AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

54TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This determination concerns appeals to the Tax Appeals Commission ("the Commission") of two Notices of Assessment to excise duty, each made by an authorised officer Revenue Commissioners ("the Respondent") on 15 May 2017 under section 99A of the Finance Act 2001, as amended.

2. In one of these Notices, the Respondent assessed the Appellant as being liable to pay mineral oil tax on 52,000 litres of hydrocarbon oil in the form of petrol, due for the period 1 March 2016 – 30 June 2016. The sum assessed was €30,560.92.

3. In the other Notice, the Respondent assessed the Appellant as being liable to pay mineral oil tax on 624,000 litres of hydrocarbon oil in the form of unmarked diesel (DERV), also due for the period 1 March 2016 – 30 June 2016. The sum assessed was €298,908.48

4. These assessments were made on foot of a raid conducted by customs officers and members of the Garda Síochána on 30 June 2016 at a farm property in [redacted] of which the Appellant is, along with her brother [redacted], the registered owner. The raid took place as a consequence of information gained from a surveillance operation

whereby lorries towing forty-foot curtain-sided trailers, suspected to be carrying supplies of hydrocarbon oil, were observed travelling in the vicinity of this farm. Upon gaining access to the farmyard thereon, customs officers and members of the Garda Síochána found and seized 52,000 litres of hydrocarbon oil stored in intermediate bulk containers ("IBC's").[1]

5. As is explained in greater detail below, the relevant authorised officer of the Respondent, having formed the belief that the Appellant had taken delivery of a total of 26 separate consignments of 26,000 litres of untaxed hydrocarbon oil (24 of DERV and 2 of petrol), raised the aforementioned assessments to excise duty.

6. However, near the conclusion of the appeal hearing, counsel for the Respondent indicated that two of the 26 alleged consignments, both assessed at the rate applicable to petrol, could be disregarded by the Commissioner.[2] In effect, this amounted to the concession by the Respondent of the appeal of the Notice of Assessment, referred to in paragraph 2 above, whereby its authorised officer assessed the Appellant as owing mineral oil tax of €30,560.92 on 52,000 litres of petrol. As a consequence of this, all that remained at issue was the appeal of the Notice assessing the Appellant as owing mineral oil tax of €298,908.48 on 624,000 litres of DERV.

Background and Evidence

7. The Appellant is a woman who is the owner of and resides at a property (hereafter "the dwelling property" or "the Appellant's dwelling") in the townland of [redacted], County [redacted], the Land Registry Folio number for which is [redacted]. The dwelling property lies at the corner of the junction of two country roads in the townland of [redacted]. One of these was referred to in the appeal hearing as the [redacted] road [redacted]

8. [redacted]

[1] It was an agreed fact in this appeal that what was found in these IBC's was hydrocarbon oil that was either petrol or DERV;
[2] Transcript of hearing, page 161;

[redacted]

9. The other road on which the Appellant's dwelling sits is a narrow, tarmacked, cul-de-sac running up the side of the Appellant's home in a [redacted] direction for a distance of about 450 meters. It was referred to in evidence as a "boreen". A picture of it provided to the Commissioner suggests that it could not accommodate two vehicles travelling in opposite directions without one pulling over onto the verge. [redacted]

10. The Appellant is also the registered owner of another, larger, property in [redacted], the Land Registry Folio number for which is [redacted] (referred to hereafter as "the farm" or "the farm property"), which is divided into two parts. The much smaller part lies behind the Appellant's dwelling, alongside the cul-de-sac. It is apparent from an aerial photograph furnished to the Commissioner during the appeal hearing that there is a shed and yard here, but it is not clear whether they are situated on the dwelling property or the farm property. Nothing would appear to turn on this detail in any event.

11. At the top of the cul-de-sac lies the gated entrance to the much larger part of the farm property. This straddles the border between Ireland and Northern Ireland and is made up of a farmyard and fields. The gate in question is electrically powered, about 8 feet high, and leads directly to the farmyard on which are situated several farm buildings.

12. The Appellant's dwelling, the electrical gate and the farmyard are all located on the Irish side of the border.

13. Just in front of the aforementioned electrical gate is a right turn that leads to, or is the beginning of the driveway to, a property on which is situated the dwelling of [redacted], the Appellant's adult son (hereafter he is referred to as "the Appellant's son"). The map contained within the Land Registry Folio [redacted] indicates that this property does not form part of the farm property.

14. The Appellant's dwelling and the farm property were previously owned by her late husband, [redacted], until his death in [redacted]. The Commissioner was shown the Will of

[redacted], which disclosed that his property was distributed in the following manner upon his death:-

> *"I GIVE DEVISE AND BEQUETH my Dwellinghouse and Lands situate at* [redacted], [redacted], [redacted] *to my dear wife* [redacted] *for the term of her natural life and thereafter to my EXECUTORS and TRUSTEES TO HOLD UPON TRUST for* [the Appellant's son] *until such time as he reaches the age of twenty one years and then to him absolutely SUBJECT at all times to a right of residence in the Dwelling house thereon for my* [redacted] *children namely* [redacted] *until such time as they each reach the age of twenty one years.*
>
> *I GIVE DEVISE AND BEQUETH all my Stock and Machinery to my dear Wife* [redacted] *absolutely."*

15. Part 2 of the Land Registry Folio relating to the farm property is entitled "*Ownership*" and contains two entries. The first of these is dated [redacted] 1997 and states that: "[The Appellant] *of* [redacted], [redacted], [redacted], *County* [redacted] *is limited owner".* A line signifying deletion runs through this entry.

16. The second entry, dated [redacted] 2013, states: "[The Appellant] *of* [redacted], [redacted], [redacted], *County* [redacted] *and* [redacted] *of* [redacted], [redacted], *County* [redacted] *are full owners".* A note, also dated [redacted] 2013, at the bottom of Part 2 of this Land Registry Folio further provides that: "*No registration under a disposition by or a transmission from the registered owner is to be made without prior notice to* [the Appellant's son]".

17. It is appropriate to observe at this point that the legal import of the terms of the Will of [redacted] and the entries and note contained in Part 2 of the Land Registry Folio relating to the farm property were matters in dispute in this appeal. These questions will be revisited at a later point in this Determination.

18. The Appellant filed Form 11 income tax returns for the years 2015 and 2016 in which she stated her trade to be farming and her turnover therefrom to be €367,497 and €250,523 respectively. The net profit after expenses and deductions was €3,848 for 2015 and €3,717 for 2016.

19. The Appellant gave evidence that despite the content of these returns, she never had any involvement in the running of the farm, had not set foot on the larger part of the farm property in over twenty years and had no knowledge of whatever activity took place thereon. She said that, far from being a farmer, she had worked as a shop assistant until about 2014, at which point she had retired from work altogether.

20. The Appellant was cross-examined as to why she filed Form 11 returns disclosing farming income in circumstances where she claimed to have no involvement in farming at all. She said she had nothing to do with their filing, which was arranged by her accountant acting on instructions given by her son. She asserted that her ownership of the lands, including the farmland, was in "*name only".* The true owner, she said, was her son. When it was put to the Appellant by counsel for the Respondent that the herd number relevant to the farm was in her name as well and that she was in receipt of farm subsidies paid to her by the State, she accepted these facts. She repeated, however, that she was not a farmer, stating, inter alia, that "*I don't deal with any of that. That's not my department"* and "*I personally don't do* […] *this".*

21. Counsel for the Respondent called into question the truth of the Appellant's claims of ignorance regarding activities occurring on the farm. He put it to her that she must, for instance, pass by the entrance to the farmyard when visiting her son at his dwelling. The Appellant accepted that she did so but did not accept that this was of any relevance to the question of her understanding of, or participation in, the activities that took place thereon. It was further put to her that she must, at the very least, have been aware of the installation of sliding electrical gates that were not typical farmyard gates. The Appellant indicated that she was aware of these gates and accepted that they were not what one would describe as farm gates. She repeated, however, that she had no idea what went on behind them.

