TC04266

Appeal number: TC/2014/00039

Excise Duty - Registered dealer in controlled oil - HODA 1979 s100G - CEMA 1979 - Hydrocarbon Oil (Registered Dealers in Controlled Oil Regulations) 2002 - removal of approval - whether reasonable - yes - Appeal not allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDEN FUELS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MR DAVID MOORE

Sitting in public at Bedford House, 16 - 22 Bedford Street, Belfast on 30 September 2014

Mr Justin Byrne of Counsel for the Appellant Company

Mr Richard Adkinson of Counsel instructed by The General Counsel and Solicitor to the Respondents

DECISION

1. This is an appeal by Eden Fuels Limited ("the Appellant"), against the decision of the Commissioners for Her Majesty's Revenue & Customs ("HMRC") to revoke the Appellant's licence to operate as a Registered Dealer in Controlled Oils (RDCO). The Appellant seeks restoration of its licence.

Background

2. The Appellant is a private limited company, incorporated on 18 November 2008, and trades in the retail sale of automotive fuel and heating oils. The company operates from premises at 34(a) Edenappa Road, Jonesborough, Newry, Northern Ireland. The sole director is Mr Miceal Morgan.

3. The Appellant was approved as a RDCO from 3 March 2009, under s 100G of the Customs & Excise Management Act 1979 and operates subject to the requirements of the Hydrocarbon Oils (Registered Dealers in Controlled Oils) Regulations 2002 (SI 2002 No. 3057) and Public Notice 192.

4. On 21 April 2011 an officer of HMRC visited the Appellant in relation to its RDCO registration. The visit established that the Appellant was not fully compliant with the requirements of the RDCO scheme. The officer identified poor compliance in a failure to record all of the necessary information relating to the sale of fuel and a failure to render returns on time.

5. On 3 May 2011 HMRC issued a letter of warning to the Appellant in relation to its record keeping and duty of care. The Appellant was reminded in this letter that it has a duty of care when selling or delivering controlled oil and must take reasonable steps to ensure that it only makes supplies to customers who have a legitimate use for the volume sold. The Appellant was referred to Public Notice 192, which gives details of the checks that RDCO are required to carry out.

6. Notice 192 was first released in March 2003. "Controlled Oils" are oils subject to a rebated rate of duty under sections 11 and 13 of HODA. They include marked rebated gas oil ("RED Diesel") and marked rebated kerosenes (paraffin, burning oil etc.). The RDCO Scheme and its requirements were imposed to prevent unauthorised consumers from using oils that have the benefit of the rebated rate of duty and to contain the risk of loss to the Revenue because of an unauthorised consumption of such oils. For this purpose the terms of the Scheme place rigorous restrictions on the dealer.

7. Paragraph 4.8 of notice 192 states:

> "We are likely to cancel your approval if:
>
> • it is considered necessary for the protection of the revenue because, for example, we have evidence that you have been involved in the misuse of controlled oil or excise fraud. In such cases, we may also prosecute you.

> • in light of any new information that comes to our attention, or that you notify to us, we are no longer satisfied that you are fit and proper to hold an RDCO approval as per paragraph 4.3, and
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> • you persistently fail to meet the requirements of the scheme, for example, fail to exercise your obligations or fail to submit H05 returns on time. However, this is likely to be the final step following a series of warning letters and civil penalties - see paragraph 6.5 and section 8."

8. Paragraph 5.2 of Notice 192 states:

> "The following rule has the force of law
>
> As an RDCO, you must take every reasonable precaution to make sure that your supplies of controlled oil (as defined in paragraph 1.5) are only to persons who will use that oil as permitted by the law. This is a legal obligation, imposed under Regulation 8 (2) of the Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002.
>
> If HMRC considers that you have failed in that obligation, they can take enforcement action against you, ranging from a variation of the conditions of your approval to a warning letter and, in more serious cases, withdrawal of your approval, civil penalties and even prosecution."

9. The following amounts of contaminated fuel (contaminated with red diesel; red diesel being fuel on which the duty has been rebated), were seized from the Appellant's premises:

- On 18 May 2012, a total of 5,500 litres found in 6 Intermediate Bulk Containers, "IBCs". Neither the Appellant nor anyone else challenged the forfeiture.
- On 3 July 2012, a total of 1,400 litres was found in the Appellant's diesel pump, in the running tank of two vehicles at the Appellant's premises and in IBCs stored in a shed at the Appellant's premises. The two vehicles (which belonged to third parties) were also forfeited. Neither the Appellant, nor anyone else challenged the forfeitures.

10. On 29 January 2013, HMRC issued a formal warning to the Appellant that non-compliance with the RDCO scheme or further seizures would result in revocation of the RDCO licence.

11. On 30 January 2013 HMRC imposed conditions on the Appellant's RDCO approval that required the Appellant to send weekly returns to allow HMRC to monitor its sales of rebated fuel. The conditions applied for 3 months from 20 March 2013.

12. Although the Appellant complied with the requirement to submit weekly returns, a further detection of contaminated fuel was found on the Appellant's premises on 24 May 2013 (a total of 500 litres). The Appellant did not challenge the forfeiture.

13. Section 100G (5) of Customs and Excise Management Act 1979 provides, "The Commissioners may at any time, for reasonable cause, revoke or vary the terms of their approval or registration of any person under this section."

