a bank and credit union run done with the cash. Cash transactions were between €100,000 – €150,000 a week.

Changes in the regulations

(h) Changes in legislation were notified by the Respondent at a briefing session in the Location Redacted in 2012. He was also made aware of the system of Return of Movements (ROM) and this was the first time that he was shown this new system.

(i) On foot of that demonstration, the business invoices were changed to show the licence numbers of the customers. Deliveries were marked as a cash sale unless otherwise stated. He also confirmed that it was a requirement to record the lorry registration number on the new invoice.

Revenue Audit – 2012

(j) The Appellant was visited by the Respondent in the summer of 2012 for the purpose of renewing its licences. An officer from the Redacted office met his brother in the yard and identified herself as Customs and Excise, and explained [redacted] to inspect the pumps and took the pump readings and checked the seals on the retail pumps in the yard.

2014 Audit and Name Redacted

(k) In 2014 there was another visit from the Respondent. The purpose of this visit was initially concerned with conducting a general audit of the three directors of the company and later focused on one customer – 'Name Redacted'. During the audit the pumps were read and the accounts were analysed.

(l) The Respondent expressed dissatisfaction with the sales to 'Name Redacted' as it was not believed such a customer existed. Director's Name Redacted confirmed that he did not have personal dealings with 'Name Redacted' as it was his brother who dealt with him, but saw him coming and going from the yard. He described 'Name Redacted' as a man in early 50's, maybe 5 feet 9, 5 feet 10, dressed with work boots, overalls. He drove 'an old white trailer' and that it was unmarked. He confirmed that he did not have the registration number of the lorry.

Procedure regarding invoices

(m) When explaining the procedure regarding the issuing of invoices to somebody who comes into the yard to purchase fuel, he stated that '*when they come into the office, we write up a docket book. There were four parts to each docket. Top part was to keep the oil off the docket and subsequently binned. The white docket is filed away in the office in case the others ones are lost, the pink one goes to the customer as a movement document. The other one comes back in, and its matched up with the white one and then goes on to the system*.'

Sales to 'Name Redacted'

(n) 'Name Redacted' purchased road diesel, tractor diesel, kerosene and petrol and 70% of the sales to him was marked gas. 'Name Redacted' always collected the fuel and that he was given a Movement Document with every purchase. He confirmed that from the period from the 01 April 2011 - 31 March 2013 over 3,746,000 litres of LSGO was sold to 'Name Redacted'.

(o) Approximately each week, 'Name Redacted' purchased 36,000 litres of LSGO and that he would pay €30,000 cash for the purchase. When questioned whether he

believed that these purchases were unusual, he stated that he did not believe they were unusual as they were lodging €150,000 in cash sales a week.

(p) 'Name Redacted' ordered the oil by contacting his brother and that he would pay for it in advance or as he collected it. 'Name Redacted' purchased ordinary gas oil, LSGO, petrol, diesel and kerosene. When questioned why 'Name Redacted' would want to pay more for the other type of oil, to which he responded that he thought that he may have had a customer for it. The other Director's Name Redacted gave 'Name Redacted' the price on the fuel and that he had no input in this sale.

Sales of LSGO to Name Redacted and Client Name Redacted

(q) There were only 2 recorded purchasers of LSGO - *Client Name Redacted* and 'Name Redacted'. When asked why he treated purchases of fuel from *Client Name Redacted* completely differently from how he treated purchases of fuels by Name Redacted, he confirmed he gave credit to *Client Name Redacted* as they were an established customer. When asked to explain why there would be a difference on a per – litre price charged to *Client Name Redacted* and 'Name Redacted', he replied that there would have price discrepancies like that all the time and that some people would have been more price conscious than others. In 2013, €3.491 million of LSGO was sold to 'Name Redacted'.

(r) On cross examination, he confirmed that he was aware of the illicit fuel trade and the use of green diesel. He also agreed that in the past that laundered fuel was identifiable due to the high sulfur levels in the washed agricultural diesel.

Movement documents to Name Redacted

(s) When referring to the 'movement documents' that were issued to 'Name Redacted', he said that the docket was filled in manually and that the docket included his name, address, the date, the number of litres, price per litre, the ex-VAT figure, the VAT figure and the total of the docket. He further indicated that this was the invoice or Movement Document in operation at the time, and that subsequently this process changed in 2013 on foot of an awareness campaign carried out by Revenue.

(t) When responding to the Respondent's criticism regarding the Movement Documents issued to 'Name Redacted' and with specific regard to the address entered on the Movement Document, he stated that his address was Dublin. He argued that because they did not deliver to him, never gave him credit and did not need to send him a statement, he believed that there was no necessity for a full address. He further asserted that every one of 'Name Redacted' deliveries were on the Sage accounts system, and also on the sales ledger.

(u) When questioned on what he perceived Name Redacted's business to be, he replied that he assumed that he was a trader as he was buying different products. When asked if he was curious as to the fact that he was paying cash, he replied that he was not dealing with him personally. He stated that because 'Name Redacted' was coming in and buying different fuels that he assumed he was a trader.

(v) When probed further about compliance with the Regulations regarding invoices, he reasserted that he was satisfied that he had 'Name Redacted' name and address.

(w) On cross examination, he confirmed that there is a requirement in accordance with the Mineral Oil Regulations of 2001 to complete the full details of the Movement Document. He also agreed that this was in place for the vast majority of the sales for the period between 2011 – 2013. For 2012, there was 61 sales at issue and 62 sales at issue for the year 2013.

Evidence - Witness for the Appellant – Witness Name Redacted

ALL REDACTED

Evidence - Witness for the Respondent

17. Witness for the Respondent gave evidence as follows:

a) He was involved in the Revenue Audit of the Appellant, that commenced on 24 November 2014. In detailing the reason why he raised the assessment, he explained that the Respondent had a problem with laundered fuel at the time. He stated that there was 3.74 million litres of LSGO that was unknown to the Respondent, as they did not know who had bought this fuel or where it had gone. He confirmed that the cash sale of this fuel would have raised red flags in terms of fuel laundering. He considered that there had been breaches of the Mineral Oil Regulations in relation to sales to 'Name Redacted'.

b) He confirmed that a person named 'Name Redacted' from Dublin did not exist on their systems. He said that the Respondent had no identifiers of who 'Name Redacted' was, no registration number, or details of where the fuel had been delivered to. Breaches included paragraphs D and E of Regulation 31(4), which refers to the name and address of the person to whom the mineral oil was sold and delivered, and the registration number of the vehicle being used for the purpose of such movement. He also confirmed that he was not given any explanation by the Appellant as to what their understanding of the use of the fuel to be.

c) When questioned about the '*modus operandi*' of the purchase, he stated that he believed that everything about the sale was unusual, as an unknown person had come into the yard to purchase by cash, large quantities of LSGO. He stated that the nature of this purchase would have raised red flags from a fuel laundering point of view. He also explained that he would have expected a sale of such volume of LSGO to be completed via credit transfer, cheque, or draft, rather than the advanced cash sale that was used in this purchase of LSGO. He stated that there had been 123 or so of these sales to 'Name Redacted'.

Redacted Office

d) When questioned on whether he believed it to be normal to have inquiries coming through the Redacted office in respect of an alleged individual in Dublin, he said that generally it would be unusual because at the time they were geographically split, meaning that if an individual was from Dublin, the inquiry would generally come from Dublin. He stated that he was not sure how somebody in Redacted would know about a Dublin trader as ROM was not in operation in 2012. He also confirmed that he was not aware of any fuel trader or person involved in fuel named 'Name Redacted'.

Information on traders – Pre ROM

e) On cross examination, he explained how the Respondent would get information on traders prior to the introduction of ROM and that the only way that they would have known that 'Name Redacted' did not exist because of the information procured from officers working in the field. He also referred to good citizen reports, whereby a person could alert the Respondent to an individual who was purchasing large quantities of fuel. When questioned about tip offs in respect of one divisional area from another geographical area, he confirmed that it does happen.

Information Campaign / 2012 Visit

f) He explained why the Appellant was visited in 2012 as part of an information campaign at the time, and confirmed that letters would have been sent to traders. He confirmed that most of them would have been visited. He also said that Witness for the Appellant visit in 2012 would have been in relation to the information campaign. He confirmed that the documents presented at the hearing are the only records that exists in the Respondent's office in respect of the 2012 visit. He said in the context of the information campaign, Witness for the Appellant would not have been expected to complete these tasks but may have been required to, in the context of her day to day work.

Risk Rating Document

g) When asked to explain the paperwork that was on the file, he said that the risk rating document would have been prefilled and that a risk rating would have been pre-determined as a result. He stated that he was unable to confirm if this form had been filled in before or after the date of the visit in light of the information campaign and given that this form was filled out in conjunction with this campaign, that the position that a site visit is discretional is meaningless, as all traders were visited during the information campaign.

