91TACD2021

BETWEEN/

[redacted]

trading as [redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against an assessment to excise duty dated 31 July 2017, in the sum of €160,566.58 in respect of the supply of 426,200 litres of marked mineral oil ('MMO') by the Appellant in respect of the period 14 November, 2013 to 25 May, 2014.

2. The assessment relates to four supplies of MMO by the Appellant to [redacted] trading as [redacted] and to eleven supplies of MMO by the Appellant to [redacted] delivered to [redacted]

3. The Respondent took the view that the supplies of MMO the subject of this appeal were not made by the Appellant in the manner contended by the Appellant. Following a

Revenue audit undertaken by the Respondent in August, 2014, an assessment to excise duty in the sum of €160,566.58 in respect of the supply of 426,200 litres of marked mineral oil ('MMO') by the Appellant in the period 14 November, 2013 to 25 May, 2014, was raised on 31 July, 2017. The Appellant duly appealed.

Background

4. The Appellant resides at [redacted] and trades as [redacted]. At all material times the Appellant was fully licenced to trade in auto fuels and marked fuels.

5. During the period 14 November, 2013 to 21 May, 2014, the Appellant's records contained the following supplies of MMO, the subject of the assessment raised:

Date	Customer	Litres of MMO
14/11/13	[redacted]	36,000
19/11/13	[redacted]	28,000
22/11/13	[redacted]	38,000
25/11/13	[redacted]	38,000
14/02/14	[redacted].	38,000
20/02/14	[redacted].	30,000
07/03/14	[redacted].	20,000
12/03/14	[redacted].	20,000
25/03/14	[redacted].	38,000
04/04/14	[redacted].	25,200
15/04/14	[redacted].	20,000
24/04/14	[redacted].	20,000
30/04/14	[redacted].	20,000
08/05/14	[redacted].	20,000
21/05/14	[redacted].	25,000
	Total	**426,200**

6. The four consignments to [redacted] were in each case sold by [redacted] to [redacted]. On the same day and while the fuel was in [redacted] depot in [redacted], it was sold by [redacted]. to the Appellant and on the same day sold by the Appellant to [redacted].

7. The records of [redacted] show [redacted] customer as [redacted] the destination of each load as the premises of the Appellant at [redacted] and the haulier as [redacted], a company owned by the Appellant, for three loads and [redacted], for one load.

8. The eleven consignments to [redacted]., were sold by [redacted] to [redacted] and on the same day and while the fuel was still in [redacted] depot in [redacted], sold by [redacted] to the Appellant and on the same day sold by the Appellant to [redacted]. [redacted] immediately sold the fuel to [redacted] and engaged the Appellant to deliver the fuel to [redacted].

9. The records of [redacted] show [redacted] customer as [redacted] Ltd., the destination of each load as the premises of the Appellant at [redacted], and the haulier as [redacted] (a company owned by the Appellant) for ten consignments and [redacted], for one consignment. Neither [redacted] nor [redacted] were employees of the Appellant and neither invoiced for their services.

10. The Appellant furnished bank records showing payment having been received by electronic funds transfer for the sale of the fuel to [redacted] and produced 'delivery note/invoice' documents purporting to show that the eleven consignments (invoiced by the Appellant to [redacted]) were delivered by the Appellant to [redacted] customer, [redacted].

11. In relation to the Appellant's liability to excise duty, the Respondent submitted that the application of the reduced rate was conditional on the Appellant's compliance with the Mineral Oil Tax Regulations 2012, and on the provisions of section 99(10) of the Finance Act 2001 ('FA 2001'). The Respondent submitted that pursuant to Chapter 1 of Part 2 FA 2001, the charge to excise duty applies at the standard rate unless the conditions for the application of a reduced rate are satisfied. The Respondent raised the assessment on 31 July 2017, and the Appellant duly appealed.

Legislation

12. Relevant legislation is as follows;

Section 99A(2) of the Finance Act 1999 provides:

(2) *Where an authorised officer has reason to believe that a person is liable for payment of excise duty, then such officer may make an assessment of the amount that, in the opinion of such officer, such person is liable to pay.*

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

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

(a) Such requirement has not been satisfied, or

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

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

13. Other relevant legislation, excerpts of which are set out below include;

- Sections 94 – 109 of the Finance Act 1999
- Sections 96-153 of the Finance Act 2001
- Section 99(10) of the Finance Act 2001
- Mineral Oil Tax Regulations 2001
- Mineral Oil Tax Regulations 2012
- Council Directive 2003/96/EC
- Council Directive 2008/118/EC
- Council Directive 95/60/EC
- The European Convention on Human Rights Act 2003

Submissions *in brief*

14. The Appellant submitted that he was not liable to pay excise duty at the standard rate pursuant to section 99(10)(b) FA 2001. The Appellant submitted that the interpretation of section 99(10) FA 2001 ought to be such as to put the Respondent in a position to charge persons caught in possession of '*washed*' diesel but that the section did not apply to a trader in the chain. The Appellant submitted that he did not use MMO for a purpose other than its intended purpose and was not liable for excise duty at the standard rate.

15. In addition, the Appellant submitted *inter alia* that section 99(10) FA 2001, was in the nature of a recharging provision, that it was incompatible with Council Directive 2008/118/EC and incompatible with the State's obligations under the provisions of the European Convention for the Protection of Fundamental Rights and Freedoms and in particular, article 1 of the first protocol. Further, the Appellant submitted that the provision infringed the principle of proportionality and resulted in an undue reversal of the burden of proof.

16. The Respondent submitted that where the requirements of section 99(10)(b) FA 2001 were not satisfied, fuel falls to have been supplied as road diesel and excise duty at the standard rate applies. The Respondent submitted that as the Appellant failed to comply with the Mineral Oil Tax Regulations and with the conditions governing applicability of the reduced rate, he was liable to pay excise duty at the standard rate. The Respondent submitted that section 99(10) FA 2001, was not incompatible with European Law.

Evidence

17. Witness evidence on behalf of the Appellant was provided by Mr. [redacted], Mr. [redacted], Mr. [redacted], Ms. [redacted], Mr. [redacted] and Mr. [redacted].

18. Witness evidence on behalf of the Respondent was provided by Revenue officials Mr. [redacted] and Ms. [redacted].

Mr. [redacted]

19. The Appellant confirmed that he was a licensed mineral oil trader and he accepted that he was bound to comply with the Mineral Oil Tax Regulations, 2012. He stated that he commenced trading as [redacted] in October 2013.

20. The Appellant stated that he did not use any of the MMO in vehicles as a propellant. The Appellant stated that he had received payment by electronic funds transfer, in relation to all fifteen consignments, the subject of this appeal.

21. In relation to the four supplies to [redacted], the Appellant stated in direct examination that he would send his driver to collect the load at [redacted] in [redacted] and that the driver would deliver the fuel to [redacted] in [redacted].