"Operation Chess" and the raid on 30 June 2016

Evidence of Officer A

22. The Commissioner heard evidence from, [redacted], Assistant Principal Officer in the Respondent's Customs Division ("Officer A") regarding the circumstances leading up to the raid on 30 June 2016. He said that from 2013 the Respondent introduced various measures to combat what it saw as the serious problem of the "washing" (i.e. the removal) of the green marking applied to diesel meant for agricultural use. One such measure was the introduction of the requirement for "licensed traders" in oil to keep and submit "Oil Movement Returns". Another was the advent of a new, indelible, marker for agricultural use diesel called Accutrace S10. According to Officer A, the introduction of these measures had the effect that while the threat of washing was greatly reduced, the smuggling of DERV into Ireland from outside the jurisdiction increased.

23. Officer A gave evidence that at some point in 2015 or 2016, it was not clear precisely when, the customs authority of the Czech Republic informed the Respondent that it believed particular "tractor and trailer units" (i.e. articulated lorries towing 40 foot curtain-

sided trailers), ostensibly carrying goods declared to be solvents, were in fact smuggling diesel from that jurisdiction, through Poland and other countries, to Ireland. He said that on foot of this information, and being unaware of the identities of those involved in the activity, the Respondent established "Operation Chess". Officer A described himself as the senior investigator involved in this operation, which involved the covert surveillance of specific lorries and trailers from the point of their arrival at Dublin Port on journeys that invariably took them [redacted] in the direction of [redacted].

24. Officer A said that surveillance began in Dublin Port where customs officials there performed discreet 'soft touch' checks. This meant "[…] *talking to drivers; looking at the paperwork; looking at the address* [of destination]*".*[3] It also involved the conduct of a visual inspection of the contents of the suspect trailers, which he said always revealed that they contained full loads of 1,000 litre IBC's designed to carry liquids.

25. Officer A gave an explanation of the operational plan after the departure of each lorry and trailer from Dublin Port. He said they would be followed as far as [redacted] toll plaza by customs officials from Dublin Port and the Respondent's Investigations and Prosecutions Division. Officer A said that from this point surveillance would be taken up by customs personnel local to [redacted], travelling in unmarked cars. Officer A said that in total 20-30 people, comprising a mixture of national and local customs personnel and members of the Garda Síochána, would be involved in each surveillance exercise undertaken as part of Operation Chess.

26. The evidence of Officer A was that he was not part of the "operational team" and did not take part in the surveillance activity. Notwithstanding this, he was examined-in-chief and cross-examined on what was observed by others who did participate and relayed information back to him. He said that his information was that the lorries towing trailers would stop at a service station just off [redacted] at [redacted], where they would stay for "[…] *up to 48 hours* […] *awaiting further instruction."* He said he was informed that upon eventually departing the service station, the lorries and trailers would proceed to the farm property.[4]

27. In examination-in-chief, counsel for the Respondent asked Officer A to comment upon a printed list included in the Respondent's book of documents. In so commenting, Officer A said that this list, entitled "[redacted]", specified 24 individual instances, the first being on 23 March 2016 and the last on 30 June 2016, where lorries towing trailers were followed by Garda or customs personnel from Dublin Port to the [redacted] area. On the

[3] Transcript of hearing, page 77
[4] Transcript of hearing, page 62

evidence of Officer A, this list, which contained five separate columns headed "*Tractor Unit", "Date of Movement", "Litres", "Excise Rate"* and *"Excise Due",* reflected the fact that there were lorries bearing 6 different registrations which were followed on various dates over the course of the operation. The lorries listed and the dates associated with them were as follows:-

- *PO7L*[redacted]: 23 March 2016, 1 April 2016, 10 April 2016, 19 April 2016 and 30 April 2016 and 30 May 2016;
- *PCT*[redacted]: 23 March 2016, 4 April 2016, 16 April 2016, 25 April 2016 and 13 May 2016;
- *PKE*[redacted]: 2 April 2016, 14 April 2016; 22 April 2016, 25 April 2016 and 30 June 2016;
- *PO7R*[redacted]: 18 April 2016, 26 April 2016 and 9 May 2016;
- *WR8*[redacted]: 22 April 2016 and 12 May 2016; and
- *PO5*[redacted]: 29 April 2016, 22 May 2016 and 30 June 2016.

28. It is worth emphasising at this stage of the Determination that the evidence of Officer A was that the list document constituted an enumeration of the reports made to him by persons conducting the surveillance of deliveries, believed to be of hydrocarbon oil, to the farm property. It was not suggested that it was a document drawn up at the outset of the surveillance operation and added to over its lifetime so that it constituted a contemporaneous record of alleged deliveries that could be treated as admissible evidence. Rather, counsel for the Respondent sought to rely on the evidence given orally at hearing by Officer A as to what was told to him by persons who were on the ground and, he said, did observe the 24 deliveries specified therein.

29. Officer A was cross-examined as to why he was giving evidence in relation to alleged deliveries of hydrocarbon oil to the farm property that he did not himself observe. In reply, Officer A stated that one local customs officer who observed some of the alleged deliveries would give evidence after the conclusion of his own. He said that it was the view of the Respondent that this evidence, combined with his own, was sufficient to answer the case made by the Appellant in respect of all 24 of the deliveries alleged to have been observed. This answer was more in the nature of legal submission than evidence.

30. Officer A was pressed by the Appellant's solicitor as to whether there were in existence any written statements of evidence made by customs officers detailing their observation

of some or all of the alleged deliveries. His reply was that there were no such statements in existence.[5] The admissibility of and weight to be given to the evidence of Officer A was dealt with in legal argument by the Appellant's solicitor and counsel for the Respondent. This question is the subject of a finding in the Analysis part of this Determination.

31. Officer A was also cross-examined on what occurred during the raid on 30 June 2016. In circumstances, however, where the Commissioner had the benefit of non-hearsay oral evidence from the other witness called by the Respondent, whose evidence is summarised below, it is not necessary to set this out.

Evidence of Officer B

32. This other witness was [redacted], an officer in the local customs enforcement branch in [redacted] (hereafter "Officer B"). In evidence he said that he participated in five surveillance operations, each beginning at the Toll Plaza [redacted] and involving the tailing of a lorry, with the registration number PKE[redacted], towing a 40-foot curtain-sided trailer believed to hold a consignment of hydrocarbon oil on which no duty had been paid. The dates on which he carried out these surveillance operations were 2 April 2016, 14 April 2016, 22 April 2016, 25 May 2016 and 30 June 2016. Officer B said that he and his colleagues in the unmarked car would follow this "target vehicle" as it exited [redacted] onto the N[redacted], [redacted], at junction [redacted]. On each occasion the target vehicle would make its way to and then take the [redacted] turn onto [redacted] Road, which is described at paragraph 7 herein. Officer B said that he and his colleagues would bring an end to the tail at this point and would instead proceed straight on to the [redacted]. [redacted]. After about 5 minutes of driving, Officer B and his colleagues in the unmarked car would take the left-hand turn back onto the [redacted] Road. On each occasion they would proceed past the Appellant's dwelling on their left. On four out of the five operations in which Officer B participated he saw no trace of the target vehicle and did not pass it travelling in the opposite direction [redacted]. On one occasion, however, he said that he saw the target vehicle parked in the yard behind the Appellant's dwelling. He did not specify on which date this happened, though it is clear that it must be one other than 30 June 2016, when the raid occurred.