Appellant's Submissions

Application of excise duty

18. The charge to excise duty arises when mineral oil is released for consumption in the State, whether it be the standard rate or the reduced rate. At no point after that is excise duty payable. This is set out in primary domestic legislation Finance Act 2001, section 95 and Article 7 and 8 of the 2008/118/EC Directive.

19. The mineral oil may be traded between a number of different parties, as is the case in these circumstances, however none of these parties are liable for excise duty, nor do they obtain any benefit from the State or relief from the legislation.

20. While it may be argued that they receive a commercial benefit they do not receive a State benefit or relief from trading in mineral oil *per se*.

21. It is only when the use has been determined can the rate be changed from the reduced rate to the standard rate pursuant to Article 21(4) 2003/96/EC.

22. Finance Act, section 99(10) sets out the basis upon which the standard rate is imposed *in lieu* of the reduced rate. The section is designed to impose liability on the person who obtained the benefit from the tax relief, rebate, repayment or lower rate.

23. Finance Act section 99(10) specifically states if the products are not used for the specific purpose then the person is liable for payment of the excise duty "*at the rate appropriate to them*". This clearly indicates that the person who is liable is the person who would have obtained the relief, rebate, repayment or lower rate.

24. The Appellant submits that this is the end user. This is the person who obtained the benefit to which the section refers. Such an interpretation conforms with Article 21 (4) of Directive 2003/96/EC. This Article clearly states that where Member States impose the standard rate instead of the reduced rate "*it shall become due when it is established that 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*".

25. It was submitted that in order for a Member State to increase the excise it must first be established that the final use condition has not been fulfilled. It was not sufficient for the Respondent to simply rely on a presumption that the *final use condition* for the purpose of a reduced level of taxation or exemption was not fulfilled.

26. Moreover, Article 21(4) of Directive 2003/96/EC places the burden of proving the use on the Respondent because it could not be the case that a taxpayer is required to prove something that is completely out of his control or that is against his own interest.

27. If the domestic legislation, Finance Act section 99(10) is interpreted as proposed by the Respondent that the onus is on the Appellant to establish the specific purpose, this does not conform with the requirements of Article 21(4) of Directive 2003/96/EC and therefore is not in conformity with the EU Directive 118/2008/EC.

28. It was submitted that a '*conforming interpretation'* or consistent interpretation must be applied to ensure that the national legislation is in conformity with EU law. The Court of Justice of the European Union has held that this is 'inherent' in the treaties.

The Law

29. The general scheme and purpose of Directive 2003/96 is based on the principle that excisable products are taxed in accordance with their actual use. In the case C-503/17 *The Commission v The United Kingdom* the CJEU held in respect of article 21(4) the following:

> "*Fourthly, nor can the United Kingdom's argument based on Article 21(4) of Directive 2003/96 be upheld. That provision relates to energy products intended for use which is tax exempt or is subject to a reduced level of taxation, where a final use condition has not been met, as a result of which, ultimately, it becomes apparent that those products must be subject to excise duty calculated at the full rate. It does not relate to energy products intended from the outset for use which is taxable at the full rate, such as the fuel intended for use in the engines of private pleasure craft.*"

30. It is manifestly clear from the foregoing that in order to impose the standard rate of tax, the starting point is to establish that the '*final use condition*' has not been met and it is only then that the standard rate can be imposed.

31. The '*final use condition*' has not been met in the present case, which is fundamental to the ability to impose the standard rate.

Burden of Proof

32. The burden of proof in the context of European caselaw and the CJEU is twofold –

    a) Member States cannot reverse the burden of proof automatically and

    b) that the relevant authorities must have a *prima facie* reason for suspecting fraud or tax avoidance activity in order to place the onus of proof on the taxpayer, either because of the facts of the particular case raise such a *prima facie* reason in and of themselves or because the circumstances are such that the probability of tax evasion or avoidance is very high.

33. This general position was summarised by Advocate General Mazán in his Opinion in Case C-451/05 *ELISA* at §§102–103:

> *"As far as the burden of proof is concerned, the Court's case-law provides that it is in principle for the tax authorities of the Member State concerned to prove a risk of tax avoidance or evasion in each case. It cannot be inferred from the fact that a taxpayer uses his fundamental freedoms to establish his residence in another Member State that such a taxpayer pursues a fraudulent objective. A general presumption of tax*

evasion or tax avoidance cannot justify a fiscal measure which compromises the objectives of Treaty. The Court has gone as far to consider that the laying down of a general rule automatically excluding certain categories of operations from a tax advantage, whether or not there is actually tax evasion or tax avoidance, cannot be considered as proportionate."

34. In Case C-6/16 *Eqiom*, the CJEU did not allow the French authorities to reverse the burden of proof. It held that it could not reverse the burden of proof without any *prima facie* evidence and moreover it found that the national legislation went too far in its tax avoidance and abuse objectives.

35. The main dispute in *Eqiom* was the scope of the Parent-Subsidiary Directive (2011/96) in France concerning a dividend distribution from a French subsidiary to a Luxembourg parent company. The French authorities imposed a withholding tax on the dividend distributions, as the tax exemption in France did not apply where the distributed dividends were received by the parent company (which was controlled by a Swiss company) unless the taxpayer provided proof that the principal purpose or one of the principal purposes of the chain of interests was not to take advantage of the tax exemption.

36. The Parent-Subsidiary Directive precluded Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company. However, Article 1(2) provided that that directive did not preclude the application of domestic based provisions required for the prevention of fraud and abuse.

37. The question referred to the CJEU was whether or not the denial of the tax exemption could be accepted based on the then applicable article 1(2) of the Parent-Subsidiary Directive.

38. The CJEU noted the opinion of the Advocate General wherein she stated:

"although Article 1(2) of the Parent-Subsidiary Directive reflects the general principle of EU law that no one may benefit from the rights stemming from the legal system of the European Union for abusive or fraudulent ends, it must nevertheless, in so far as it constitutes a derogation from the tax rules established by that directive, be interpreted strictly (see, to that effect, judgment of 25 September 2003, Océ van der Grinten, C-5/01, EU:C:2003:495, paragraph 86)".

39. Thus, the power conferred on the Member State by Article 1(2) of the Parent-Subsidiary Directive in order to prevent fraud and abuse cannot be given an interpretation going beyond the actual terms of the provision.

40. The CJEU further identified the aim of the national legislation vis-à-vis tax evasion. It stated at paragraph 30 of its decision *"In that context, it should be noted that, in order*

for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage." It further stated that a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive.

41. The CJEU found that authorities cannot start from a position of a general presumption and held that a national authority must examine the operation at issue and must provide some evidence on a *prima facie* basis of fraud and abuse. The CJEU found that the restrictions imposed by the French authorities with the aim and objective of combatting fraud and abuse were not justified in the circumstances.

42. CJEU stated in Case C-6/16 *Eqiom* at §§30–32:

> *"In that context, it should be noted that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (see, to that effect, judgments of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, EU:C:2006:544, paragraph 55, and of 5 July 2012, SIAT, C-318/10, EU:C:2012:415, paragraph 40).*
>
> *Therefore, a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive, or a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties (judgments of 26 September 2000, Commission v Belgium, C-478/98, EU:C:2000:497, paragraph 45 and the case-law cited, and of 5 July 2012, SIAT, C-318/10, EU:C:2012:415, paragraph 38).*
>
> *In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue. The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse (see, to that effect, judgment of 8 March 2017, Euro Park Service, C-14/16, EU:C:2017:177, paragraphs 55 and 56)."*

43. The CJEU made similar findings in joined cases Cases C-504/16 *Deister Holding* and C-613/*16 Juhler Holding* and further held that, in the context of those cases that simply because they had foreign holdings did not, in itself, indicate the existence of a wholly artificial arrangement that did not reflect the economic reality.

44. In the present case, Finance Act 2001, section 99(10) imposes particular obligations on the Appellant in respect of trading in MMO. In the event that there is a breach of the Mineral Oil Tax Regulations, however minimal, there is an automatic presumption that the use to which the product was put did not comply with the conditions attached to the reduced rate. It follows from this that there is a general presumption that the Appellant, due to a breach, no matter to what extent, is engaged in fraud or abusing the system. The Respondent states that the onus rests on the Appellant and that is incumbent upon the Appellant to dislodge this 'general presumption' without even an attempt to put forth any evidence of fraud or abuse.

45. In light of the decisions of the CJEU in *Eqiom* and *Deister/Juhler* there is an onus on the Respondent to put forth even on a *prima facie* basis evidence of fraud and/or abuse. The Respondent has flatly and vehemently refused to so do. It repeatedly contends that the onus rests on the Appellant. In light of the decisions of the CJEU this is not correct.