22. He stated that the fuel went to the premises of [redacted] in [redacted], however, later in direct examination, he stated that the driver stopped at [redacted] before continuing to [redacted]. He stated that the driver would also stop in at [redacted] before delivering fuel to [redacted].

23. Subsequently during cross-examination, Counsel for the Respondent reminded the Appellant that he had been visited by Revenue officials in late 2013. On that occasion, the Revenue official observed that a large fuel consignment was not present at [redacted] and queried the Appellant's tank capacity at [redacted]. The Appellant's response was that the fuel was not at [redacted] as it had been sold in transit.

24. Subsequently during cross-examination, the Appellant accepted that '*a lot of the time*' the fuel went direct from [redacted] to [redacted] in [redacted] or to [redacted] in [redacted] without stopping at [redacted]

25. Further during cross-examination he stated that the fuel did go to [redacted] to collect paperwork and then continued on its journey.

26. Further during cross-examination he stated that '*..but there might have been a day or two where the lorry sat overnight in the yard in* [redacted] *for delivery the following day*'. He then added that this may not have occurred in the fifteen consignments, the subject of this appeal.

27. Revenue submitted that when [redacted] listed '[redacted]' as the destination of the fuel, that this did not highlight the true destination of the fuel. The Respondent submitted that making a stop at [redacted] would bring the driver off of the main route and would cost time such that it might not be possible to deliver the fuel in the same day as indicated by the invoices.

28. In relation to the issue of due diligence and the checks carried out by the Appellant in advance of selling and delivering fuel to [redacted] and [redacted], the Appellant stated that in relation to [redacted], he checked their VAT number and fuel licence numbers. He did not visit the [redacted] yard however.

29. In relation to delivering fuel to [redacted], the Appellant stated in direct examination that he satisfied himself as per the following exchange:

> *'Q: And who are [redacted]?*
>
> *A: They're [redacted] engineers. They work for the [redacted] lines. I checked them out, I validated the number and all.*
>
> *Q: You validated what number?*
>
> *A: Their VAT number and their - - I checked them before we moved.*
>
> *Q: Their VAT number. Were they licenced for MMO, for marked gas oil?*
>
> *A: No, it was just - - they're [redacted] engineers. Their VAT number was valid and I googled them, they were a proper company so we went on ahead.*
>
> *Q: Engineering company is that what you said?*
>
> *A: Mm hmm, [redacted] engineering.'*

30. There was no evidence given by the Appellant, of any other checks carried out in relation to either [redacted] or [redacted]

31. The Appellant admitted during cross-examination that he had limited capacity in terms of holding fuel at his premises in [redacted]. He stated that he had 25,000 litres capacity on site for MMO and a tank of 4,500 litre capacity for DERV (diesel engine road vehicle) and a road fuel tanker, not taxed or insured which was used to store DERV and sometimes MMO. He stated that he did not mix DERV with MMO. The Appellant stated that he had a lorry of 38,000 litres capacity and that he employed a driver, Mr. [redacted] to drive the lorry. During cross-examination, he stated that he had a loan of a lorry from a person, that he used that lorry for storage and that he did not have to pay for the use of the lorry. The Appellant confirmed that although he purchased two 55,000 and one 75,000 litre tanks, he never used the tanks because he did not obtain planning permission to do so.

32. In relation to tank capacity at [redacted], the Appellant stated in evidence that he thought that [redacted] had a tank of approximately 22,000 litre capacity however, in his statement of case, paragraph 17, he stated that [redacted] had a large over ground tanker to store approximately 38,000 litres of gas oil. When he was asked by Counsel for the Respondent to explain this contradiction, he was unable to.

33. The Appellant stated that [redacted] was a company owned by him that delivered oil. He stated that the company owned two trucks.

34. The Appellant stated that he used [redacted] for transportation of the fuel. When it was put to him by Counsel for the Respondent, the Appellant accepted that [redacted] never sought to charge in respect of any of these deliveries and that there were no invoices for any transport company in his accounts. During cross-examination, the Appellant accepted that he did not write any cheques to [redacted]. He admitted that when he told Revenue officer [redacted] on 7 August, 2014, that he paid [redacted], that that was untrue.

35. The Appellant accepted that no invoices were furnished on behalf of either [redacted] or [redacted] in relation to the delivery of fuel and that there were no records in the Appellant's bank accounts showing payments to any haulier transporter.

36. It was put to the Appellant in evidence that [redacted] did not account for the first two deliveries of fuel. The Appellant's response to this was '*They were delivered in our books*' referring to the sales invoices and the delivery advice notes. The Appellant stated that he was paid for these consignments by [redacted].

37. In this appeal the fuel came into the State to [redacted] and was sold to [redacted], then sold to the Appellant, then sold to [redacted], then sold to [redacted]. However, the delivery to [redacted] was made not by [redacted] but by the Appellant at the request of [redacted]. The Appellant in evidence accepted that the number of same day transactions made the chain of supply more complicated and from the Respondent's view more difficult to follow.

38. In evidence the Appellant was asked about Regulation 23(2) of the 2012 regulations namely the requirement that *'a consigning mineral oil trader shall, for each delivery of mineral oil and before the mineral oil concerned is consigned for delivery from the premises or place concerned, complete an approved document (referred to in these Regulations as a "delivery document") in three copies (referred to in this Regulation as "copy one", "copy two" and "copy three") and numbered in a consecutive series.'*

39. The Appellant stated that all deliveries were made to [redacted] including the two deliveries that [redacted] stated they did not receive.

40. It was put to the Appellant in cross-examination that he did not retain three copies of the delivery documents as required by regulation 23(2) but retained only two copies. The Appellant accepted that he was in breach of this regulation.

41. As regards the requirement that that the delivery documents be numbered in a consecutive series, the Appellant submitted that he had satisfied this requirement by inserting the date as the consecutive number. The Respondent stated that this would

not comprise a consecutive series on days when the Appellant made more than one delivery.

42. The Appellant was asked whether there was a movement document in respect of the transportation of the fuel from [redacted] to [redacted] and the Appellant confirmed there was not and that he was in breach of his responsibilities as a result because there should have been a movement document in respect of the fuel from [redacted] to [redacted]. During cross-examination of the Appellant, the following exchange occurred:

> *'Q: You have worked out where the supply is going to go to, the exact price, the number of litres, and you have worked out exactly where it's being collected. So you have all the details necessary for completing a delivery document and in fact the regulations stipulated that you were to complete the document in advance of leaving the premises where the fuel was being collected from; isn't that right?*
>
> *A: Yes.*
>
> *Q: So, if what you are saying is that you prepared movement documents only from [redacted] onwards that would mean that you had no movement document in respect of your collection from [redacted] to [redacted], that's if one even accepts that it ever went to [redacted]?*
>
> *A: That's it, yes.*
>
> *Q: That's what?*
>
> *A: You're correct.*
>
> *Q: What am I correct on?*
>
> *A: There was no movement docket from [redacted] to [redacted] and he picked up the docket in [redacted] and continued on.*
>
> *Q: Yes. Well, do you accept then that you were in breach of your responsibility?*
>
> *A: Well, yes.*

Q: Because you should have had a movement document, if what you say is the case, in respect of the fuel from [redacted] *to* [redacted]*, isn't that right?*

A: Yes.'