33. On the morning of 30 June 2016 Officer B swore an information and obtained a search warrant in respect of the farm property from a judge of the District Court. That afternoon/evening, the Appellant followed the target vehicle to close to that location and,

[5] Transcript of hearing, pages 78-80;

after waiting for approximately 45 minutes – 1 hour for the arrival of the Garda Síochána armed support unit, proceeded at about half five to six o'clock up the cul-de-sac in a convoy of about 10 – 12 vehicles. Finding the gate at the entrance to the farmyard to be closed and locked, Officer B scaled it with a ladder and made his way to the sheds a short distance away. He gave evidence that once in the farmyard he found two persons to be in the process of unloading IBC's from the curtain-sided trailer towed by the lorry that they had followed not long before. One of these individuals, who was not identified, was said to have then jumped into a four wheel drive vehicle and driven "[…] *across fields towards the border* [where he] *sat on the other side".* The other, who turned out to be the driver of the lorry, was apprehended.

34. Officer B gave evidence that a search of the yard revealed the presence of 52 IBC's. Half of these had either just been unloaded or were, by all appearances, about to be unloaded from the trailer towed by the lorry. The other half, Officer B surmised, had been delivered by another lorry and trailer that he had been informed had been observed by other customs officials driving onto the [redacted] Road in the direction of the farm property at about 3 o'clock that same afternoon.

35. The 52 IBC's were seized and samples of their contents were taken away to be tested at a laboratory. There was no dispute between the parties that this testing occurred and that it revealed that they all contained supplies of hydrocarbon oil, almost all of it DERV. Lastly, Officer B gave evidence that the sum of €21,300 was seized from the driver of the lorry they had followed to the farm property.

36. The Commissioner now returns to the evidence of the Appellant given at hearing. It was an agreed fact in this appeal that at the time of the raid the Appellant was not present on the farm property, or in her dwelling. Her own evidence was that she thought she may have been "*in town"* at this time. The Appellant gave evidence in examination-in-chief and cross-examination that she had never noticed lorries towing trailers driving along the [redacted] Road or up the cul-de-sac running to the farmyard of which she was a registered owner and from where, if one were to believe her Form 11 returns for 2015 and 2016, she carried on the trade of a farmer. She stated that she had no notion whatever of fuel being delivered thereto and stored thereon.

37. Counsel for the Respondent questioned the Appellant about three specific documents that she had included in her appeal papers, each of which was addressed or related to a business trading as "[redacted] *Oils",* with an address at "[redacted]." The first was an acknowledgment by the Collector General, dated 26 March 2010, of VAT payments received for the period March – September 2009. The

second was the Certificate of Registration of this business name, dated 19 July 2005 (the full corporate name of the business was "[redacted] Limited"). The third was the renewal notice for a mineral oil trader's licence, addressed to the nominee of [redacted] Limited, trading as [redacted] Oils, this being her son. No date was visible on this document, though it records that the licence renewed was to expire on 30 June 2007.

38. Counsel asked the Appellant how this material, which he suggested showed that an oil trading business had been operating from her address, had come to be included in her papers if she was unaware that such activity was carried out from the property of which she was an owner. The Appellant stated that she was unable to answer this and knew nothing of the correspondence she had included in her own hearing booklet.

39. It was put to the Appellant in cross-examination that her son had received convictions in [redacted]2010 and [redacted] 2014 in [redacted] District Court, both allegedly relating to illegal oil activity. The Appellant denied any knowledge of such convictions. No evidence of any such convictions was adduced by the Respondent in the making of its own case. The Commissioner finds the accusation that the Appellant's son was convicted of, or for that matter charged with, illegal activity relating to oil trading to be unproven and, for the avoidance of doubt, has disregarded it entirely in making this Determination.

Legislation and Guidelines

40. The following legislation, as applicable at the times relevant to this appeal, was cited by the parties at the hearing of the appeal.

41. Section 95 of the Finance Act 1999 provides:-

"(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 (other than vehicle gas)—

(i) released for consumption in the State, or (ii) released for consumption in another Member State, and brought into the State

[…]

(2) Liability to mineral oil tax shall arise—

(a) in the case of mineral oil other than vehicle gas, at the time when that mineral oil is—

(i) released for consumption in the State, or

(ii) following release for consumption in another Member State, brought into the State,

[…]"

42. "*Mineral oil*" includes both petrol and DERV. Section 96(1) of the Finance Act 1999 provides that *"Mineral oil tax shall be charged at the rates specified in Schedule 2"* to the Act. At the relevant times DERV was taxed at the rate of €479.02 per 1,000 litres. Petrol was taxed at the higher rate of €587.71 per 1000 litres.

43. Section 94 of the Finance Act 1999 defines "*release for consumption"* as having the same meaning as that given to the term by section 98A of the Finance Act 2001. Chapter 1 of Part 2 of the Finance Act 2001 sets out general provisions relating to excuse duty.

44. Section 98A(1) of the Finance Act 2001 provides that "*release for consumption"* means:-

"(a) any release, including irregular release, of excisable products from a suspension arrangement,

(b) any production, processing or extraction, including irregular production, processing or extraction, of excisable products outside a suspension arrangement,

(c) any importation of excisable products from outside the European Union or any arrival in the State of products from within the European Union, except where the excisable products are, immediately upon such importation or arrival, placed under a suspension arrangement, or

(d) any irregular entry of excisable products, except where the customs debt was extinguished under points (e), (f), (g) or (k) of Article 124(1) of the Council Regulation."

45. Part 2 of the Finance Act 2001 is entitled "*Excise".* Section 99 therein, relating to "*Liability of persons",* provides at subsection (9):-

"Where any person, otherwise than under a suspension arrangement, has—

(a) sold or delivered, or

(b) kept, held or stored for sale or delivery,

excisable products on which the appropriate excise duty has not been paid, then—

(i) such person,

(ii) any other person on whose behalf such excisable products have been so sold, kept, held, stored or delivered, and

(iii) any person to whom such products have been delivered, is liable for payment of the excise duty on such excisable products."

46. Section 99(11) of the Finance Act 2001 provides:-

"*Where under subsections (1) to (10A) more than one person is, in a particular case, liable for payment of an excise duty liability, such persons are jointly and severally liable."*

47. Section 99A(2) of the Finance Act 2001 provides:-

"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."

48. The Appellant's solicitor also made reference in oral submission at hearing to Articles of Council Directive 92/12EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. This, he said, was the operative EU legislation relating to the charging of excise duty, which the State had sought to transpose by way of the enactment of the Finance Act 2001. As a consequence, Articles of Directive 92/12EEC had a bearing on how sections of the Finance Act 2001 should be interpreted. The Commissioner notes that, at the time of the alleged deliveries of hydrocarbon oil and the assessments under appeal, Directive 92/112EEC had in fact been repealed and replaced by Directive 2008/118EC concerning the general arrangements for excise duty.[6] The Appellant's argument relating to the interpretation of relevant sections of the Finance Act 2001 in light of EU law is discussed in the Analysis part of this Determination. The relevant Articles of Directive 2008/118EC likewise are set out in detail by the Commissioner in that part.