46. The Appellant submitted that there is a clear disconnect between the requirements of the 2003 Directive and Finance Act No.2 section 99 (10). As set out *supra* the Directive puts the onus on the Member State to establish the 'final use', this is supported by the decisions in *Eqiom* and *Deister/Juhler*. On the other hand, Finance Act 2001 section 99 (10) imposes the burden on the taxpayer without any requirement of the Respondent to establish the final use.

47. Additionally, the aims and objectives of Finance Act, section 99(10) and the Mineral Oil Tax Regulations go further than is necessary in their attempts to prevent fraud and abuse.

48. When one compares the Mineral Oil Tax Regulations with Article 21(4) of the 2003 Directive, the Directive is clear in order to impose the standard rate it is necessary for the tax authority to establish the actual use. This is in line with the decisions of the CJEU in *Eqiom and Deister/Juhler* as the onus rests with the authorities to set out an actual use to which the excise product was put. In failing to provide any evidence of the use to which the product was put the Respondent has failed to discharge the onus as set out in the Directive. Additionally, the Mineral Oil Tax Regulations go further than is necessary.

49. There is clearly an incongruity between Finance Act 2001, section 99(10) and Article 21(4) of Directive 2003/96/EC. As set out in submissions, Article 21(4) requires final use to be "established" which is at variance with Finance Act 2001, section 99(10).

50. In addition to the said submissions and in reply to the Respondents submissions, it was submitted that in light of the fact that the Mineral Oil Tax Regulations seek to achieve the objectives of the EU Directives in respect of Mineral Oil, the Mineral Oil Tax Regulation must be assessed in light of the harmonising provision i.e. the Directives and in this particular case Council Directive 2003/96/EC. Council Directive 2003/96/EC seeks

to restructure and thus harmonise the Community Framework for the taxation of energy products and electricity.

51. In C-37/92 – *Vanacker and Lesage* – the Cour d'Appel of France referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 to 36 of the EEC Treaty and Council Directive 75/439EEC on the disposal of waste oils.

52. The CJEU, at paragraph 9, of its decision noted that "*since the collection of waste oil has been regulated in a harmonized manner at Community level by the directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of Articles 30 to 36 of the Treaty*."

53. In the event that it is unclear as to how Article 21(4) of the Directive should be interpreted, a preliminary reference pursuant to Article 267 of the Treaty of the Functioning of the European Union should be made.

Conclusion on Burden of Proof

54. Therefore, the tax authority must establish the use to the requisite legal standard with objective evidence before drawing the conclusion that the use has not been complied with. In applying this requirement, it was submitted that it does not suffice for the tax authority to rely on a presumption that the actual use was not the use for which the lower rate was applied.

Statutory Interpretation

55. An issue was raised during the course of oral submissions in respect of the approach to be adopted in respect of statutory interpretation. The Tribunal was urged to adopt a literal approach whereupon the tribunal and counsel for the Respondent expressed the view that in light of the decision of O'Donnell J in *O'Flynn* a purposive approach was the present approach adopted.

56. In *McGrath v. McDemott* [1988] I.R.258, Finlay C.J. stated:-

> *"The function of the courts in interpreting a Statue of the Oireachtas is … strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the Statute involved, or even of other Statutes expressed to be construed with it. The courts have not got a function to add to or delete from expressed statutory provisions so as to achieve objectives which to the courts appear desirable"*

57. McCarthy J. in the case of *Texaco (Ireland) v. Murphy* [1991] 2 I.R. 449 commented (at p. 456).

> *"Whilst the court must, if necessary, seek to identify the intent of the legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning".*

58. In the case of *Cork County Council v. Whillock* [1993] 1 I.R. 231 which concerned an issue relating to the interpretation of the Malicious Injuries Act, Egan J. stated (at p. 239):-

> *"There is abundant authority for the presumption that words are not used in a Statute without a meaning and are not tautologous or superfluous, and so if effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vein".*

59. It is well established that penal statutes must be construed strictly in order to give the benefit of the doubt to the individual as against the State. (See *Mullens v. Harnett* [1988] 2 I.L.R.M. 304). The application of the presumption beyond criminal statutes was emphasised by O'Higgins J. the same case when he said: -

> *"Penal statutes are not only criminal statutes, but only statutes that impose a detriment".*

60. The application of strict construction to taxation statutes was confirmed in *Inspector of Taxes v. Kiernan* [1982] I.L.R.M. 13. At p. 15 Henchy J. stated: -

> *"When a word or expression is used in a Statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language".*

61. In the case of *The Minister for Justice and Equality v. Palonka [2015] IECA 69*, the issue that fell to be decided related to s.16(1) of the European Arrest Warrant Act , and which provide that an order for the surrender of a person to a issuing State can be made "provided that":-

> *(a) ..*
> *(b) ..*
> *(c) the European Arrest Warrant states, where appropriate, the matters required by s. 45 (inserted by s.23 of the European Arrest Warrant) application to third countries (and amendment) and extradition (amendment) Act 2012."*

62. In his judgment, Peart J. stated (at para. 29):-

> *"The provisions of section 45 are very clear. Under section 16(1)(c) of the Act surrender is prohibited unless the European arrest warrant states, where appropriate, the matters required to be stated by section 45. One of those matters is the information to be provided at point 4 where, in this case, point 3.2 of the Table is relied upon. That information is absent. It has not been provided. The warrant therefore does not indicate the matter required by point 4 of point (d) of the Table. Section 16(1)(c) of the Act is therefore not satisfied. To give the section a purposive interpretation in the light of the stated objectives and provisions of the Framework Decision would in this case fly in the face of clear national legislation."*

63. He followed on saying –

> *"To so interpret the legislation would be to ignore the plain and ordinary meaning of the words used by the Oireachtas to express its intention. The section does not permit any derogation or discretion in relation to compliance with s.45, or any part of it. It is stated in mandatory and clear times".*

64. In *Gaffney v Revenue Commissioners,* the High Court's Judgment records that the Respondent's agreement that the principles applicable to the construction of tax statutes are those set out in *Doorley* and *Kiernan* and no mention was made of the Supreme Court's Judgment in *O'Flynn Construction*. In the High Court's Judgment in *Bookfinders v Revenue Commissioners (Unreported 14 October 2016)* Judge Keane expressly applied the principles of interpretation as summarised in *Gaffney*. The principles set out in *Gaffney* have also been cited with approval by the High Court in *Fennell v Creedon [2015] IEHC 711*.

65. Between the date of *Gaffney* and *Bookfinders*, in *DPP v Perennial Freight Ltd [2015] IECA 252* the Court of Appeal considered an assessment for excise duty and noted that:

> *"The Court must have regard to the fact that the statutory scheme relates not simply to the imposition of duties or taxes, but creates offences for the use of a vehicle in respect of which the required excise duty has not been paid, and the need therefore to apply a strict construction to the provisions under scrutiny in the search for certainty."*

66. In the matter of *DPP v. Moorehouse [2006] 1 IR 421,* the judgment of Kearns J (as he then was) provides that there is a well established presumption in areas of statutory interpretation that statutes providing for a penalty have to be construed strictly and that the matters seemingly giving grounds for the imposition of the penalty must be clearly specified and defined and cannot be implied from the wording of the statute. The learned Judge stated at paragraph 68:

> *"If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."*

67. In 10TACD2016 the Appeal Commissioners held that:

> *"Both parties in their submissions argued that the interpretative approach to be applied was a literal one taking into account the jurisprudence in respect of the interpretation of taxation statutes based on a long line of authorities including inter alia, Revenue Commissioners v Doorley [1933] IR 750, Inspector of Taxes v Kiernan [1982] ILRM 13, Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64, Texaco (Ireland) Ltd v Murphy [1991] 2 IR 449 and I fully accept this submission."*

Conclusion: Statutory Interpretation

68. It was submitted that a strict interpretation of the statute is to be engaged. It was submitted that the decision in *O'Flynn* is in respect of section 811 tax avoidance and particular to tax avoidance. Moreover, as a first step in any statutory interpretation it was submitted that the starting point is the literal interpretation of the legislation and any ambiguity in the legislation ought to be interpreted in favour of the taxpayer.

VAT element

69. It was submitted that when one compares the two recent decisions of the Tax Appeal Commissioners dealing with Finance Act, section 99(10) it is evident the difference in approach to the two cases. In Determination 225/15 the Respondent assessed the Appellant for both VAT and excise duty. The Appellant was found not to have proved that the marked mineral oil (MMO) was used for the specific purpose or in a specific manner in accordance with Finance Act, section 99(10). Following on from this the Commissioner found that as the fuel fell to be supplied as road diesel then VAT was charged at the standard rate of 23%.