43. Further on in cross-examination, the following exchange occurred:

Q: Right, okay. Now, the next – if we looked under 4(b), "The address of the premises or place from which the mineral oil is to be consigned for delivery". So, for instance, when you are collecting from [redacted]*, I think you have already agreed with me that you didn't put in the place that it was being consigned from as* [redacted]*; isn't that right?*

A: That's right.

…..

44. Thus the Appellant accepted he was in breach of regulation 23(4)(b) which requires every delivery document to include *'the address of the premises or place from which the mineral oil is to be consigned for delivery'*. During cross-examination, the Appellant accepted that he did not comply with this obligation, as evidenced by the following exchange;

…

Q: But do you agree with me that on your delivery notes and in fact on those other delivery advice dockets it makes no reference as to where the mineral oil is being delivered from?

A: Being picked up from?

Q: Yes.

A: Just the only thing is the bill of lading from the --

Q: Look, the bill of lading is a document from [redacted]*?*

A: Yes.

Q: It has absolutely nothing to do with these documents that you say you filled out to comply with the regulations; isn't that right?

A: Yes.

Q: Yes. I am asking you, on foot of your responsibility pursuant to the regulations, to identify to the Appeal Commissioners where in these documents you say that you put in the address from where the oil was consigned?

A: I don't have it.'

45. Regulation 23(4)(d) provides: *'A delivery document shall include – the address of every premises or place to which a delivery is to be made.'* During an exchange with Counsel for Respondent, the Appellant admitted that the delivery document did not include this information, as follows;

> *'Q:... . it is very clear that this does not - - all this does is sets out the name and address of the client, it does not say where the delivery is being made to. If it had been carried out properly we would see that detail, isn't that right?*
>
> *A: Yes.'*

46. In respect of the requirement of regulation 23(4)(g) that the delivery document shall include the registration number of the vehicle used for the delivery, this was not recorded. The Appellant submitted that this information was contained on a separate document which related to the transportation of the oil by [redacted] however, the document that the Appellant relied on as the movement document did not include the registration number of the vehicle used for the delivery.

47. Regulation 23(6) provides:

> *'The person in charge of the delivery vehicle shall –*

(a) retain copies two and three during the course of the delivery and, except where paragraph 7(a) applies, give copy three to the person receiving the delivery,

(b) following the delivery, endorse copy two with details of –

(i) the quantity actually delivered, and

(ii) the date and time when that delivery was made

48. The Appellant did not endorse copy two in the manner aforesaid and this was accepted by the Appellant during cross-examination on day one, as follows;

Q: So, where do I see it endorsed by the driver?

A: You don't.

Q: No, you don't. Neither document; isn't that right? And where do we see the actual quantity delivered?

A: On the delivery note.

Q: And where do we see the time?

A: There's no time.

Q: No.

A: There is a date.

Q: Well, there is a date but there's no time; isn't that right, and it's not endorsed by the driver as required under the regulations; isn't that right?

A: That's right.

Q: So, can you see then that there's quite a significant number of failures on your part to comply with the obligations imposed on you by the Mineral Oil Tax Regulations?

A: Yes.'

49. Cross-examination of the Appellant by Counsel for the Respondent concluded with the following exchange:

> *'Q: And it's just that what Revenue see as being highly peculiar is the modus operandi that you had and you being involved in this chain of supply in the context of the fuel changing hands four to five times while still in the premises in Derry; isn't that right?*
>
> *A: Yes*
>
> *Q: Yes. And I think you agreed with me earlier the more times that the fuel changes hands, the more complicated the supply chain, the harder for Revenue to track this commodity: isn't that right?*
>
> *A: Yes.*
>
> *Q: And all the more reason why the likes of movement documents are relevant; isn't that right?*
>
> *A: Yes.*
>
> *Q: And you saw how relevant it is because Revenue actually visited your premises to check the veracity of what was being represented and when they saw on the 20th of October that no delivery had come to your premises they were then advised by you that it had been sold on transit?*
>
> *A: Yes.*
>
> *Q: Thank you, Mr.* [redacted]*.'*

Mr. [redacted]

50. Mr. [redacted] confirmed that he was the owner of [redacted].

51. Mr. [redacted] in direct examination stated that he had capacity to hold just over 40,000 litres of oil. Mr. [redacted] stated that he was visited by Revenue officers in September, 2014. On that occasion he informed the Revenue officers that he had capacity comprising a tank of 22,000 and four bowsers that would each hold 1,000 litres. He informed Revenue officer [redacted] that he had another tank for 6,000 litres but that that was used for DERV. At hearing, Mr. [redacted] stated that that tank was used for both DERV and marked gas oil. Mr. [redacted] at hearing stated that his storage of MMO was not limited to the 22,000 litre tank.

52. Mr. [redacted] was asked how [redacted] utilised so much MMO and Mr. [redacted] in evidence stated that he had on site 50-60 mini diggers, 20-30 compressors and 20-30 dumpers. However, this was not consistent with the information he provided to Revenue officers in September, 2014, which was that he had 23 mini diggers, 9 compressors and 10 dumpers.

53. Mr. [redacted] initially stated that he received deliveries from the Appellant of 38,000 litres of mineral oil on 14 February, 2014, and 30,000 litres of mineral oil on 20 February, 2014. When questioned about the delivery of 38,000 litres Mr. [redacted] was unable to say who in his business dealt with the delivery of the fuel, when it arrived in his yard and who organised bowsers to be present to refuel.

54. When it was put to Mr. [redacted] that consignments dated 14 and 20 February, 2014 were not listed in his purchases ledger, Mr. [redacted] stated that if that was the case then he did not receive these deliveries. He stated that if it wasn't recorded in his accounts, then he did not receive the deliveries.

55. Mr. [redacted] stated that he sometimes paid for the consignments of fuel by cheque and would have on occasion, given cheques to the driver of the vehicle (Mr. [redacted]).

However, Mr. [redacted] evidence was that he never received cheques from [redacted] or from anyone else at [redacted] in respect of his deliveries to [redacted].