Submissions

49. The following is a summary of the submissions made on behalf of the parties at the hearing of the appeal.

Appellant

50. The Appellant's solicitor submitted, firstly, that only those who deal or trade in oils may be liable for excise duty on excisable products in respect of which duty has not been paid

[6] Directive 2008/118EC came into effect on 15 January 2009 and was itself repealed on 12 February 2023;

pursuant to section 99(9) of the Finance Act 2001. The Appellant did not and had never dealt in oils by keeping them for sale or delivery. He submitted that:-

> *"*[…] *it is simply ludicrous to assume that a then* [redacted]*-year old woman* [was] *involved in oil smuggling, in arranging loads of fuel to come from the Czech Republic* […] *importing them into Dublin Port and arranging for their delivery to a premises*."[7]

51. The Appellant's solicitor submitted that the Respondent had sought to affix the Appellant with liability on the grounds that she was the supposed owner of the farm. This, however, was incorrect as a matter of fact and law. The Appellant had given oral evidence that she held the farm in name only. When one looked at the content of the Land Registry title documents in conjunction with the Will of the Appellant's deceased husband, it was clear that this was true. The Appellant's interest in the farm property was only a life interest and it was plain that her son was to become its owner in the wake of her death. While she was described in the Land Registry title documents as full owner of the farm along with her brother, [redacted], no disposition of it could occur without prior notice to her son. The net effect of the foregoing, it was submitted, was that the Appellant held the farm property "on trust" for her son.

52. The Appellant's solicitor submitted that the fact that it was the Appellant who filed returns disclosing income from the farm and that the herd number was in her name was irrelevant. Even were one to draw the inference from this that she was running a farming business, and the Appellant's solicitor reiterated his contention that the evidence was that she was not, this did not mean that she had any involvement in oil trading. In this regard, he submitted:-

> *"*[…] *in my submission, one has to be a trader essentially to be caught under section 99 of the Finance Act* [2001]*, one has to be involved in the business of trading* [oil]*. One cannot fix someone* [with liability] *who is involved in a different business*.[8]

53. Elaborating on this, he submitted:-

> *"*[The Customs Officer] *openly admitted he could not fix any of the people* […] *with an assessment* […]*. So he chooses the person he thinks he can fix with an assessment but I say on the legislation he cannot. He takes a person* [the Appellant] *who has no involvement whatsoever in this transaction, no involvement whatsoever in the oil business, and fixes them with an assessment for duty on fuel. And I say that* […] *it is* […] *a capricious act on behalf of the Respondents* […]*."*

[7] Transcript, page 134;
[8] Transcript, page 133.

54. The Appellant's solicitor said that the effect of the case being made was that:-

> *"*[The Respondent] *could simply pick anybody* […] *and say, well okay you had nothing to do with this* […]*, but because we say that we can tie you to the premises, we're going to fix you with liability. In my view there is no lawful or factual basis for doing that."*

55. The solicitor for the Appellant made clear that there was no dispute that two deliveries of hydrocarbon oil comprising 26,000 litres each were made to the farm premises on 30 June 2016, though it was reiterated that the Appellant herself had no knowledge of them.

56. The solicitor for the Appellant further accepted at legal submission stage that, based on the evidence of Officer B, deliveries of some kind had been made to the farm property by a lorry towing a forty-foot curtain-sided trailer on the other occasions that he had been involved in the surveillance operation. These occasions were 2 April 2016, 14 April 2016, 22 April 2016 and 25 May 2016. However, the solicitor for the Appellant submitted that there was no admissible evidence that any of these deliveries involved excisable goods in the form of hydrocarbon oil. It was implicit in the submission of the Appellant's solicitor that the Commissioner could or should not infer that what was being delivered on these occasions was hydrocarbon oil.

57. As regards alleged deliveries on all remaining dates, the solicitor for the Appellant argued that the Respondent was basing its case wholly on hearsay evidence given by Officer A regarding what he was supposed to have been told by other persons, none of whom had come to give evidence. This was procedurally unfair and should not be allowed. All allegations of the occurrence of deliveries for which there was no admissible evidence should be disregarded by the Commissioner.

58. Moreover, even if the Commissioner took a contrary view in relation to the fact of alleged deliveries made to the farm premises on dates other than those observed by Officer B, there was, as with those that he did observe on 2 April 2016, 14 April 2016, 22 April 2016 and 25 May 2016, no admissible evidence that they were deliveries of hydrocarbon oil.

59. Accordingly, and without prejudice to the aforementioned submissions relating to the Appellant's non-liability as a person not involved in the oil trade, the great majority of the sum assessed by the Respondent was in error. This was so either because of a want of any evidence of deliveries having occurred, or of evidence that they were deliveries of hydrocarbon oil.

60. Lastly, the Appellant's solicitor submitted that the decision of the Respondent to raise an assessment was in error in circumstances where, he said, it was apparent that any

hydrocarbon oil found to have been transported to the farm property was destined for the United Kingdom, a jurisdiction at that time still a member of the European Union. The location of the farm premises on the border with Northern Ireland meant that the inference had to be drawn that Ireland was a country through which any hydrocarbon oil delivered thereto merely transited, on its journey from, it would seem, the Czech Republic. As such, it was not for the Respondent to seek to recover duty in respect of goods which had been released for circulation. It was, rather, a matter for the tax authorities of the United Kingdom.

61. In support of this argument, the Appellant's solicitor opened the judgment of the CJEU (Sixth Court) in *Prankl.*[9] This case concerned a reference under Article 267 of the TFEU by an Austrian court made in circumstances where its national authority had levied duty in respect of a consignment of cigarettes which it discovered, after the fact, had transited by road through its territory, without necessary documentation, in a smuggling operation beginning in Hungary and planned to end in the United Kingdom. In the event, the smuggled goods were discovered by the customs in the Netherlands before the last leg of the journey.

62. The solicitor for the Appellant relied in particular on paragraph 32 of *Prankl*, where the CJEU held:-

> *"In the light of all of those considerations, the answer to the question referred is that Article 7(1) and (2) and Article 9(1) of Directive 92/12 must be interpreted as meaning that, where goods subject to excise duty that have been smuggled into the territory of a Member State are transported, without the accompanying document prescribed in Article 7(4) of that directive, to another Member State, in the territory of which those goods are discovered by the competent authorities, the transit Member States are not permitted also to levy excise duty on the driver of the heavy goods vehicle who transported them for having held those goods for commercial purposes in their territory*."

Respondent

63. Counsel for the Respondent began by submitting that there was no evidence before the Commissioner upon which to conclude that the Appellant held the farm property on trust for her son. The Land Registry documentation indicated that from 1997 until 2013 she was the "limited owner" of the farm property and that, on or about December 2013, she became, along with [redacted], its full owner. The proviso in the Land Registry

[9] Case C-175/14;

documents to the effect that any sale of the farm property by the Appellant or by her brother would have to be on notice to her son did not equate to proof of the existence of a trust. Furthermore, when one looked at the terms of the husband's will, it was clear that the Appellant had been granted a life interest in the farm property, with the only prospect of the creation of a trust in favour of her son being if he inherited the property from her prior to his reaching the age of 21. This had not occurred. The argument that the Appellant's son was the beneficial owner of the farm property was not, submitted counsel for the Respondent, grounded in fact.