70. However, in Determination 33/16 the Appellant was held to fall foul of the first part of Finance Act, section 99(10) due to the failure to retain the regulated records. However, no VAT was raised in respect of the appellant in that case which is indicative of the fact that Respondent was not satisfied as to the end use of the product.

71. Similarly, in the present case no VAT has been raised which is indicative of the fact that the Respondent is not satisfied of the end use to which the MMO was put.

72. The Respondent's Counsel in the present appeal indicated during the hearing that he would be relying heavily upon cases 225/15 and 33/16 but the Appellant herein asks that the significant factual differences between it and the Appellants in 225/15 and 33/16 be noted by the Commissioner. In particular the Appellant in 225/15 had had his oil trader's licenses revoked and in 33/16 the Commissioner made a determination that the Appellant had admitted multiple breaches of the Regulations. In the present appeal, the Appellant remains an oil trader and continues to be licensed by the Respondent and Director's Name Redacted made no admission of breach of the Regulations.

73. It was submitted that in principle the Appellant complied with the Mineral Oil Tax Regulations. Director's Name Redacted gave evidence of company's background, its long standing in the community, and its type of business. It was stated that in 2014 an audit began and it eventually focused on excise on the 'Name Redacted' sales. No issue was raised in respect of VAT and the directors were all audited personally without any issues and no unjust enrichment on their personal parts was found.

74. Director's Name Redacted confirmed that 'Name Redacted' did exist and he gave a detailed description of 'Name Redacted' personal appearance and the lorry used. It was also confirmed that 'Name Redacted' bought a number of different products which he collected. It was also confirmed that 'Name Redacted' was always given a movement document. It was also confirmed contents of 'Name Redacted' invoices would be "*the number of litres, the product he got, the number of litres he got, the date that he got it, the price he was charged before VAT, including VAT, the invoice number*". It was confirmed that roughly 35% of their customers were cash customers and that 'Name Redacted' was not their only cash customer. It was confirmed that in 2012 revenue officers called in respect of the renewal of the Company's traders licenses and to ask about the 'Name Redacted' account. It was confirmed when Witness for the Appellant visited the Appellant's premises and took away a sales ledger and and placed this on the Revenue's file. It was confirmed that there was no follow up in respect of the 'Name Redacted' account thereafter. It was confirmed that the Appellant's owners met with Witness for the Respondent, of Respondent in December 2015 and advised him of Witness for the Appellant ' 2012 visit and that subsequently Witness for the Respondent produced the risk assessment document generated as a result of the visit which classified the Appellant as being low-risk.

75. In addition to the evidence of Director's Name Redacted, Witness for the Appellant , previously an official of the Respondent, gave evidence and confirmed that there was 2 purposes for her visit to the Appellant in 2012 which were the renewal of licenses and a request by customs in Redacted to check out a low sulphur customer of the Appellant's named 'Name Redacted'. Witness for the Appellant confirmed **** the instruction to enquire about 'Name Redacted' [redacted] recalled that the instruction came from a colleague in Redacted. [redacted] took a copy of the sales ledger from the Appellant's premises and [redacted] placed this on the Respondent's file.

76. It was confirmed by Witness for the Appellant that everything complied with the regulations and stated "*No. The ledger sheet was there that showed the lodgments and the invoices. To me – I'm not an auditor – but to me it seemed to be - - I had no issue with it". We would have done the risk assessment, and it came out as low risk*". Under cross examination of Witness for the Appellant the Respondent's Counsel sought to assert that Witness for the Appellant ' colleague Name Redacted, who attended with Witness for the Appellant at the premises in July 2012, had no recollection of a direction to enquire about 'Name Redacted', however the Respondent's Counsel then conceded that Name Redacted would not be available to give this evidence. In addition, Witness for the Respondent confirmed that the issue of whether or not Name Redacted recalled the direction of the 'Name Redacted' enquiry did not even come up in recent discussions he had had with Name Redacted.

77. In respect of 'Name Redacted' address Witness for the Appellant confirmed that "*Revenue had an address".* Witness for the Appellant also confirmed when asked by the Commissioner that was satisfied that the full address for Name Redacted' was on the Movement Documents provided.

78. Witness for the Respondent also gave evidence to the effect that he had reviewed the Revenue's file and could not locate the aforementioned sales ledger.

79. It was submitted that despite the previous conviction of Witness for the Appellant there was no basis upon which the Commission could find [redacted] was not a credible witness. [redacted] did not know the Director's Name Redacted personally at all and had no incentive or desire to be a witness in the present appeal but [redacted] to assist the Commission in its fact finding mission, and in the circumstances her evidence should be given the due weight and attention that it deserves.

80. Witness for the Appellant was an employee of the Respondent at the time of the visit to the Appellant's premises in 2012 and attended at the premises with the Respondent's authorisation and as its representative. Although Witness for the Respondent disputes that Witness for the Appellant would have been charged with or instructed to make the 'Name Redacted' enquiry and although he stated that the sales ledger account was not on the Revenue's file, the Appellant stated that these internal Revenue notes conflict and are not for the Appellant to resolve.

81. It was submitted that the Appellant was in compliance with the regulations in principle and that the Respondent was aware of the Appellant's dealings with 'Name Redacted' since before July 2012.
82. It was therefore submitted that the Appellant's appeal should be allowed.

Respondent's Submission

83. The Respondent disagreed with the Appellant's contention that once oil is released for consumption, "*at no point after that is excise duty payable*". "*Release for consumption*" is defined by Finance Act 2001 section 98 as meaning effectively when the excisable products are imported into the State. An amount of 3,746,000 litres LSGO, were purchased by the Appellant from a wholesaler at a reduced rate of excise duty and this application of the reduced rate was conditional on the Appellant as a Mineral Oil Trader complying with its obligations pursuant to the Mineral Oil Tax Regulations. Mineral oil may be traded and change ownership many times before it eventually reaches an end user. However, during all of that period the entitlement to the rebated level of excise duty is entirely dependent on compliance by the Mineral Oil traders of their obligations pursuant to the Mineral Oil Tax Regulations.

84. If the Appellant had complied with its obligations pursuant to the Mineral Oil Tax Regulations, the assessments herein would not have arisen. However, due to the flagrant breach of its obligations pursuant to the said Regulations, the Respondent has no ability whatsoever to identify the party to whom the Appellant alleges it sold the LSGO.

85. The Mineral Oil Tax Regulations exist in order to ensure that the significant excise duties attaching to mineral oils are protected. At the appeal hearing there was evidence that standard mineral oil excise duty is at a rate of €492.02 per 1,000 litres applied to DERV / white road diesel. The reduced rate of mineral oil excise duty attaching to what is often referred to as green or agricultural diesel/LSGO is €88.66, a difference of €403.35 per 1,000 litres. Thus, for the quantity of 36,000 litres being purchased more than once a week there is a differential of €14,527.80 in excise duty as between marked and unmarked oil. It was for this reason that LSGO has a green marker, to identify it as marked gas oil with a reduced rate of excise duty.

86. During the course of the hearing, there was evidence that in the years 2011, 2012 and 2013, given the low level of sulphur in LSGO, once the green marker was laundered out, it was difficult, if not impossible to decipher between DERV (normal white road diesel in respect of which full excise duties had been paid) and laundered LSGO and for that reason LSGO was the fuel of choice for laundering. Director's Name Redacted, who gave evidence on behalf of the Appellant was in agreement and acknowledged that this was a matter known to those involved in the fuel trade, including himself. A cheaper marked gas oil (MGO) was also available at that time, but because of its higher sulphur level, if laundered, would have been readily detectable as laundered fuel. Therefore, at the material time there was a more limited market for LSGO as MGO was still available and cheaper and consequently it is not surprising that the Appellant had only one other customer purchasing LSGO, *Client Name Redacted*, but at much lesser quantities than "Name Redacted".

87. The Mineral Oil Tax Regulations exist in order to impose conditions upon Mineral Oil Traders to safeguard the excise duties involved. This appears to have been accepted in evidence by the Appellant.

88. What is noteworthy is that the Appellant in its further submissions seems to ignore the clear evidence that the Appellant failed to comply with provisions of the Mineral Oil Tax Regulations in the context of the supplies of LSGO. In this regard it should be borne in mind that the thrust of the Regulations was to ensure that the Respondent was in a position to *inter alia* identify the name and address of the party purchasing the mineral oil as well as the registration number of the vehicle used, yet all that is apparent from the invoices presented are purported sales to 'Name Redacted' with a purported address of "Dublin."