56. In evidence, Mr. [redacted] stated that he had been using marked mineral oil for purposes for which it was not intended and for the propulsion of vehicles. The following exchange between Counsel for the Respondent and Mr. [redacted] took place during cross-examination:

> *Q: You wouldn't mix marked mineral oil into the DERV, would you?*
>
> *A: Shouldn't but it did happen.*
>
> *Q: Well, what you are saying then is whenever the big truck loads came in you just said, "Lookit, don't worry about that, we'll throw the marked mineral oil into …" -*
>
> *A: Well, there wouldn't have been a lot in it but it would have happened sometimes.*
>
> *Q: But I have to suggest to you that if things were being operated in accordance with your legal obligations in using oil in the proper manner that wouldn't have occurred?*
>
> *A: It didn't occur - - shouldn't have occurred but we did get prosecuted for gas oil in the lorries so there was a bit of a mixture in it, do you know.*
>
> *Q: I see, I see. So, it's just that when - - later on then when you were visited by* [redacted] *and questions were put to you by Officer* [redacted] *in September of 2014, that's just two months after the July visit, they asked you more specific questions in relation to your fuel usage and they- - because it became clear to you that they knew that you were buying bulk amounts of marked gas oil; isn't that right?*
>
> *A: Probably, yes.*
>
> *Q: And despite the fact that you had informed Officer* [redacted] *previously, only two months earlier, that you were only buying off two local suppliers and small*

amounts, I think when it was put to you in terms of what Revenue were aware of, that you then agreed that you were purchasing from loads of other entities; isn't that right?

A: Probably.

Q: So why then were you trying to withhold that information from Revenue?

A: I wasn't trying to withhold anything at all. Like I can't remember. I don't know why I didn't say it at the time. I suppose at the end of the day we were using some of the oil in the lorries and things like that as well, you know, and we were prosecuted for that.

Q: Okay. So, what you are saying is that the marked mineral oil was being used for purposes which it was not intended for which was in propulsion purposes?

A: Probably some of it, yes.

Q: And can I ask you why did you feel the need to mislead Mr. [redacted] *regarding the purchases by you of fuel?*

A: I don't remember trying to mislead him at all.

Q: Well, he asked you "can you tell me about your fuel purchases", you specifically told him that there were two entities that you purchased from and you didn't mention the other seven entities that you were bulk buying from?

A: Yes. I don't know, I was probably hiding the fact that I was using some of it in the lorries.'

Mr. [redacted].

57. Mr. [redacted] confirmed that he resided in [redacted] and that he worked for the Appellant as a driver, delivering fuel namely, DERV, kerosene, gas oil and at times, coal. In cross-examination he stated that his employer was the Appellant's company, [redacted].

58. He stated that he commenced working for [redacted] in 2013, and that he completed a week long health and safety course together with a course in safe loading. He stated that he did not receive training in the Mineral Oil Tax Regulations.

59. He stated that if he received a call from the Appellant to collect fuel he would drive to the terminal in [redacted], he would load up and would get a bill of lading, he would then travel to the Appellant's premises in [redacted]. He would collect dockets and would travel on and deliver the fuel to the next destination. Mr. [redacted] stated that he was not given documentation before he went to collect the fuel loads in [redacted]. In arriving at the yard of the recipient of the fuel he would hook up to a tank, unload the fuel and sign a docket book confirming delivery.

60. He stated that he delivered three loads to [redacted]. When it was put to him that there was a fourth delivery advice docket which was unsigned, he accepted that it would not be his practice to not ask for a signature on delivery.

61. In relation to deliveries to [redacted], he stated that he would be on the premises for approximately an hour while the fuel was unloading. It was put to him in cross-examination that there would have been a lot of activity required to transfer the fuel to smaller tanks and bowsers as Mr. [redacted] had alleged was the practice. Mr. [redacted] stated that during the unloading process, he stayed at his tank and while he noticed a number of persons assisting the transfer of the fuel, he did not notice a lot of activity.

62. Mr. [redacted] evidence was that he never received any cheques from [redacted] or any other person from [redacted].

Ms. [redacted].

63. Ms. [redacted] was called on behalf of the Appellant. She confirmed that she started working in [redacted] in 2013.

64. Ms. [redacted] stated that she was involved in the day-to-day running of [redacted] at the time of the relevant supplies to the Appellant. She stated that she worked part-time in wholesale and invoicing. She stated that her job involved taking orders for wholesale customers and placing those orders with [redacted] and invoicing customers.

65. Ms. [redacted] stated that before supplying oil to a new customer she would carry out a due diligence on the customer namely; she would check on the Revenue website that the customer has a valid and up to date marked fuel or auto fuel licence, she would check that the address on the licence matched the address that the customer had provided, then check that there was a VAT number in place and finally, check that the business had capacity to store the fuel and if necessary, seek written confirmation from the customer that they had capacity to store the fuel.

66. Ms. [redacted], during cross-examination, confirmed that the information in the delivery note prepared by [redacted] was information that was provided to her by the Appellant. She stated that the Appellant made payments by cheque.

Mr. [redacted]

67. Mr. [redacted] confirmed that he was a licensed auto fuel and marked fuel trader. He stated that he established [redacted] in or about 2012.

68. He stated that Mr. [redacted] of [redacted] contacted him to purchase oil. He stated that he carried out due diligence and that he went in person to the premises of [redacted] to check storage capacity. He stated that he observed a lot of machinery, tanks and lorries in the yard at [redacted].

69. He stated that he paid the Appellant by bank transfer for all eleven consignments and that he was paid by [redacted] by cheque for all eleven consignments. He stated that he sometimes drove around to people he was supplying, to collect cheques. He stated that the driver Mr. [redacted], sometimes collected cheques for him. [Mr. [redacted] evidence however, was that he did not collect cheques from [redacted].]

Mr. [redacted].

70. Mr. [redacted] stated that he was an accountant with [redacted] for 21 years, that he had a diploma in accounting and a degree in banking and finance.

71. Mr. [redacted] confirmed that the Appellant had received payment in respect of the four consignments to [redacted] and the eleven consignments to [redacted] delivered to [redacted].

72. In cross-examination, Counsel for the Respondent brought Mr. [redacted] through correspondence from the Respondent dated 22 August, 2014, 27 November, 2014, and to responses received from [redacted]. dated 18 November, 2014 and 20 February, 2015.

73. Mr. [redacted] accepted that documentation which was sought by the Respondent was not furnished by the Appellant to him and therefore not supplied to the Respondent as requested, namely:

- Statements of account in respect of all supplies to trade/wholesale customers detailing all invoices issued and payments received
- Copies of the invoices received from [redacted] and [redacted]
- A summary of the supplies by the Appellant from [redacted]

- The name and address of the driver who made deliveries to [redacted]
- The address of the premises to which the deliveries were made
- The person whose signature appears on the '*received delivery*' section of the '[redacted]' delivery advice documents in relation to ten of the eleven deliveries.
- The return of the monthly fuel movements ('ROM') for the period October, 2013 to May, 2014

74. The following exchange then ensued between Counsel for the Respondent and Mr. [redacted]:

Q: *So, you didn't address the bulk of nearly of the issues that were raised of you in the earlier letter; isn't that right?*

A: *That would be correct, yes.*

Q: *And you've no explanation to offer as to why it wasn't responded to?*

A: *I can't respond with information that I don't have.*

Q: *Indeed. Because obviously you are here, you're acting as Mr.* [redacted] *accountant but you can only act upon whatever information that you are given by Mr.* [redacted]*; isn't that right?*

A: *That's correct.*

75. He stated that he was never provided with invoices from [redacted] or [redacted] in relation to transportation of the fuel. He stated that he had not heard of [redacted] until the hearing commenced.