64. Likewise, the assertion that the Appellant was not involved in the activity of farming was contradicted by the available evidence. The Appellant was the holder of the herd number associated with the farm property. She delivered income tax returns for 2015 and 2016 disclosing Schedule D income arising from farming. For the former of these years turnover of the Appellant's farm business was €367,497, with its profit being €4,838. Counsel for the Respondent made the point that the Appellant would have been entitled to claim deductions in respect of farm expenditure. He posited that the very sheds in which hydrocarbon oil was found on 30 June 2016 could have been subject to capital allowances.

65. Counsel cast doubt on the credibility of the Appellant's evidence that she had no knowledge of what activities were being carried out on the farm that belonged to her and was located only a short distance from her dwelling, down a narrow cul-de-sac at the end of which her son resided. Counsel pointed to the correspondence included in the Appellant's own bundle, dating from 2005, 2010 and some unknown date, indicating that a business known as [redacted] Limited, trading as [redacted] Oils, used the Appellant's address as its principal place of business.

66. It was submitted that even if the Appellant had opted to delegate the management of the farm to her son, this was her prerogative. Doing so did not absolve her of responsibility for what then happened thereon in her name. Counsel for the Respondent made the point that many a person involved in the business of farming did so without, as he put it, "driving a tractor".

67. Counsel for the Respondent drew the Commissioner's attention to the relevant legislative provisions. Under section 99(9) of the Finance Act 2001, any person who sells or delivers, or keeps for sale or delivery, excisable products on which duty is due is liable to pay that duty. Critically, in addition "[…] *any person to whom such products have been delivered*" is also liable to pay the duty due on an excisable product. When one looks at this in conjunction with section 99(11) of the same legislation, which provides that where more

than one person in a particular case is liable to pay excise duty on a good, each or all of them are liable jointly and severally, it is clear that "[…] *the legislature simply doesn't care as to who was involved with what. The whole purpose of the Finance Act* [2001] *is to* […] *collect taxes that ought to have been paid when the* [excisable good] *was released for consumption in the State."*[10]

68. Regarding release for consumption, counsel for the Respondent submitted that this occurred, pursuant to section 98A(1)(c) of the Finance Act 2001, when the consignments of hydrocarbon oil, having come from elsewhere in the EU, were unloaded at Dublin Port and thereafter transported by road while not under a suspension arrangement.

69. Counsel submitted that the reliance by the Appellant's solicitor on *Prankl* was misconceived. The case was not authority that no duty was chargeable in the State on goods that were unlawfully transported to a location therein, unloaded and, at some point thereafter, perhaps brought into Northern Ireland. Counsel made the point that the crucial issue in *Prankl* was whether the European legislature intended to allow every Member State through which unlawfully transported goods merely transited to levy excise duty. At paragraph 27, the CJEU held that it could not "[…] *reasonably be maintained"* that this was its intention. The circumstances in this case were in marked contrast. The evidence was that consignments of unlawfully transported hydrocarbon oil were unloaded at the farm property and, it was submitted, delivered to the Appellant.

70. Counsel for the Respondent submitted that there appeared to be no dispute that deliveries of some nature had, on the occasions observed by Officer B, been made by lorries towing trailers. He said that in respect of the remaining deliveries alleged to have been made, the evidence of Officer A was sufficient to prove them. This was so, counsel said, because Officer A was the person who was involved at a high level in the planning of Operation Chess and had received, by his own evidence, intelligence from the Czech Republic. What Officer A said in relation to what had been reported back to him by those who did observe deliveries was corroborated by the oral evidence given by Officer B. Regarding the absence of these persons who had reported to Officer A as witnesses at the hearing, it was submitted that regard should be had to the fact that over the years officers move on to new employment and retire. Nothing specific to officers involved in Operation Chess who might have given non-hearsay evidence was mentioned.

71. In relation to whether any deliveries found to have been made to the farm property other than on 30 June 2016 contained hydrocarbon oil, counsel for the Respondent submitted

[10] Transcript, page 154;

that there was ample evidence to suggest that they did. The Respondent did not intervene to seize and test the earlier lorry deliveries on the grounds that they were conducting an intelligence led operation with the aim of "*gaining greater insight into practices of tax evasion*". The overlap in lorries making the deliveries and the commonality in the pattern of behaviour relating to their route to the farm property meant that the inference should be drawn that what was contained in the 40-foot trailers on these occasions was the same as on 30 June 2016.

Material Facts

72. The facts material to this appeal that were not in dispute were as follows:-

- in 199[redacted] the Appellant, upon the death of her husband [redacted], became the holder of a life interest in the farm property in [redacted] (Land Registry Folio Number [redacted]) and the dwelling property in the same [redacted] (Land Registry Folio Number [redacted]);
- the farm property is divided into two geographically separate parts. The larger part is about 450 meters away from the dwelling property, at the end of a narrow cul-de-sac, and straddles the border between Ireland and Northern Ireland. The smaller part, which also is located off the cul-de-sac, is situated just behind the dwelling property;
- at the entrance to the farm property there is a sliding electrical gate which is opened by use of a pin-code. The entrance and the farmyard which lies a short distance behind it are situated on the Irish side of the border;
- the dwelling of [redacted], the Appellant's son, is a short distance from the entrance to the farm property. This property on which this dwelling sits is adjacent to the larger part of the farm property;
- for the Appellant to visit her son's dwelling she had to pass by the entrance to the farm;
- the Appellant did, from time to time, pay visits to her son at his dwelling;
- pursuant to the terms of [redacted]'s Will, the Appellant's dwelling and the farm property were, upon the death of the Appellant, to pass to his executors to hold in trust for her son until he reached the age of 21;
- the Appellant's son surpassed the age of 21 prior to the date of the deliveries which occurred, or which were alleged to have occurred, at issue in this appeal;

- in the part of the Land Registry Folio relating to the farm property concerning ownership, there is a deleted entry, dated [redacted] 1997, which states: "[redacted] *of* [redacted], [redacted], [redacted] *County* [redacted] *is Limited owner";*

- thereunder in the same part of the Land Registry Folio is another entry, not deleted, which states: "[redacted] *of* [redacted], [redacted], [redacted], *County* [redacted] *and* [redacted] *of* [redacted], [redacted], *County* [redacted] *are full owners";*

- for the years 2015 and 2016 the Appellant filed Form 11 income tax returns in which she stated her trade to be farming and her turnover therefrom to be €367,497 for 2015 and €250,523 for 2016. Her net profit from this trade, after expenses and deductions, was €3,848 and €3,717 respectively;

- the Appellant was, at all times material to this appeal, the holder of the herd number relating to the farm property;

- the Appellant claimed State subsidies in respect of the farm business;

- on the late afternoon or early evening of 30 June 2016 customs officers and members of the Garda Síochána carried out a raid of the farm property. There they found and seized 52,000 litres (comprising two separate consignments) of hydrocarbon oil. Almost all of this was DERV. A small percentage was petrol;

- 26,000 litres of this hydrocarbon oil was delivered to the farm property at about 5-6pm on 30 June 2016 in a 40-foot curtain-sided trailer towed by a lorry with the registration number PKE6N95;

- prior to this, on 2 April 2016, 14 April 2016, 22 April 2016, 25 April 2016 the same lorry also made deliveries to the farm property;

- the Appellant was not present on the farm property or in her dwelling at the time of the raid;

- on 15 May 2017 an authorised officer of the Respondent, Officer A, having formed the belief that the Appellant had taken delivery of 624,000 litres of DERV and 52,000 litres of petrol, made assessments that she was liable for duty thereon in the amounts of €298,908.48 and €30,560.92 respectively;

- at the hearing of the appeal the Respondent withdrew its allegation that deliveries of petrol, giving rise to the assessment of €30,560.92 of excise duty, had been made to the Appellant.