89. It is clear that the Appellant was only interested in safeguarding its own interests and had no regard to its obligations pursuant to the Mineral Oil Tax Regulations. Before considering any further the additional submissions of the Appellant it is necessary to recap on the evidence, which was to the effect that:

    a) An old, white, articulated lorry, with no logo, collected 36,000 litres of LSGO from the Appellant, more than once a week over the two year period;

    b) The party who purchased the LSGO was a 'Name Redacted'. It will have to be determined whether this was a full name or a fictitious name, particularly given the evidence of Officer Witness for the Respondent that there was no record of such a person on the Respondent's systems. It is the Respondent's position that the name was fictitious and/or not a full or real name and the fact that there was no accompanying address. It was submitted that the failure to record the name amounts to a breach of Regulation 31(4)(b) of the Mineral Oil Tax Regulations, 2001.

    c) The Appellant did not record any address for 'Name Redacted' other than "Dublin", contrary to the requirements of the Mineral Oil Tax Regulations. Director's Name Redacted accepted that he did not have a full address for 'Name Redacted'. It was submitted that the failure to record the address amounts to a breach of Regulation 31(4)(b) of the Mineral Oil Tax Regulations, 2001.

    d) The Appellant allegedly does not know and did not record the registration number of the lorry, despite its obligation to do so, which was accepted by Director's Name Redacted. It was submitted that the failure to record the registration number amounts to a breach of Regulation 31(4)(e) of the Mineral Oil Tax Regulations, 2001;

e) Each time 'Name Redacted' came with approximately €30,000 in cash, Director's Name Redacted spent 10 minutes counting in his office yet allegedly not in the presence of 'Name Redacted';

f) Director's Name Redacted acknowledged that the *modus operandi* was not normal as the large quantities of fuel being paid in cash upfront;

g) Director's Name Redacted also gave sworn evidence that he never met 'Name Redacted' despite "Name Redacted" being on the premises for a considerable period each week over a two year period (while 36,000 litres was loaded on the articulated lorry). Director's Name Redacted on each visit spent 10 minutes counting approximately €30,000 cash and admitted that 'Name Redacted' was their biggest customer, representing more than 5% of their sales, bearing in mind that they had 20,000 customers.

h) The Appellant's sales to 'Name Redacted' ceased in or around the time the ROM1 (Return of Movements) requirements came in early 2013.

i) The only other sales of LSGO were to *Client Name Redacted*, whom the Appellant gave 30 days credit and in respect of which the Appellant incurred the additional cost of delivering the fuel, yet charged 5 cents less per litre for that same fuel than it allegedly sold to 'Name Redacted', despite 'Name Redacted' purchasing far more and paying cash in advance;

j) The Appellant alleged that 'Name Redacted' came from Dublin, which would mean that he travelled some 90 or 100 miles to Location Redacted to collect the fuel in an articulated truck and yet paid 5 cents more per litre that the Appellant was selling to *Client Name Redacted*, yet *Client Name Redacted* had the fuel delivered to it. On the evidence of Director's Name Redacted 'Name Redacted' was being charged 6 or 7 cents a litre more and admitted that 'Name Redacted' was being charged more per litre than the sales to *Client Name Redacted*. On a load of 36,000 litres at 7 cents per litre – would equate to €2,520 profit per load, which was occurring more than once a week, cash upfront, no delivery or holding costs.

k) It was acknowledged by Director's Name Redacted in evidence that despite the fact that the Appellant made nil net profits in 2013, the gross profits arising from the alleged sales to 'Name Redacted' in 2013 gave rise to €180,000, which was a significant contribution towards the Appellant;

l) Director's Name Redacted acknowledged that he was aware in general terms that at the material time illicit fuel trade and fuel laundering was going on in the State and that there was an onus on the Appellant to be vigilant, yet the Respondent contended that the Appellant in choosing not to fulfil its obligations

pursuant to the Regulations assisted in concealing the identity of the purchaser of the LSGO.

m) Despite having its accountant Name Redacted, at the Appeal hearing on both days, the Appellant chose not to call him as a witness;

n) The Appellant never chose to make contact with 'Name Redacted', despite him being a significant customer who allegedly stopped purchasing for no reason known to the Appellant, despite the assessments raised herein and the burden of proof on the Appellant to prove the end use of the LSGO. Ironically, the Appellant allegedly went to much effort to locate Witness for the Appellant, former Excise Compliance Officer.

90. Evidence was given by Officer Witness for the Respondent to the effect that in his view the Appellant breached the provisions of the Mineral Oil Tax Regulations as set out above.

91. Witness for the Respondent gave evidence that there was no 'Name Redacted' registered on the Respondent's system. Witness for the Respondent also gave evidence that he suspected that the LSGO purchased from the Appellant was thereafter laundered.

92. In the Appellant's submissions it is alleged that the Appellant does "*not receive any State benefit or relief from trading in mineral oil per se*". Obviously, without the benefit of a mineral oil traders licence the Appellant could not carry on as a Mineral Oil Trader, so the entitlement to hold the licence in itself is a benefit, but is conditional on the Appellant complying with the conditions attaching thereto, i.e. compliance with its obligations pursuant to the Mineral Oil Regulations, which the Appellant failed to do herein.

93. The Appellant placed much emphasis on Article 21(4) of Directive 2003/96/EC which 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 not longer, fulfilled."*

94. As stated above, evidence by the Respondent that despite the very significant quantities involved (3,746,000 litres) of LSGO, there is no record of a 'Name Redacted' on the Respondent's system. Thus 'Name Redacted' is not a registered Mineral Oil Trader and did not exist as a taxable person registered with the Respondent. This evidence, tallied with the high price for LSGO allegedly paid by 'Name Redacted', the large cash payments in advance and *modus operandi* involved as well as the Appellant's flagrant breach of the

Mineral Oil Tax Regulations, the Respondent believes that the LSGO after leaving the Appellant's premises was laundered, giving rise to a significant loss of revenue to the State. Despite the acknowledged awareness on the part of the Appellant that LSGO was used for laundering purposes and the need to keep vigilant to prevent same occurring, the Appellant failed to do so and appears to have facilitated the LSGO being used illegally by failing to comply with the Mineral Oil Tax Regulations, thus concealing the true identity of the party who purchased the LSGO.

95. It is not for the Respondent to prove that the final use condition has not been met. Article 21(4) of Directive 2003/96 makes no such provision, despite what is contended for by the Appellant.

96. The Appellant contends that Finance Act 2001 section 99(10) is precluded by Article 21(4). This has already been considered in detail by Commissioner Gallagher in determination 33/16 dated 11/09/19 and in particular at paragraphs 60 to 70 and regard should be had for same.

97. It is important to have regard to what is actually provided for in Finance Act 2001 section 99(10):

> "*Where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than that 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 a lower rate."*

98. The focus in the appeal herein is on Finance Act 2001 section 99(10)(b), which provides that liability only attaches to a mineral oil trader if the mineral oil trader firstly has not complied with the requirements of excise law in relation to the holding or delivery of the mineral oil and secondly is not in a position to prove to the satisfaction of the Respondent that the mineral oil was used for a rebated purpose.

99. Effectively, Finance Act 2001 section 99(10)(b) gives a mineral oil trader, if they have failed in their duties pursuant to Mineral Oil Tax Regulations the opportunity of avoiding

liability if they can prove to the satisfaction of the Respondent that the mineral oil was used for rebated purposes and that there was no loss to the State.

100. The Appellant suggested that the obligation to prove that the end use was not complied with rests with the Respondent is entirely illogical. If the Appellant had complied with its duties pursuant to the Mineral Oil Tax Regulations, then one would not have to consider any liability on the part of the Appellant. It was only as a consequence of the Appellant's decision not to comply with its obligations pursuant to the said Regulations that these significant transactions were allowed to occur such that the identity of the purchaser of the 3.74m litres of LSGO was and remains untraceable to the Respondent, giving rise to a very significant loss in excise duties and an inability to trace any party with joint liability.

101. It is noteworthy that despite the Appellant's unfounded insistence at the appeal hearing that it had complied with its obligations when completing the Movement Documents, it made no effort whatsoever to trace this alleged 'Name Redacted' from Dublin. Surely, if, as contended, there were *bona fide* sales, the Appellant would have called its client, 'Name Redacted' to give evidence regarding the end user of the LSGO, particularly given that he was its biggest client for a two year period.

102. The Appellant in its recent submissions contends that Finance Act 2001 section 99(10) provides that the person who is liable is the person who would have obtained the relief, rebate, repayment or lower rate. There is no basis for such a contention. Finance Act 2001 section 99(10) as set out above is quite clear – "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 a lower rate."* This is not in any way restricted to the end user. Indeed, Finance Act 2001 section 99(10) starts with the words "*where any person has received excisable products* …"

103. The Respondent endorses the determination of the TAC in 33/16 which considered this point in detail as follows:

> *40. 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 of 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.*

41. 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.

42. 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.'

43. 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."