76. He stated that he was first furnished with delivery documents in relation to supplies to [redacted] approximately six months prior to the hearing.

Mr. [redacted], Revenue officer

77. Mr. [redacted], Revenue officer gave evidence on behalf of the Respondent. He stated that he visited the premises of [redacted] on 23 July, 2014.

78. He stated that on that occasion he observed a large tank which Mr. [redacted] stated held 22,000 litres and a smaller tank which Mr. [redacted] stated held 6,000 litres. Mr. [redacted] stated that the smaller tank had a lock and Mr. [redacted] stated that it was used for road diesel.

79. When asked about his suppliers, Mr. [redacted] stated that he was supplied by [redacted] of [redacted] and [redacted], [redacted]. Mr. [redacted] stated that the return of oil movement documents identified a number of other suppliers which were not identified by Mr. [redacted] on the 23rd of July, 2014, and which showed that Mr. [redacted] was being supplied with substantial amounts of MMO.

80. Mr. [redacted] returned to the premises of [redacted] on 1 September, 2014, however Mr. [redacted] was not present on that date. On 2 September, 2014, Mr. [redacted] returned to the premises with his colleague, Revenue officer, Ms. [redacted]. In terms of capacity, Mr. [redacted] stated that he saw approximately half a dozen items of plant on site and one other person who he thought might have been an employee of [redacted].

Ms. [redacted], Revenue officer

81. Ms. [redacted] confirmed that she was a Revenue officer and that she visited the premises of [redacted] in September, 2014, to make enquiries in relation to deliveries of MMO.

82. Ms. [redacted] stated that the ROM reports showed large amounts of MMO being received by [redacted]. When questioned on tank capacity, Mr. [redacted] stated that he had a large tank of 22,000 litres capacity for marked gas oil and a 5,000 litre tank which was used for DERV. He also stated that he had four bowsers, each of a capacity of 1,000 litres, which were used to transfer the MMO from [redacted] yard to sites around the

country. [redacted] stated that based on the tank capacity at [redacted], she did not consider that it would be possible to unload a 38,000 litre tank of fuel at that fuel yard.

83. As regards payment for the fuel, Mr. [redacted] stated that cheques were either given to the driver or collected in advance. Ms. [redacted] requested Mr. [redacted] to provide tank readings however, none were provided. When Ms. [redacted] asked to see the cheque stub for an upcoming pre-paid delivery, Mr. [redacted] was unable to produce it.

84. When questioned as to the use to which the MMO was put, Mr. [redacted] stated on 2 September, 2014 that he used the MMO in his plant and machinery which consisted of 23 mini diggers, 9 compressors and 10 dumpers. However at hearing, Mr. [redacted] stated that his plant and machinery at that time comprised 50-60 mini-diggers, 20-30 compressors and 20-30 dumpers.

Admissions

85. The Appellant, during cross-examination accepted that there were a significant number of failures on his part, in terms of compliance with the Mineral Oil Tax Regulations.

86. The Appellant admitted that he was in breach of regulation 23(2) of the Mineral Oil Tax Regulations 2012, as regards the requirement to retain three copies of the delivery documents, as the Appellant stated that he retained two copies and not three.

87. The Appellant confirmed that there was no movement document in respect of the transportation of fuel from [redacted] to [redacted] and that he was in breach of the regulations as a result.

88. The Appellant admitted that contrary to regulation 23(4)(d), he was in breach in terms of the requirement that delivery documents include '*the address of every premises or place to which a delivery is to be made'.*

89. The Appellant did not endorse copy two in the manner required by regulation 23(6) and this was accepted by the Appellant during cross-examination as set out above.

Regulatory Contravention

90. Regarding the matter of regulatory breach and taking into account the evidence, the submissions, the documentation furnished and the admissions made by the Appellant, I find that for the period assessed namely; 14 November, 2013 to 21 May, 2014, the Appellant was in breach of the mineral oil tax regulations as follows;

    i. Contravention of regulation 18(1) of the Mineral Oil Tax Regulations 2012, as the Appellant failed to keep records in respect of each delivery as required by regulation 18(1).
    ii. Contravention of regulation 18(2) of the Mineral Oil Tax Regulations 2012, in respect of each purchase, sale supply and delivery of mineral oil and the requirement to show '*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'.*
    iii. Contravention of regulation 23(2) of the Mineral Oil Tax Regulations 2012, in that the Appellant did not retain three copies of the delivery documents as required by regulation 23(2) but retained only two copies and in addition, failed to number the delivery documents in a consecutive series.
    iv. Contravention of regulation 23(4)(b) of the Mineral Oil Tax Regulations 2012, in that the delivery documents issued by the Appellant did not include *'the address of the premises or place from which the mineral oil is to be consigned for delivery'*.
    v. Contravention of Regulation 23(4)(d) of the Mineral Oil Tax Regulations 2012, in that the delivery documents issued by the Appellant did not include the address of every premises or place to which a delivery was made.
    vi. Contravention of Regulation 23(4)(g) of the Mineral Oil Tax Regulations 2012, in that the delivery documents issued by the Appellant did not include the registration number of the vehicle used for the delivery.

vii. Contravention of Regulation 23(6) of the Mineral Oil Tax Regulations 2012, in that the person in charge of the delivery vehicle did not record the time that the delivery was made.

91. Based on the aforesaid regulatory contraventions and the admissions of the Appellant, I am satisfied that the Appellant failed to hold or deliver MMO in accordance with the regulations. In the context of section 99(10) FA 2001, I am satisfied that the statutory requirement that *'any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with'* has been met.

ANALYSIS

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

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

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

93. The statutory provisions governing excise duty on mineral oils are contained within Chapter 1 of Part 2 of the Finance Act 1999 comprising sections 94-109 as amended. Pursuant to section 95(2), as amended by section 79 of the Finance Act 2012, a duty

of excise to be known as mineral oil tax, shall be charged, levied and paid on all mineral oil once it is released for consumption in the State.

94. In addition, the parties were at odds on the application of sub-section (b) of section 99(10) FA 2001.

95. Section 99(10) provides;

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

96. Where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, are not satisfied, excise duty at the standard rate applies.

97. For the reasons set out above I have found that the Appellant failed to hold and/or deliver MMO in accordance with the Mineral Oil Tax Regulations 2012, and in the context of section 99(10) FA 2001, I am satisfied that the statutory requirement that

it be proven that *'any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with'* has been discharged.