Findings on Factual Matters Contested and Legal Analysis

73. The Commissioner will first address the submissions made by the Appellant's solicitor that the Appellant holds the farm property, along with her brother [redacted], "on trust" for her son, who is its beneficial owner. The clear terms of the Will of [redacted] are that the Appellant became the owner of all of his lands at [redacted], the dwelling property and the farm property, upon his death for the duration of her lifetime. The only contingency in which a trust was to be created was if the Appellant died prior to her son, who was to inherit the properties at that juncture, turning 21. This, however, did not occur. The Land Registry Folio relating to the farm property first recorded the Appellant as being its "*limited owner".* This later changed in [redacted] 2013 to her being a "*full owner*" in conjunction with her brother. Whether or not this was consistent with the wishes of [redacted] specified in his Will, the Commissioner agrees with counsel for the Respondent that there is no evidence of the existence of a trust in favour of her son. The note at the foot of Part 2 of the relevant Land Registry Folio only provides that no transmission of the farm property *"from the registered* owner" may occur without prior notice to her son. This does not equate to his having beneficial title to it. Accordingly, the Commissioner finds as a fact material to the determination of this appeal that the Appellant owns the farm property and her son, [redacted], has, at least for her lifetime, no legal entitlement to possess it or dictate to her the activity which is to take place thereon.

74. At this point it is appropriate to examine the question of where the burden of proof falls in this appeal. The judgment of the High Court in *Menolly Homes v The Appeal Commissioners & Anor [2010] IEHC 49* concerned a judicial review in which the appellant in a tax appeal sought an order from the High Court requiring the Appeal Commissioners to allow the cross-examination of the tax inspector who made a VAT estimate in respect of it. At paragraph 22 therein, Charleton J held that:-

> *"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."*

75. This passage is much quoted before the Commission and, in the submission of the counsel for the Respondent, should mean that in this appeal all factual issues arising should stand to be proved by the Appellant. However, it is the view of the Commissioner that this statement of Charleton J must be understood in the context of the remainder of the paragraph of which it forms part, wherein he quoted the earlier judgment of Gilligan J in *TJ v Criminal Assets Bureau [2008] IEHC 168* :-

> *"The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in T.J. v. Criminal Assets Bureau, [2008] IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue. The applicant in that case was assessed for income tax by a tax inspector assigned to the Criminal Assets Bureau. He was assessed to tax on a large amount of income from apparently mysterious sources. Invoking his statutory right of appeal in those circumstances, the applicant sought disclosure of all information on which the assessment was made. Referring to the Revenue Customer Service Charter, the court noted that there was a self-imposed obligation on the Revenue Commissioners to give all relevant information whereby the taxpayer would understand his tax obligations. This did not extend, it was held by Gilligan J., to making an order for discovery. In taking the appeal, the taxpayer was undertaking the burden of appeal within the relevant formula as to the relief which he might be granted if successful. At para. 50 Gilligan J. stated:-*
>
> > *"The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal*

to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court. Any reasonable approach dictates that if the applicant, on appeal to the Appeal Commissioners or to the Circuit Court, can demonstrate some form of prejudice, then an adjournment in accordance with fair procedures would have to be granted, and if not granted, the applicant would have an entitlement to bring judicial review proceedings. There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant."

76. It appears from this that the statements regarding the evidential burden made by Charleton J in *Menolly Homes v Appeal Commissioners & Anor* and Gilligan J in *TJ v Criminal Assets Bureau,* the latter of which was quoted in the former judgment, are premised on the information relating to the matter or matters which must be proved in a tax appeal being within the particular knowledge of the Appellant. In the context of an appeal of an assessment to income tax or VAT made under the self-assessment system, it is clear that this will be so.

77. In the Commissioner's view, the position is, in a fundamental way, different in respect of one factual issue arising in the appeal at hand. Grounding both assessments appealed is the Respondent's belief, and allegation, that deliveries of hydrocarbon oil were made by third parties to the farm property (and by its case therefore the Appellant) on specific dates, by means of specific lorries, over a three month period. Its reason for making this allegation is that it says its agents or officers observed the deliveries either happening or about to happen and it asks the Commissioner to find that on the balance of probabilities they occurred. The Appellant denies, *inter alia,* any knowledge of such deliveries having been made.

78. It is the Respondent in this case that has the capacity to prove the accuracy of the core allegation grounding the assessments, specifically that deliveries of excisable goods were made to the Appellant's farm property by other persons. Were it otherwise, the Appellant would bear the onus of having to prove a negative, namely that no deliveries were made to her. This, as a matter of principle, is something that someone in the Appellant's position may not be able to do as, unlike in *TJ v Criminal Assets Bureau,* evidence relevant to this question may be outside her *"*[…] *knowledge and* [her] *power, procurement and control* […]". The Commissioner notes in this regard that what the Respondent must prove is not

to the effect that the Appellant "took" delivery, but rather that she was a person "*to whom such products have been delivered".* For this reason, the Commissioner finds as a matter of law that the burden of proof this appeal rests with the Respondent insofar as it must prove that the alleged deliveries of excisable goods giving rise to the assessment of €298,908.48, which it claims to have observed over various dates, were made to the Appellant's farm property.

79. This leads to the question of whether evidence sufficient to prove, on the balance of probabilities, some or all of the deliveries alleged has been brought forward by the Respondent. The Commissioner will deal, firstly, with those alleged deliveries in respect of which Officer A gave evidence. He said that he was the senior investigating officer involved in Operation Chess and obtained oral reports from those operating 'in the field' regarding what they observed in the course of their surveillance of particular lorries. Officer A did not, it would seem, keep any contemporary record of what was reported back to him. If he did, none was sought to be admitted as evidence at the hearing. The Commissioner wishes to emphasise again that there was no suggestion that the list document referred to heretofore was such an item, and counsel for the Respondent made clear that he was not making that case. He relied, rather, on the oral evidence of Officer A and on the evidence of Officer B insofar as his account tended to corroborate what Officer A said was reported to him by other persons.

80. As already noted, the solicitor for the Appellant argued that there was no admissible evidence of deliveries having been made to the farm property, other than those observed by Officer B. Section 949AC of the TCA 1997 allows for the admission of evidence whether or not it would be admissible in court proceedings. Its existence, however, does not mean that a Commissioner must admit such evidence. If a party to an appeal wishes to depart from the rules of evidence in circumstances where the other side objects to this course, it is incumbent on them to give reasons as to why this departure should be allowed. It was a striking feature of the appeal hearing that no specific reasons were given as to why what was hearsay evidence on the part of Officer A should be admitted as proof of deliveries of hydrocarbon oil on various dates. No explanation was given as to why the persons who actually saw these deliveries were absent as witnesses. Although the Commissioner is conscious of the lapse in time between the period during which Operation Chess took place and the hearing of the appeal, there was no suggestion made that the Respondent was unable to call any of these people. In addition, one can conceive of circumstances where the Respondent might, for operational reasons, feel it essential to protect the anonymity of some of those who carried out surveillance in the field. If so, an application to have their evidence taken by the Commission in a manner preserving

this would be considered on its merits, with, of course, due regard to the imperative for procedural fairness to the other party. In this instance though, nothing of this nature was suggested and no such applications were made.