104. The Appellant contends that Article 21(4) of Directive 2003/96/EC provides that the standard rate shall only become due when it is established that the final use condition is no longer fulfilled. As set out above, it is the Respondent's submission, as set out in detail in its earlier written submissions, that the burden of proof rests upon the Appellant to satisfy the Respondent that the end use condition was fulfilled, a matter the Appellant has failed to address with the Respondent and chose not to lead any evidence at the appeal hearing herein. On the other hand, Witness for the Respondent gave evidence of his belief, given the circumstances of the supply of the LSGO herein that the end user condition was not fulfilled.

Burden of Proof

105. The Appellant contends that Article 21(4) of Directive 2003/96/EC places the burden of proving the end use on Revenue "*because it could not be the case that a taxpayer is required to prove something that is completely out of his control or that is against his own interest."* Once again, there is no basis whatsoever for such a contention in Article 21(4) of Directive 2003/96/EC is also illogical. The Appellant is the entity who dealt with

the purchaser of 3.74m litres of LSGO over a two-year period, with the purchaser visiting its premises more than once a week, each time with €30,000 cash and was paying over the odds, yet travelling allegedly all the way from Dublin. The Appellant was obliged pursuant to the Mineral Oil Tax Regulations to obtain the name, address and registration number of the purchaser, but failed to do so. This was the most basic information, which would have been readily available and in respect of which the Appellant knew it was obliged to keep, yet failed to do so. By choosing to conceal this information from the Respondent, the Appellant by his breach of the Regulations has prejudiced any ability on the part of the Respondent to locate the purchaser. Following the Appellant's submissions, it would mean that any Mineral Oil Trader who assists excise fraud by concealing the identity of the purchaser of fuel used for laundering by not properly completing the Movement Document could never be liable as such necessary information would be unknown to Revenue.

106. The Appellant already raised the issue of burden of proof in its original submissions which were responded to in detail in the Respondent's earlier submissions. In this regard the Appellant had sought to argue that the VAT cases of *Mahageben and David* (Cases C-80/11 and C-142/11) provided that there ought to be a reversal of the burden of proof herein. The determination of the TAC in 33/16 (paragraphs 71 to 81) considered similar arguments in detail and affirmed the position adopted by the Respondent herein – that the Appellant's reliance on those authorities was misconceived and the principles contained in *Mahageben and David* are not transposable to the assessment of excise duty since no right to deduct arises in relation to excise duty as it is not a turnover tax.

107. The Appellant refers to case C-503/17 *The Commission v The United Kingdom*. That case was taken against the UK by the Commission arising from the UK's failure to fulfil its obligations under Council Directive 95/60 EC on fiscal marking of gas oils and kerosene arising from the UK's practice of allowing marked fuel to be used for the purposes of propelling pleasure craft. However, in that case it was common case that the final use condition was not met. Rather the issue was whether marked fuel could be used in pleasure craft, even when there was no exemption or reduction in excise duty applicable to that marked fuel. Consequently, the findings of the Court it was submitted have no application herein, other than the principle, which has always been accepted by the Respondent, as made clear in its earlier submissions, that where the final use condition has not been met, the standard rate of excise duty applies. At the hearing herein Officer Witness for the Respondent gave evidence of his view that the LSGO was used for laundering purposes. It was submitted, given the circumstances and unusual *modus operandi* herein that such a view was well founded. However, as set out above, in accordance with Finance Act 2001 section 99(10)(b) it is a matter for the Appellant to satisfy that the final use condition was satisfied.

108. The Appellant makes reference to Case C-6/16 *Eqiom*. This case considered the Parent-Subsidiary Directive and has no bearing upon the facts of the within appeal. The Parent-

Subsidiary Directive precludes Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, thus ensuring that withholding taxes are not imposed simply because the parent company is in another Member State. The decision confirmed that Member States cannot unilaterally introduce restrictive measures limiting the right to exemption from withholding tax in such circumstances. The Appellant also refers to Case C-613/16 *Deister/Juhler* which also considered the Parent-Subsidiary Directive. It is important to bear in mind that both of these cases were considered in the context of restrictions of freedom of establishment as between Member States and had no direct bearing whatsoever on Member States implementation of Directives governing the taxation of energy products.

109. The comparison being made to case C-6/16 *Eqiom* is without basis. As stated, in that case the domestic provisions in France sought to introduce a restrictive measure/condition which undermined the application of Article 5(1) of the Parent-Subsidiary Directive and was not provided for in the said Directive. Similarly, in *Deister/Juhler* the CJEU found that imposing particular conditions not provided for in the Parent-Subsidiary Directive constituted an impediment on the freedom of establishment. Therefore, in both cases, the respective Member States introduced legislative restrictions which undermined the Directive they were seeking to implement.

110. The Appellant contends that "*in light of Eqiom and Deister/Juhler there is an onus on the Respondent to put forth even on a prima facia basis evidence of fraud and/or abuse.*" There is no basis whatsoever for such a contention arising from either of those decisions. Rather, in each the CJEU came to the conclusion that the imposition of conditions/restrictions which were not provided for by the Parent-Subsidiary Directive was precluded and could not be justified as were an impediment to the freedom of establishment. In those cases, the CJEU was considering whether an operation pursues an objective of fraud and abuse. These were conditions/restrictions imposed by the Member States in implementing the Parent-Subsidiary Directive, which were simply not provided for in the Directive.

111. In contrast, in the appeal herein, there is no allegation being made that the Appellant was involved in fraud or abuse, but rather that the Appellant failed to comply with its obligations pursuant to the Mineral Oil Tax Regulations and consequently flowing from those breaches ought to satisfy the Respondent that the LSGO was used for its intended use and therefore that there was no loss of excise duty to the State arising from those breaches. Finance Act 2001 section 99(10) reflects Article 21(4) of Directive 2003/96/EC, which clearly provides that:

> *"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."*

112. Finance Act 2001 section 99(10)(b) simply reflects this final use condition. It does not introduce anything that is not already provided for in the Directive. Article 21(4) of Directive 2003/96/EC does not provide that any burden of proving same rests with the Respondent as would be suggested by the Appellant herein, and for reasons set out earlier, such a suggestion would be illogical. As set out above, one must bear in mind that consideration of whether the final use condition was met only comes into play in Finance Act, section 99(10)(b) stemming from the Mineral Oil Traders failure to comply with its obligations pursuant to the Regulations, as is the case herein. By failing to comply with its obligations pursuant to the Regulations, the Appellant has put this onus of satisfying the Respondent regarding the final end use upon itself.

113. It is further important to bear in mind that Finance Act 2001 section 99(10)(b) should be interpreted having regard to the full provisions of Directive 2003/96/EC which in paragraph 9 of its preamble provides as follows:

> *"Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances."*

114. In case C-418/14 *ROZ-WIT*, which was referred to in the Respondent's earlier submissions, the CJEU at paragraph 25 of the judgment referred to the discretion afforded to Member States when implementing Directive 2003/96/EC as follows;

> "*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."*

115. It was submitted that Finance Act 2001 section 99(10)(b) reflects the State exercising its discretion in implementing an appropriate policy to implement Directive 2003/96/EC and does not contain any additional restrictive measures as occurred in *Eqiom and Deister/Juhler*.

116. In conclusion, regarding the burden of proof, there is no presumption on the part of the Respondent that the actual use was not met, as was suggested by the Appellant in its further submissions. Rather, what Finance Act 2001 section 99(10)(b) provides is that if a Mineral Oil Trader fails to comply with its obligations pursuant to the Regulations (which Regulations exist as measures to prevent evasion of excise duties), then it is a matter for that Mineral Oil Trader to satisfy the Respondent that the final use condition was met, i.e. that there was no loss of excise duty arising from the breaches. The Appellant by breaching the Regulations has imposed this onus upon itself, which is entirely logical and equitable given that the Appellant was the last Mineral Oil Trader in

the chain of supply, but failed to record necessary details, thus facilitating abuse of the final use condition.

Statutory Interpretation

117. The Respondent disagrees with the Appellant's submissions that a literal approach ought to be adopted in respect of interpretation of taxing statutes.