98. Section 99(10)(b) continues: *'.. 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,..'*

99. The Appellant claimed that section 99(10) FA 2001 was ambiguous and that the ambiguity should be resolved in favour of the taxpayer pursuant to the *contra proferentem* approach to statutory interpretation referenced by the High Court in *McGarry v Revenue Commissioners* [2009] ITR 133. However, I find no ambiguity in section 99(10) FA 2001. 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 or manner (i.e. as MMO) must, under section 99(10)(b) comply with '*any requirement of excise law in relation to the holding or delivery of such excisable products*' and must show '*to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner*'. The subsection provides that if the Appellant is in contravention of excise law requirements, that the burden of proving that '*the excisable products have been used, or are held for use'* as MMO, falls to the Appellant under s.99(10)(b) FA 2001.

100. I am satisfied that 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.

101. The Appellant in his written submissions contended that section 99(10) did not apply *'unless the trader "washes" the gas oil himself'.* While I accept that if the trader is in contravention of the regulations and he uses the mineral oil for an improper

purpose *i.e.* as propellant, he will fall foul of section 99(10)(b), this is not the only scenario where the benefit of the reduced rate may be lost. For example, where the trader is unable to show the final use to which the oil was put, the trader must show that the oil was '*held for use'* for the proper purpose.

102. Section 99(10) applies 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'.* The Appellant submitted that the person who has received such excisable products pursuant to section 99(10) is the person who has received them for final use only and that section 99(10) does not apply to a trader in the chain. The Respondent submitted that the section expressly applies to *'any person'* who has received excisable products on which excise duty has been charged at the lower rate and that that is the person who may be liable to lose the rebated rate, where certain conditions have not been met. Section 99(10) FA 2001 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 from the statutory wording that the Appellant is such a person within the meaning of the provision and is a '*person who has received such excisable products, or who holds them for sale or delivery…'* in accordance with the provision.

<u>Use of the excisable products as MMO</u>

103. In relation to the requirement pursuant to section 99(10)(b) FA 2001, that it be shown to the satisfaction of the Commissioners that the excisable products have been used for a specific purpose or in a specific manner namely, as MMO, there was no evidence that the Appellant himself used the fuel as propellant.

104. In relation to the four consignments to [redacted], there was no evidence from [redacted] either to confirm that the fuel had been delivered or to confirm the use to which the fuel was put. In relation to the eleven consignments to [redacted], the evidence from Mr. [redacted] was that the fuel was sometimes used other than for its intended purpose, namely, it was sometimes used as propellant.

105. Section 99(10)(b) places the onus on the Appellant to show to the satisfaction of the Commissioners, that the excisable products have been used for the intended purpose, i.e. as MMO. As the Appellant was unable to adduce sufficient evidence to prove as a matter of fact that the fuel was used for the intended purpose, it falls to the Appellant to prove that '*the excisable products have been … held for use, for such purpose or in such manner'.* [emphasis added]

Held for use

106. In terms of the Appellant's custodianship of the excisable products the subject of this appeal namely, the period in which the Appellant '*held for use*' the excisable products, this period commenced on the collection of the fuel from [redacted] in [redacted] (by a driver acting on behalf of the Appellant) and concluded on the delivery of the products to the intended recipient namely, [redacted] in [redacted] or [redacted] in [redacted].

107. To hold '*for use*' for a specified purpose or in a specific manner (i.e. as MMO) the Appellant must prove that he had the requisite tank capacity to hold and store the fuel as MMO and that the fuel was in fact held by him and was held for the proper purpose. Where holding takes place during haulage and delivery, the Appellant must prove that haulage occurred and that the holding of the fuel was at all times appropriate to the intended use of the fuel.

108. The delivery notes from [redacted] show the Appellant's premises at [redacted] as the destination of the fuel. The Respondent was notified through the ROM systems of significant volumes of fuel being delivered to [redacted], and an official on behalf of the Respondent inspected the Appellant's premises in late 2013, queried the Appellant's tank capacity and asked the Appellant how the fuel was stored. When this question was asked of the Appellant, he stated that the fuel was not at [redacted] as it had been sold in transit.

109. At hearing, the Appellant in his evidence initially maintained that the fuel went from [redacted] in [redacted] to [redacted] in [redacted]. Later during direct examination, he stated that the haulier would stop in at [redacted] before delivering the fuel to [redacted] in [redacted] or [redacted] in [redacted]. Subsequently during cross-examination the Appellant stated that '*a lot of the time*' the fuel would go direct from [redacted] to [redacted] in [redacted] and [redacted] in [redacted]. Further during cross examination the Appellant stated the driver stopped at [redacted] to collect paperwork before travelling on. Mr [redacted] evidence was that he would stop at [redacted] to collect dockets. Counsel for the Respondent queried the additional driving time that would take and whether the deliveries which took place during the evening would have arrived in [redacted] and [redacted] that same day as per the invoices. The Appellant later stated that the fuel sometimes remained in the lorry which stopped at [redacted] overnight. He stated that this may not have occurred in relation to the consignments at issue in this appeal.

110. The evidence in relation to whether the fuel went to [redacted] was inconsistent however, taking the Appellant's case at its height *i.e.* if the fuel did travel to the Appellant in [redacted], questions remain regarding the tank capacity at those premises.

111. The Appellant's evidence in relation to tank capacity was that he had limited capacity in terms of holding fuel at his premises in [redacted]. He stated that he had 25,000 litres capacity on site for MMO and a tank of 4,500 litre capacity for DERV and a road fuel tanker, not taxed or insured which was used to store DERV and sometimes MMO. The Appellant confirmed that although he purchased two 55,000 and one 75,000 litre tanks, he never used the tanks because he did not obtain planning permission to do so.

112. Eight of the fifteen consignments of fuel in this appeal exceeded 25,000 litres in capacity and on the Appellant's own evidence, he would not have had sufficient capacity to store this volume of MMO on site.

113. The Appellant stated that the fuel sometimes remained in the lorry which stopped at [redacted] overnight. Notably, the Appellant did not identify which, if any of the consignments the subject of this appeal were stored in this manner. He stated that this may not have occurred in relation to the consignments at issue in this appeal. Thus there is insufficient evidence to conclude that the fuel the subject of this appeal was stored overnight in the lorry.

114. Based on the evidence in relation to tank capacity, I am satisfied that the Appellant did not prove that he had sufficient tank capacity on site at [redacted] to store the substantial volumes of MMO the subject of the consignments grounding the assessment in this appeal.

115. The Appellant in evidence stated that his driver stopped at [redacted] to collect papers and then travelled to [redacted] and [redacted] where the fuel was delivered. If this is correct and if the fuel was not stored at [redacted], then it falls to the Appellant to prove that the fuel was *'held for use'* for the purposes of section 99(10)(b) FA 2001 during the haulage period.