81. The effect of this is that the Commissioner is not minded, in a case where the Respondent has assessed the Appellant to have a duty liability that would be a major financial burden, to admit the evidence of Officer A insofar as it constitutes a repetition of what he said was told to him by unknown others a[redacted] unspecified times about the making of deliveries by lorry to the farm property. This aspect of his evidence, in clear breach of the rule against hearsay, which exists to safeguard fair procedures, in particular the proper[redacted] scrutiny of evidence by way of cross-examination, is excluded in its entirety.

82. As a consequence, the Commissioner finds that there is no admissible evidence on which to hold, in accordance with what was alleged by the Respondent, that 18 deliveries made by the following five lorries occurred on the following dates:-

- *P07L[redacted]:* 23 March 2016, 1 April 2016, 10 April 2016, 19 April 2016, 30 April 2016, 30 May 2016;
- *PCT[redacted]*: 23 March 2016, 4 April 2016, 16 April 2016, 25 April 2016 and 13 May 2016;
- *PO7R[redacted]*: 18 April 2016, 26 April 2016 and 9 May 2016;
- *WR8[redacted]*: 22 April 2016 and 12 May 2016; and
- *PO5[redacted]*: 29 April 2016 and 22 May 2016.

83. This leads to the question of the deliveries not referred to above. At closing submission stage, the solicitor for the Appellant accepted that the evidence of Officer B was sufficient to prove that the lorry with the registration PKE[redacted] had made deliveries of some sort to the farm property.[11] The Commissioner agrees with this and, had it been in issue, would have so found as a matter of contested fact in any event. In respect of the delivery made on 30 June 2016, the solicitor for the Appellant accepted that it was a consignment of hydrocarbon oil in the form of DERV (with some small quantity of petrol), as scientific testing had established this. However, he then argued that, by contrast, there was no sufficient evidence on which to make as finding in relation to what was in fact delivered to the farm property on 2 April 2016, 14 April 2016, 22 April 2016 and 25 April 2016. In his view it could have been anything at all.

[11] Transcript of evidence, page 137.

84. The Commissioner does not agree with the submission that there is no, or insufficient, evidence upon which to make a finding that what was then being delivered was hydrocarbon oil. On the contrary, it is considered highly likely, given the corresponding pattern of behaviour observed by Officer B in respect of these deliveries and the delivery of the consignment observed and seized on 30 June 2016, that what was occurring on each occasion was the delivery of hydrocarbon oil, in all probability DERV, most likely in quantities of 26,000 litres, by 40-foot curtain-sided trailer towed by a lorry with the registration number PKE[redacted]. It is so found as facts material to the determination of the appeal. It is further found that these deliveries of hydrocarbon oil were unloaded, or in the case of some of the consignment transported by lorry PKE[redacted] on 30 June 2016 about to be unloaded, and stored on the farmyard on the farm property.

85. This leaves the delivery of 30 June 2016 alleged to have been made by a lorry with the registration number PO5[redacted], several hours before that made by PKE[redacted]. It was not altogether clear from the closing submissions of the solicitor for the Appellant whether he accepted that this delivery had been made. He seemed to be under the impression that the evidence of Officer B had been that he had observed this lorry making its delivery to the farm property, however the transcript bears out that he did not. In any event, it was not contested that what was found in the farmyard, either still loaded or unloaded, was 52,000 litres of hydrocarbon oil in 52 IBC's and that this constituted two separate deliveries. This being so, the evidence on the ground suggests that a consignment of 26 IBC's containing hydrocarbon oil, not transported by the trailer that arrived at the farmyard between 5 and 6 o'clock, had occurred at a time not long before then. To the Commissioner's mind, this rules out the former consignment being attributable to the deliveries carried out by the lorry with the registration number PKE[redacted], observed by Officer B as having occurred at various dates in April 2016. It must, the Commissioner finds, be in addition to them. To the Commissioner's mind this is sufficient to corroborate and render credible and reliable the evidence of Officer B regarding the making of a lorry delivery on 30 June 2016 of 26,000 litres of hydrocarbon oil, separate to that already found to have been made by the lorry with the registration PKE[redacted]. This evidence is therefore admitted and accepted.

86. Accordingly, lest there be any doubt on the matter, it is found as a fact material to the determination of the appeal that a delivery of 26,000 litres of hydrocarbon oil, separate to that made in the same amount by the lorry with the registration PKE[redacted], occurred on 30 June 2016.

87. The Commissioner further finds as a material fact that the evidence regarding the manner in which the consignments of hydrocarbon oil were transported to the farm property and the circumstances in which the 52,000 litres were discovered on 30 June 2016 prove, beyond any major doubt, that all of the deliveries were transported in a smuggling operation, without excise duty having been paid either prior to or upon their arrival in the State.

88. Accordingly, and in summary, the Commissioner finds as facts material to the determination of this appeal, additional to those already set out at paragraph 72 herein, that:-

- a lorry with the registration number PKE[redacted] made deliveries of 26,000 litres of hydrocarbon oil to the farm property on 2 April 2016, 14 April 2016, 22 April 2016, 25 April 2016 and 30 June 2016;
- a further lorry delivery of 26,000 litres of hydrocarbon oil was made to the farm property on 30 June 2016
- no excise duty had been paid on the hydrocarbon oil delivered to the Appellant on 2 April 2016, 14 April 2016, 22 April 2016, 25 April 2016, 30 June 2016 and 30 June 2016.

89. The question then arises as to whether the Appellant is liable to pay excise duty in the form of mineral oil tax on these consignments of hydrocarbon oil, which were delivered to her property. The Respondent's case was grounded on the assertion that the Appellant's liability arose from her being a person to whom excisable and untaxed products had been delivered. The solicitor for the Appellant, however, submitted that it was clear from the wording of section 99(9) of the Finance Act 2001, as amended, that one had to be an 'oil trader' to be a person liable. There was no suggestion, he said, that the Appellant, a [redacted] year-old widow at the time of the raid, was involved in the oil trade. If that was what was suggested, then it was, he submitted, an absurdity.

90. As set out in the preceding part of this Determination setting out the relevant legislation, section 99(9) of the Finance Act 2001, as amended, does provide that where "*any person*" has "*kept for sale or delivery*" excisable products in respect of which duty has not been paid (other than products under a suspensive arrangement) then "*such person*" shall, under 99(9)(b)(i), be liable to pay duty. It is clear, however, from the wording of the provision that this is not the full extent of who may be liable. In particular, pursuant to section 99(9)(b)(iii), so can "*any person to whom such products have been delivered."*

91. In oral submission, the solicitor for the Appellant described this legislation as giving effect to Council Directive 92/12EEC. However, as previously observed, the effective EU legislation at the time when the consignments found to have been delivered took place was Directive 2008/118EC concerning the general arrangements for excise duty. Notwithstanding this, the essence of the submission was that when read in conjunction with EU law, it was clear that section 99(9) of the Finance Act 2001, as amended, had to be read in a manner that only made provision for the charging of those involved in the trading of oil. Without prejudice to his position that no deliveries of hydrocarbon oil were made to the Appellant, he submitted that even if they were, this would not be enough to make her chargeable in respect of the duty involved.