118. The Appellant cites a number of authorities, but it is most telling that the Appellant fails to make reference in any detail to the most pertinent authority on this matter, namely the decision of O'Donnell J in *Revenue Commissioners v O'Flynn Construction Co Ltd* [2011] 3 IR 533. In that case the Appeal Commissioners had incorrectly understood that *McGrath v McDermott* [1988] IR 258 prohibited them from adopting a purposive approach (pg 561). At paragraph 72, page 570 of the judgment O'Donnell J determined that:

> 72. "*The suggestion that the principles in McGrath v. McDermott [1988] I.R. 258 preclude a "purposive approach" is also perplexing. In the first place the express words of s.86 require the Commissioners to have regard to the "purpose for which it [the relief] was provided". Furthermore, the decision in McGrath v. McDermott itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay C.J. restated at p. 276 the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a "consideration of the purpose and intention of the legislature". Indeed, if McGrath v. McDermott stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters. As Lord Steyn observed in the Northern Ireland case of I/R.C. v. McGuchian [1997] N.I. 157, at p. 166, there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be subject of a strict literalist interpretation:-*
>
> > *"During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminister doctrine tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute …. [t]as law was by and large left behind at some island of literal interpretation."*
>
> 73. *In Barclays Finance Ltd v. Mawson [2004] UKHL 51, [2005] 1 A.C. 684 the House* [redacted]

interpretation applied to taxation statutes as to other non-criminal statutes. Indeed, it was the realisation in Lord Stein's words in I.R.C. v. McGuckian [1997] N.I. 157 at p. 166, that "those two features – literal interpretation of the tax statutes and the formalistic insistence on examining steps in a composite scheme separately – [which] allowed tax avoidance schemes to flourish" which led the United Kingdom courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in McGrath v. mcDermott [1988] I.R. 258, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes. Accordingly, the Appeal Commissioners' conclusion that the principles set out in McGrath v. McDermott prohibited the adoption of a purposive approach is incorrect on a number of levels."

119. It is noteworthy that the Appellant quotes selectively from *McGrath v. McDermott* [1988] I.R. 258 and fails to make any reference to O'Donnell's reliance on same in *O'Flynn Construction* in terms of acknowledging that a purposive approach ought to be adopted as set out above. The case of Inspector of *Taxes v. Kiernan* [1982] I.L.R.M. 13 is also quoted by the Appellant, but this case predated *McGrath v. McDermott*. The Appellant also quotes cases which deal with penal or criminal statues, such as DPP v. *Perennial Freight Ltd* [2015] IECA 252 and *DPP v. Moorehouse* [2006] 1 IR 421 which are of no consequence regarding how one interprets a taxing statute. The appeal herein relates to an appeal of an assessment for excise duties and like any tax assessment is not penal or criminal in nature and consequently reference to authorities dealing with statutory interpretation in such cases is of no consequence herein, as was made clear by O'Donnell J in the passage quoted from his judgment in *O'Flynn Construction* above.

120. The Appellant in its submissions seems to suggest that no regard should be had to the decision of O'Donnell J in *O'Flynn Construction* as those principles of interpretation were not referenced in two subsequent High Court decisions cited in their submissions, being Gaffney and *Bookfinders*. The Supreme Court decision of *O'Flynn Construction* takes precedence over those said High Court cases cited by the Appellant. Furthermore, the fact that O'Donnell J was dealing with Taxes Consolidation Act, section 811 is irrelevant and his findings regarding the purposive approach when interpreting tax statutes was not confined to section 811, as is clear from the passage set out above and furthermore his determination that the provisions of the Interpretation Act 2005, which embodies a purposive approach to the interpretation of statutes applies similarly to all taxing statutes.

VAT element

121. As the assessment under appeal is in respect of excise duties, it is entirely irrelevant and furthermore would be inappropriate to have regard for the fact that there is no VAT. It is still open for the Respondents to issue a VAT assessment in respect hereof. The fact that as matters stand no VAT assessment is under appeal is irrelevant to the matters to be determined herein. VAT is a completely separate tax and has no bearing upon the excise duty assessment herein.

122. The Appellant suggests that the failure to raise VAT assessments suggests that the Respondents are not satisfied as to the end use of the product. Such a contention is without basis. Evidence of Witness for the Respondent was heard as to his belief that the LSGO was laundered.

The Respondent's reliance on the evidence at the hearing

123. In the Appellant's supplemental submissions, it is alleged that Director's Name Redacted made no admission of breach of the Regulations. However, the transcript and the cross examination of Director's Name Redacted regarding the identity of the person who purchased the LSGO, allegedly one 'Name Redacted' that no address was given other than "Dublin" and that no registration number was recorded. Director's Name Redacted admitted that he did not record the registration number on the Movement Document, which in itself was a breach of the Regulations.

124. The Appellant in the supplemental submissions suggests that 35% of the customers paid in cash. However, this is what one would expect given that they had retail pumps - [redacted] pumps in Location Redacted and [redacted] pumps in Location Redacted which were bringing in a lot of cash. However, as was put to Director's Name Redacted, there were no other clients calling up in an articulated lorry to buy 36,000 litres of LSGO for €30,000 cash. No evidence was given by the Appellant of any large customer paying in cash as occurred herein. Further, it was accepted by Director's Name Redacted that the *modus operandi* was not normal and was completely different to the way he dealt with normal customers. All of these factors would have been red flags for fuel laundering. It is clear however, that so long as the Appellant was paid cash upfront, having earned 5 cents more per litre than normal sales, they did not see fit to complete the Movement Document to include the name, address and registration number. As far as Director's Name Redacted was concerned credit was only extended to trusted clients and as no credit was extended to the alleged 'Name Redacted' and as such there was no need to have these details. In the words of Director's Name Redacted – *"I was looking after the interests of the company that he wasn't gonna get any credit ."* Clearly the Appellant did not trust 'Name Redacted', did not extend him credit, was safeguarded having

received cash upfront, yet failed to have any regard for his obligations pursuant to the Regulations to safeguard the collection of appropriate excise duties.

125. [redacted] Her evidence was contradicted by Witness for the Respondent who gave evidence as the ROM1 had not yet been introduced, the Respondent would have had no knowledge of the sales from the Appellant to 'Name Redacted', that there was no record of a 'Name Redacted' on the Respondent's system and furthermore that as 'Name Redacted' was allegedly from Dublin it would be surprising that a Redacted Revenue office would be making such an enquiry , coincidentally on the very morning of calling there.

126. It was put to Witness for the Appellant that as [redacted] at the time, looking at the invoices alarm bells ought to have been going off having regard to the large quantities of LSGO, a fuel used for laundering. Evidence [redacted] of the large quantities of that fuel, yet the issue that such large quantities of LSGO might be used for laundering "*didn't come into my head*". In this regard it must be borne in mind that Witness for the Appellant was an excise duty compliance officer and would have been well aware that LSGO was sought in such quantities by those wishing to launder fuel. Indeed, Director's Name Redacted acknowledged in his evidence that those involved in the fuel trade were aware of same as was he.

127. It is noteworthy that [redacted] when cross examined regarding the adequacy of "Dublin" inserted as the address on the Movement Document, Witness for the Respondent gave the following evidence:

> *"Commissioner Kennedy: Is the full address there? Are you satisfied that is a full address? That' s the question. If you are satisfied, that's fine. If you are not satisfied, that's fine.*
>
> *A: Dublin was on it and I was –*
>
> *Commissioners Kennedy: Are you satisfied?*
>
> *A: Yes."*

128. Ironically, as is apparent from the foregoing, Witness for the Appellant, who ostensibly gave independent evidence, having been located and voluntarily attended the appeal on behalf of the Appellant, gave sworn evidence that "Dublin" is a full address. This is at odds with Witness for the Respondent's evidence. Furthermore, it is also at odds with the evidence of Director's Name Redacted who admitted that "*we didn't have to pursue a full address because we weren't sending him a statement*."

129. It was also clear from the evidence of Witness for the Appellant and did not make contact with the Redacted office after her visit and did not know who had requested her to carry out the alleged enquiry regarding VAT.

130. Witness for the Respondent when called into question the evidence of Witness for the Appellant, gave the following evidence regarding the assessment:

> *"Revenue had a problem with laundered fuel at the time. The raw material was low sulphur gas oil. There were 3.74 million litres that was unknown, where they had gone, who had bought them. They were paid for in cash. That was what we would've considered red flags for fuel laundering at the time. In looking at the invoice, I consider there were breaches of the Mineral Oil Regulations.* The supplies *low Sulphur gas oil* to *"a person called Name Redacted who didn't exist in our systems. The address was Dublin. Nobody knew who this person was, where this person had come from. Nobody knew where the fuel had been delivered to or where it had been taken to. Nobody knew the reg of the truck that had come. There was basically – there as no identifiers of who Name Redacted was."*

131. It was submitted that the Appellant breached the said Regulations, to such a degree that it was impossible for the Respondent to identify who purchased the fuel, the very purpose of the Regulations.

Determination

Issue

132. The Appellant submitted that there is a "disconnect" between Article 21(4) of the Council Directive 2003/96/EC and Finance Act 2001, section 99(10) to the extent that the Directive puts the onus on the Member State to establish the '*final use condition*' whereas Finance Act 2001, section 99(10) imposes the burden on the taxpayer without any requirement for the Respondent to establish the '*final use condition*'.