116. Where the Appellant's holding period of the oil is the period of haulage of the oil, the Appellant must prove that haulage took place in the manner alleged and that storage of the fuel during haulage was at all times appropriate to the intended use of the fuel.

117. An essential element in proving haulage is to prove that the products alleged to have been transported were in fact delivered. In relation to the four consignments to [redacted], while payment was received by the Appellant in relation to these supplies, no director, employee, agent or representative from [redacted] was present to provide evidence to confirm that the fuel was in fact delivered.

118. In relation to [redacted], payment was received in relation to all supplies however the purchase ledger of [redacted] did not contain information in relation to two of the alleged consignments namely 38,000 litres of marked mineral oil on 14 February, 2014 and 30,000 litres of marked mineral oil on 20 February, 2014. The evidence of Mr. [redacted] was that these consignments had not been received.

119. In addition, while the Appellant stated in evidence that haulage of the fuel was provided by [redacted], [redacted] and [redacted], none of these hauliers charged for their services nor furnished the Appellant with invoices. The registration number of the vehicle(s) used for deliveries was not recorded on the movement documents furnished by the Appellant.

120. In relation to [redacted], a company owned by the Appellant, the Appellant's stated that it was not the company's practice to provide services free of charge to clients. Yet the Appellant's evidence was that the company did not charge for the services on multiple occasions in this appeal even though, as Counsel for the Respondent pointed out, this would have been a tax deductible expense for the Appellant. The Appellant also stated that the transactions were not accounted for in his books and records.

121. In relation to [redacted] and [redacted], invoices were not furnished by them, they did not charge for their services and no witnesses from these businesses were called to give evidence as to why that was. In addition, there was no explanation from the Appellant as to why these haulage services were provided without charge or how that came to be.

122. The fuel the subject of this appeal was bought and sold multiple times in the same day prior to being delivered to either [redacted] in [redacted] or [redacted] of being '*held for use*' by the Appellant for the correct and intended purpose (i.e. as MMO) the fuel was under the Appellant's custodianship during the haulage process. However, there was no adequate evidence or explanation for the fact that the hauliers never charged the Appellant for their services nor did two of the three hauliers attend at hearing to confirm that they supplied their services to the Appellant, as alleged.

123. There were further inconsistencies in the evidence in relation to delivering the fuel. The delivery advice docket in relation to the delivery of the fourth consignment

to [redacted] was not signed. Mr. [redacted] was unsure whether he had delivered this consignment and stated that it was his practice to sign on delivery. He thought he had delivered three consignments, not four. Significantly, there was no director, employee, agent or representative of [redacted] present at hearing to confirm in evidence that the fuel was in fact delivered.

124. In relation to his deliveries to [redacted], Mr. [redacted] was unable to recall details of unloading the fuel on site although his evidence was he would have been present for approximately one hour while unloading occurred. In addition, while the Appellant produced bank statements showing that he received payment for all eleven consignments to [redacted], Mr. [redacted] gave evidence that two of the consignments were not received. This contradiction in evidence was not adequately addressed by the Appellant particularly in circumstances where he incurred no haulage charge for allegedly delivering the fuel. On the evidence, the allegation of non-delivery of the two consignments was not rebutted.

125. In addition, [redacted] capacity to receive the substantial volumes of fuel which the Appellant alleges was supplied to [redacted], is not borne out by the evidence. In evidence, Mr. [redacted] stated that [redacted] had tank capacity for 22,000 litres which was used for MMO. There was a separate tank for DERV of approximately 6,000 litres. Mr. [redacted] stated that this tank was on occasion, used for MMO. Mr. [redacted] also stated that he had seven or eight bowsers, each of approximately 1,000 – 2,000 litres. Mr. [redacted] had previously informed the Ms. [redacted] that he had four bowsers, each of a 1,000 litre capacity and that the smaller tank had a capacity of 5,000 litres. The consignment dated 25 March, 2014, was for 38,000 litres and consignments dated on 4 April, 2014, and 21 May, 2014, were for 25,000 and 25,200 litres respectively. Ms. [redacted] stated that based on the tank capacity at [redacted], she did not consider that it would be possible to unload a 38,000 litre tank of fuel at that fuel yard. When questioned as to the use to which the MMO was put, Mr. [redacted] stated on 2 September, 2014 that he used the MMO in his plant and machinery which consisted of 23 mini diggers, 9 compressors and 10 dumpers. However at hearing, Mr. [redacted] stated that his plant and machinery at that time comprised 50-60 mini-diggers, 20-30 compressors and 20-30 dumpers. This inconsistency in evidence was not adequately explained.

126. On 7 August, 2014, the Appellant told Revenue Officer [redacted] that he had never been to [redacted] and did not know what storage it had. At hearing, the only evidence of due diligence carried out by the Appellant in relation to [redacted] was that the Appellant stated that he knew that [redacted] was a civil engineering company and that the Appellant had checked [redacted] VAT number.

127. In this appeal the Appellant asserted a position in relation to his custodianship of the fuel, its holding and transportation. He stated that MMO was transported at his direction, from [redacted] in [redacted] to [redacted] in [redacted] and to [redacted] in [redacted] by hauliers [redacted], [redacted] and [redacted]. However, I find, based on the evidence adduced, and in particular, the absence of documentation and proofs in relation to haulage and the absence of an adequate explanation in relation thereto, that the Appellant did not succeed in proving as a matter of fact, the position he asserted as regards his holding and haulage of the fuel. As a result, I find that the Appellant has not shown that the excisable products were '*held for use*' as marked mineral oil, in accordance with section 99(10)(b) FA 2001.

128. For the reasons set out above I am satisfied that the Appellant has not shown that the excisable products were '*used, or held for use, for such purpose or in such manner*' namely, as marked mineral oil, in accordance with section 99(10)(b) FA 2001, and as a result, I find that the Appellant is liable for payment of the excise duty on such products at the standard excise rate in accordance with section 99(10) FA 2001.

Compatibility with EU Law

129. The Appellant submitted that section 99(10) FA 2001 was incompatible with Council Directive 2008/118/EC, that it exceeded the terms of the directive and was incompatible with European Law.

130. Article 2 TFEU provides;

> '*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their*

competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.'

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

132. Council Directive 2003/96/EC in relation to restructuring the Community framework for the taxation of energy products and electricity, sets out the framework for the taxation by Member States of energy products, including mineral oil. It provides at recital 9:

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

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

134. Article 21.4 provides;

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

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

'It is necessary, in order to ensure the collection of taxes at the rates laid down by Member States, for the competent authorities to be in a position to follow the

movements of excise goods and provision should therefore be made for a monitoring system for such goods.'