92. The solicitor for the Appellant also indicated that the Respondent had erred in the making of the assessments in circumstances where it was clear that the goods were "released for consumption" not in Ireland, but rather, it would appear, in the Czech Republic. All of the evidence suggested that the goods were destined not for Ireland, but rather for the United Kingdom. As such, the height of the Respondent's case was that the goods were merely 'in transit' through this jurisdiction and, consequently, the Appellant could not be charged duty.

93. With these submissions in mind, it is necessary to revisit the relevant provisions of Directive 2008/118. Before doing so, however, the Commissioner finds that pursuant to section 98A(1)(c) of the Finance Act 2001, as amended, the consignments of hydrocarbon oil already found to have been delivered to the farm property were "*released for consumption*" when they were imported to the State from within the EU, as they were not "*immediately* […] *placed under a suspension arrangement*". When one also takes into account the terms of section 99(9)(b)(3), it is clear that, at least pursuant to the Irish legislation, anyone to whom these consignments were delivered is liable for the duty chargeable thereon that was not paid.

94. Returning to Directive 2008/118, Article 7 therein provides that excise duty becomes chargeable at the time, and in the Member State, of release for consumption. Article 7(2)(b) then defines "*Release for consumption*" as meaning, *inter alia*:-

> "[…] *the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of* [EU] *law and national legislation."*

95. Article 8(1)(b) of Directive 2008/118 then provides that the person liable to pay excise duty 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."*

96. Article 8(2) of Directive 2008/118 then provides that where several persons are liable, they will be liable jointly and severally.

97. Article 33 of Directive 2008/118, relating to "*Holding in another Member State"* provides:-

"*(1) Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.*

For the purposes of this Article, "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

[…]

(3) The person liable to pay the excise duty which has become chargeable shall be, depending on the circumstances referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

(4) Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the [EU] *for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34."*

98. The net effect of the foregoing provisions of Directive 2008/118 appears to the Commissioner to be that, wherever and whenever goods are first released for consumption, those goods shall thereafter be subject to excise duty and duty shall become chargeable once they are "*held for commercial purposes"* in another Member State. Reference to "*commercial purposes"* means only, in respect of a private person, that they hold the goods other than for their own personal use. It is clear to the Commissioner that these large consignments of hydrocarbon oil, having been transported by trailer from Dublin Port to the farm property, whereupon it has been found they were unloaded, were so held by a person or persons in Ireland. As a consequence, the

consignments became *"subject to excise duty"* in Ireland, notwithstanding that they were previously "*released for consumption"* in the Czech Republic.

99. But to whom did this excise duty become chargeable under Directive 2008/118? As has already been held, section 99(9) of the Finance Act 2001 makes not only those who have kept excisable products for sale or delivery liable, but also, under 99(9)(b)(iii), "*any person to whom such products have been delivered".* Article 33 of Directive 2008/118 in near identical terms provides that a person "*to whom* [excisable goods] *have been delivered"* shall be liable to pay duty that has become chargeable. It does not appear that there is a legal requirement in EU law, specific to excisable goods in the form of hydrocarbon oil such as DERV, that the person receiving the delivery be, as the Appellant's solicitor put it, "*an oil trader".* There does not, in short, appear to the Commissioner to be any obvious inconsistency between the relevant Articles of Directive 2008/118 and the provisions of the Finance Act 2001. All that is necessary for a person in the Appellant's position to be liable therefore is they are a person to whom excisable goods, not for personal use, have been delivered.

100. The question that then arises is whether the consignments of hydrocarbon oil found to have been delivered to the farm property were delivered to the Appellant, such that she was a person "*holding"* or "*involved in the holding"* of them, or to somebody else. The bare facts of this case are that the location to which the consignments of hydrocarbon oil were delivered over a period of 3 months was a property belonging to the Appellant, along with her brother. This property was one from which she lived only a short distance, on which, if one were to believe her Form 11 income tax returns, she carried out the trade of a farmer, and which was associated with a herd number issued to her by the Department of Agriculture. The Appellant also claimed State subsidies arising from the farming trade she purported to carry out in her Form 11 return.

101. The Commissioner considers that the combination of these facts must give rise, *prima facie*, to the inference that goods delivered to the farm property were delivered to the Appellant, whether she received them personally or whether someone else did so on her behalf.

102. The Appellant, in her evidence, and her solicitor, in submission, sought to explain why the drawing of any such inference would be mistaken. When counsel for the Respondent cross-examined the Appellant, she explained that her interest in the farm was "*in name only".* She professed total ignorance as to what happened thereon. In legal submission the Appellant's solicitor laid much emphasis on the fact that the Appellant was, at the time

of the raid, [redacted] years old. In his view this made it inherently implausible that she was the person who took delivery of hydrocarbon oil deliveries.

103. To the Commissioner's mind it was striking that no witnesses were called to corroborate the Appellant's account of her complete lack of control over the farm property and what occurred thereon. For example, she said in evidence that her Form 11 returns were filed by her accountant but that she had no interaction with that person, leaving it to her son to attend to it.[12] The Appellant's accountant, however, did not give evidence in this respect. There was no indication that any attempt had been made to get the Appellant's son, or anyone else supposedly involved in or connected to the conduct of the farming activity apparent from the Appellant's Form 11 returns, to come to give evidence at the appeal hearing that would support her contention that she had nothing at all to do with it. Had such persons been unprepared to give evidence at the Appellant's request, the Commissioner would of course have considered exercising his power under section 949AE of the Taxes Consolidation Act 1997 to require their attendance. Nor was there any apparent attempt made to get either of her other children referred to in the Will of [redacted], namely [redacted], or the other person with whom she shares ownership of the farm property, her bother [redacted], to give evidence that might corroborate her account of matters.

104. From all of this, and from having had the benefit of observing the Appellant give evidence at hearing, the Commissioner concludes that she was not prepared to permit her account of non-control over the farm property of which she is owner to be subjected to proper scrutiny in the appeals process. The Commissioner considers her credibility as a witness in her own cause to be in doubt and, as a consequence of this, finds that the available evidence suggests that she, as one of the two owners of the farm property, and the person who derived income from the farming which took place thereon, must be held to be the person to whom deliveries of hydrocarbon oil, each being consignments of 26,000 litres of DERV were made on 2 April 2016, 14 April 2016, 22 April 2016 and 25 April 2016, and twice on 30 June 2016. The Commissioner further finds that it is clear, given the quantities of hydrocarbon oil involved and the circumstances of their arrival on the farm property, that the deliveries were not for the Appellant's own personal use.

105. The effect of the foregoing findings is that the Appellant is a person liable to pay excise duty on the 6 aforementioned deliveries, each of 26,000 litres hydrocarbon oil (DERV),

[12] Transcript of hearing, page 40.

made to the Appellant. No excise duty is due by the Appellant on the alleged deliveries that have not been proved as having been made to the farm property.

Determination

106. The Commissioner determines that the Appellant is liable to pay excise duty chargeable on 6 deliveries of 26,000 litres of hydrocarbon oil in the form of DERV, which were made on 2 April 2016, 14 April 2016, 22 April 2016, 25 April 2016 and twice on 30 June 2016. The Commissioner finds that the appealed assessment relating to DERV, which initially stood at €298,908.48, should therefore be adjusted to €74,727.12.

107. The Commissioner further determines, in accordance with the concession made by the Respondent near the conclusion of the hearing, referred to at paragraph 6 herein, that the appealed assessment relating to excise duty on petrol, which stood at €30,560.92, should be reduced to nil.

108. These appeals are determined pursuant to section 949AK of the TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

109. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

110. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O’Higgins
Appeal Commissioner
08 February 2024