133. Relying on the primacy of Article 21(4) of the Directive, the Appellant proceeded to argue that the Member State must establish the '*final use condition*' to the requisite legal standard with objective evidence before drawing the conclusion that there was a failure to comply with that use.

134. As the failure of the Respondent to give evidence of the '*final use condition*' of the LSGO, the Appellant argued that the Respondent had failed to discharge the onus as set out in the Directive and indeed the Respondent's approach was contrary to the settled law of the Court of Justice of the European Union (CJEU).

Compliance with the Directive

135. EU Directives set out a legal framework which Member States are required to implement. However, discretion is left to the Member State to implement the provisions of Directives into domestic law.

136. The Council Directive 2003/96/EC (the Directive) sets out the framework for energy products and electricity. Recital 9 of the Directive requires that:

> *'Member States should be given the flexibility necessary to define and implement policies appropriate to their national circumstances'.*

137. In accordance with Article 21(4) of the Directive, discretion was afforded to each Member State to enact legislation to ensure:

> *"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."*

138. As the Directive does not specify any particular control mechanism for the use of LSGO nor measures to combat tax evasion connected with the sale of such oil, it is for Member States, pursuant to Recital 9 of the Directive, to define and implement policies appropriate to their national circumstances.

139. Therefore, in compliance with Recital 9 of the Directive, it is incumbent on Member States to enact domestic provisions to ensure that the reduced rate of tax is only applied to prescribed energy products. Therefore, the most practical method of achieving that objective is to ensure that each party in the consumption chain records details of the party to whom the product was sold.

140. In this regard, Article 21(4) of the Directive was lawfully transposed into domestic Irish law by Finance Act 2001, section 99(10) as amended, by providing:

> "*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."

141. To ensure the lawful entitlement to the reduced rate of tax, Mineral Tax Oil Regulations, 2001, Regulation 33(1), imposes a monitoring process to enable the Respondent to be satisfied that the reduced rate of tax applies to *"gas oil or kerosene … intended for use other than as a propellant".*

142. In pursuit of that objective, Mineral Oil Tax Regulations 2001, Regulation 31(4), in force during the period under appeal, placed the obligation of vendors of, *inter alia*, LSGO, to record:

> *(a) the name and address of the consignor of the mineral oil and the address of the premises or place from which such oil was removed;*
>
> *(b) the name and address of the person to whom the mineral oil was sold or delivered and the address of the premises or place to which such oil was delivered;*
>
> *(c) the date of such sale or delivery;*
>
> *(d) the full quantity of each specified description of mineral oil so removed;*
>
> *(e) the registration number, or other identification number, of the vehicle being used for the purpose of such movement;"*

143. Therefore, the Appellant was obliged pursuant to the Mineral Oil Tax Regulations 2001 to obtain the name, address and registration number of the purchaser, but failed to do so. This was the most basic information, which would have been readily available and in respect of which the Appellant knew it was obliged to keep, yet failed to do so. By failing to record this information, the Appellant was in breach of the Regulations and also frustrated any ability of the Respondent to locate the purchaser.

144. Therefore, I cannot accept the Appellant's submission that there is any incongruity between Finance Act 2001, section 99(10) and Article 21(4) of the Directive. It is demonstrably apparent that Article 21(4) of the Directive requires that Member States enact appropriate monitoring procedures to ensure that certain energy products are used for purposes as prescribed by the Directive and the implemented national legislation is drafted in accordance with the Directive. It is therefore entirely reasonable for the Respondent, pursuant to the powers conferred on it by Finance Act, 1999, section 104 to make regulations to place on a statutory footing the appropriate

safeguards to ensure that the reduced rate only applies to prescribed types of energy products.

Evidence

145. The witness for the Appellant, Director's Name Redacted said that he was aware of the existence of the illegal trade of fuel laundering and the obligation to be vigilant but yet failed to comply with the basic record keeping procedures notwithstanding that the Appellant would be *"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"* pursuant to Finance Act 2001, section 99(10).

146. The evidence of Witness for the Respondent was also significant when confirming that the Appellant had breached the provisions of the Mineral Oil Tax Regulations 2001, Regulation 31(4), by failing to include the name and address of the person to whom the mineral oil was sold and delivered, and the registration number of the vehicle being used for the purpose of such movement. He also confirmed that he was not given any explanation by Director's Name Redacted during the Revenue investigation as to his understanding of how 'Name Redacted' intended to use the LSGO.

147. Witness for the Respondent also gave evidence that there was no record of a "Name Redacted" on the Respondent's system despite having purchased 3,746,000 litres of LSGO. Witness for the Respondent was conscious that the failure to record such information was a 'red flag' to suspect fuel laundering. Therefore, as a result of the large upfront cash payments and *modus operandi* involved in dealings with 'Name Redacted' and the Appellant's flagrant breach of the Mineral Oil Tax Regulations, Witness for the Respondent believed that the Appellant facilitated the laundering of the LSGO.

148. Furthermore, Witness for the Respondent expressed surprise that a revenue official from the Redacted office could have directed Witness for the Appellant to enquire into the affairs of 'Name Redacted', a taxpayer who was purportedly based in Dublin.

149. It is also not credible that Witness for the Appellant , [redacted], would not have been concerned with the lack of information that the Appellant had retained on 'Name Redacted' in light of the fact that a significant amount of LSGO had been purchased by that customer. Evidence was that while [redacted] large quantities of LSGO purchased by 'Name Redacted', the significance of fuel laundering "*didn't come into my head*" is not credible.

150. I therefore disagree with the Appellant's submission that "*because it could not be the case that a taxpayer is required to prove something that is completely out of his control or that is against his own interest*" places the burden of proving the end use of the LSGO on the Respondent pursuant to Article 21(4) of Directive. Simple commercial logic as

well as statutory obligations, which was acknowledged by Director's Name Redacted, should have ensured that the address and vehicle registration number pertaining to 'Name Redacted' were recorded. The retention of such information was entirely within the Appellant's control. By breaching Mineral Oil Tax Regulations 2001, Regulation 31(4), there was an onus on Director's Name Redacted and indeed the Appellant to demonstrate that the sale of mineral oil was used "*for a specific purpose or in a specific manner*" given that Appellant was the last recorded Mineral Oil Trader in the chain of supply.

151. Furthermore, and as noted by the Respondent, if the Appellant had complied with its obligations pursuant to the Mineral Oil Tax Regulations, the tax assessment would not have arisen. However, due to the flagrant breach of its obligations pursuant to the said Regulations, the Respondent had no ability to identify the party to whom the Appellant allegedly sold the LSGO.

152. The Appellant also relied on *Eqiom* to assert that *"there is an onus on the Respondent to put forth even on a prima facia basis evidence of fraud and/or abuse*." Notwithstanding that that case considered the Parent-Subsidiary Directive, one of the main findings of the CJEU as set out at paragraph 32 of the judgment that "[T]*he imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse".* However, in this appeal, the Respondent provided sufficient evidence of the Appellant's failure to comply with the Mineral Oil Tax Regulations 2001 the result of which facilitated a significant likelihood of an unlawful use of LSGO.

153. Therefore, in this appeal and contrary to settled law, the Appellant has attempted to abdicate its responsibility to record crucial information relating to a significant customer thereby placing the obligation on the Respondent to prove that the LSGO was used for an unlawful purpose.

154. Finally, I have found that the evidence of both Director's Name Redacted and Witness for the Appellant to be unreliable.

Conclusion

155. In light of the above, I disagree with the Appellant's submission that there is a "disconnect" between Article 21(4) of the Directive and Finance Act 2001, section 99(10). The domestic provisions are clearly in compliance with the Directive to ensure that the reduced rate of taxation applies only to prescribed energy products. The '*final use condition'* pursuant to Article 21(4) of the Directive as "*laid down in national rules"*, necessarily entails compliance by all mineral oil suppliers in the supply chain. The domestic provisions as enacted in Finance Act 1999 and indeed the Mineral Oil Tax Regulations 2001 are a clear implementation of the safeguards envisaged by the Directive and therefore lawfully transposed into domestic law.

156. The Appellant's argument that the burden of proof is on the Respondent to prove the '*final use condition'* is simply bizarre to the extent that the actions of the Appellant frustrated any opportunity for the Respondent to establish the '*final use condition laid down in national rules'*. There was an onus on Director's Name Redacted and indeed the Appellant to demonstrate that the sale of mineral oil was used "*for a specific purpose or in a specific manner*" given that Appellant was the last recorded mineral oil trader in the chain of supply.

157. I therefore determine that the Notice of assessment to excise duty dated 21st December 2015, for the period for the period 1st April 2012 to 30th March 2013 in the sum of €1,350,507.12 stands.

Conor Kennedy
Appeal Commissioner
24th January 2020

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.