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

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

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

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

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

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

140. The Respondent cited the decision in *ROZ-SWIT Zaklad Produkcyino and ors,* Case C-418/14 which dealt with a request for a preliminary ruling concerning Council Directive 2003/96/EC. At paragraph 23 of the judgment the Court found that:

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

in the definition and implementation of policies appropriate to their national circumstances.'

141. At paragraph 25 the Court stated:

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

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

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

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

(a) is intended for use other than as a propellant,
(b) has been marked in accordance with Regulation 29,

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

145. I do not accept the Appellant's submission that section 99(10) FA 2001 provides for a recharging in relation to excise duty or is in the nature of a recharging provision. It is clear, based on the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, that where the statutory requirements are not satisfied, mineral oil falls to have been supplied at the standard rate, and excise duty at the standard rate applies.

146. Accordingly, I do not accept the submission of the Appellant that section 99(10) FA 2001 is incompatible with European Law in particular, Directive 2008/118/EC.

147. In paragraph 40 of his Statement of Case, the Appellant submitted that Directive 95/60/EC limited the Respondent's entitlement to seek to recover excise duty pursuant to section 99(10) FA 2001. While the Respondent accepted its entitlement pursuant to section 99B(8) of the Finance Act 2001, to impose penalties in respect of offences, the Respondent submitted that the statutory duty to seek penalties does not undermine its statutory duty to collect underlying excise duties and I accept this submission on behalf of the Respondent.

Alleged reversal of the burden of proof

148. The Appellant submitted that as drafted, section 99(10) FA 2001, '*appears to state that it falls to the Appellant to convince the appeal authorities that the Appellant complied with all areas of excise law and that the final use to which the Gas Oil was put … was not road use.'* The Appellant submitted that the law ought not to be interpreted in this manner. The Respondent submitted that the Appellant did not cite any case law or legislative provisions in support of his submission for this interpretation. The Respondent submitted that the Appellant, as a mineral oil trader was legally obliged

to comply with the provisions of the Mineral Oil Tax Regulations 2012, and that the excise duty assessment arose from his failure to so comply. The Respondent submitted that it was a matter for the Appellant to provide evidence if necessary, that the excisable products were either used or held for use for the proper purpose.

149. In this appeal, the Appellant made admissions that he affected multiple contraventions of the Mineral Oil Tax Regulations, 2012. It is the Appellant's default which led to the contraventions of the regulations and the raising of the assessment the subject of this appeal. There was no contest on the fact that excise duty in this appeal *was* applicable. The matter at issue in this appeal was the amount of excise duty applicable, whether at the standard rate or at the reduced rate, not the fact of its applicability.

150. The Appellant sought by reference to EU law to contest the Respondent's entitlement to assess excise duty on the supplies in question at the standard rate, in circumstances where the contraventions of the Mineral Oil Tax Regulations 2012, were themselves the subject of admissions by the Appellant. This is so in circumstances where compliance with the 2012 regulations is a requirement to claiming an entitlement to the reduced, rather than the standard rate of excise in addition to compliance with section 99(10) FA 2001.

151. 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 or who holds them for sale or delivery…'* in accordance with the final paragraph of the provision.

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

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

153. The Appellant submitted that section 99(10) FA 2001, was incompatible with the State's obligations under the provisions of the European Convention for the Protection of Fundamental Rights and Freedoms and in particular, article 1 of the first protocol thereof.

154. The Appellant cited and relied on the case of *Bulves AD v Bulgaria,* Judgment of European Court of Human Rights on 22 January 2009, in support of this submission.

155. In *Bulves*, the applicant company claimed that the domestic authorities deprived it of the right to deduct input VAT it had paid on a supply of goods received by it, because its supplier had been late in complying with its own VAT reporting obligations. The applicant was successful in its claim and the Court found that it should not have been required to bear the full consequences of its supplier's failure to discharge its VAT reporting obligation in a timely manner, by being refused the right to deduct the input VAT and by being ordered to pay the VAT a second time. The ECtHR confirmed that *Bulves* had at least a legitimate expectation of being able to deduct its input VAT and this amounted to a '*possession'* within the meaning of Article 1 of the First Protocol.

156. The applicant company in *Bulves* argued successfully that it should not be denied the deduction of input VAT because of the failure of the supplier to properly

account for VAT. In *Bulves* the applicant company had complied fully with the VAT legislation, had no control over its supplier and no reason to believe the supplier had not paid over the VAT. However the facts in *Bulves*, which arose in the context of VAT, are entirely distinct from the appeal under consideration herein which relates to excise duty. In this appeal the Appellant made admissions that he affected multiple contraventions of the Mineral Oil Tax Regulations, 2012, and it is the Appellant's default which led to the contraventions of the regulations and the raising of the assessment the subject of this appeal. In the circumstances, I am satisfied that there has been no interference with a '*possession'* within the meaning of Article 1 of the protocol.

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

158. Furthermore, pursuant to section 6(1) of the ECHRA '*Before a court decides whether to make a declaration of incompatibility the Attorney General and the Human Rights Commission shall be given notice of the proceedings in accordance with rules of court.'* The Respondent correctly stated that no such notice has been given nor could be given in this appeal.

Constitutionality

159. As the parties are aware, the question of the constitutionality of a statutory provision is a matter beyond the jurisdictional remit of the Tax Appeals Commission however, the presumption of constitutionality applies in respect of all enacted legislation.

Reference to the CJEU

160. On the matter of whether the Tax Appeals Commission should refer a question to the CJEU pursuant to Article 267 of the TFEU, no questions were proposed and I am satisfied that none arise.

Conclusion

161. The Appellant in this appeal, trading as [redacted] is a licensed mineral oil trader. The Appellant accepted, during cross-examination, that he was bound to comply with the Mineral Oil Tax Regulations 2012, and that he was conscious of the obligations that he had to the Respondent to safeguard the excise duty products in which he traded. The Appellant accepted that he was in contravention of the Mineral Oil Tax Regulations 2012, and contraventions are detailed at paragraphs 90-91 above.

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

163. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

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

165. Based on the evidence and for the reasons set out above, I determine that the Appellant has not shown that the excisable products were '*used, or held for use, for such purpose or in such manner*' namely, as marked mineral oil, in accordance with section 99(10)(b) FA 2001, and as a result, I determine that the Appellant is liable for payment of the excise duty on such products at the standard excise rate in accordance with section 99(10) FA 2001.

166. Further, for the reasons set out above, I do not accept the submission of the Appellant that section 99(10) FA 2001 is incompatible with European Law and thus the judgment of the CJEU in Case C-378/17, *Minister for Justice v Workplace Relations Commission* does not fall to be considered as part of this appeal.

Determination

167. For the reasons set out above I determine that the notice of assessment to excise duty dated 31 July, 2017, for the period 14 November, 2013 to 25 May, 2014, in the sum of €160,566 shall stand.

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

COMMISSIONER LORNA GALLAGHER

8th day of April 2021

This determination has not been appealed pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.