14. HMRC determined that, in relation to the seizures of fuel from the Appellant, there had been serious non-compliance with the requirements of an RDCO approval, and on 18 September 2013, following the incident on 24 May 2013, HMRC revoked the Appellant's RDCO licence.

15. On 2 October 2013 representatives of the Appellant, The Elliott-Trainor Partnership, Solicitors, claimed that the seizures could not be linked to their client and requested a review of the decision.

16. On 6 December 2013, HMRC completed its review and upheld the decision to revoke the Appellant's RDCO approval.

17. On 19 December 2013, the Appellant lodged a Notice of Appeal with the Tribunal.

Relevant law

18. The Hydrocarbon Oil Duties Act 1979 ("HODA") ss.11-13 provide for the controlled oils scheme. In summary they provide for marked rebated oils such as red diesel and marked kerosene. In particular HODA s 12 in general terms prohibits the use of red diesel on fuel for road vehicles.

19. A person may not trade in controlled oil unless he is a registered trader, HODA s 23A. Non-registered traders are liable to penalties and forfeiture. HODA s 23A allows for regulations.

20. The Customs and Excise Management Act 1979 ("CEMA") s 100G and 100H(1) contains the relevant legislation on RDCO licences. Section 100G(4) allows HMRC to approve and register a person subject to such terms as they think fit. Section 100G (5) allows for revocation or variation of the terms.

21. The relevant regulations under HODA and CEMA are the Hydrocarbon Oil (Registered Dealers in Controlled Oil Regulations) 2002 ("the 2002 regulations"). Regulation 4 provides that HMRC can register people as a RDCO. Regulation 5 provides for the imposition of conditions on approval. Regulation 8 compels an RCDO to comply with any conditions or restrictions HMRC may prescribe.

22. HMRC has issued public guidance in HMRC Notice 192, which sets out the general obligations of an RDCO and the steps necessary to ensure controlled oils are supplied to entitled end-users and not to others. It also sets out details of records that a RDCO licensee must keep. The Notice also sets out the sanctions and penalties for non-compliance.

The Appellant's case

23. The Appellant's stated grounds of appeal in its Notice of Appeal are:

i. The Appellant/Mr Miceal Morgan requests the restoration of his licence on the basis that he complied with all requests from HMRC in relation to providing them with weekly returns and that any fuel which was contaminated was contaminated without his knowledge or consent.

ii. Furthermore it is not proportional or appropriate for his licence not to be restored, as any alleged contamination of the seized fuel was minor.

24. The Appellant does not dispute that the seizures on the three dates revealed that the seized fuel was contaminated. However the Appellant disputes that the seizure of fuel on 18 May 2012 ("first seizure") should be attributed to him.

25. The first seizure related to 5,500 litres, being found in six Intermediate Bulk Containers "IBCs". The IBCs were not found on premises belonging to the Appellant but rather on land belonging to his father and were located to the rear of his father's home. This property, which is 34 Edenappa Road, Jonesborough is completely separate to the Appellant's premises at 34(a) Edenappa Road and is served by a separate entrance which can be seen from the photographs exhibited in evidence.

26. The Appellant's address is 34(a) Edenappa Road, Jonesborough is leased from Miceal Morgan's father. A copy of the tenancy agreement was produced.

27. In the formal departmental review dated 6 December 2013 carried out by Ms Carol Kunderan, the 5,500 litres of contaminated fuel was said to have been detected and seized from the Appellant's premises. The Appellant submits that Ms Kunderan has taken into account inaccurate information.

28. In the results of analysis relating to the seizure on 18 May 2012, it is noted that the 'place of sampling' was 'yard to rear of Eden Fuels'.

29. Moreover, the person spoken to on 18 May 2012 was Mr Brian Morgan, not Mr Miceal Morgan. This is noted in the report of Barbara Talbot, the Road Fuel Testing Officer.

30. The notebook entry reveals that the Customs officer spoke to Michael Morgan who was the 'gentleman in house'. It is noted that the officers went to the yard to rear of 34 Edenappa Road. Mr Michael Morgan told the officer that there was a fuel yard below run by his sons.

31. Although none of the seizures were contested, the 'first seizure' did not relate to the Appellant and therefore he submits he had no standing in order to contest this seizure.

32. It is the Appellant's case that if the 'first seizure' had not been taken into account, then his licence would not have been revoked.

33. The Appellant submits that this argument is borne out by the fact that a formal warning letter dated 29 January 2013 was sent to him by HMRC, following what they viewed as having been the second seizure - namely the seizure on 3 July 2012.

34. If the first seizure is 'removed' from the Appellant's 'record', then the detection of 24 May 2013 would have been regarded as a second detection, which would have triggered a warning letter rather than a revocation.

35. In the circumstances, the Appellant contends that this appeal should be allowed and his licence restored.

HMRC's Case

36. For the avoidance of doubt, HMRC's case is that there have been three seizures of contaminated fuel linked to the Appellant Company and that none of the seizures have been contested. A warning letter had been issued on 3 May 2011 about record keeping. A further warning letter was issued on 29 January 2013 after the second seizure and the third seizure occurred while the Appellant was subject to special conditions requiring weekly reporting.

37. It is not correct to say that the decision to revoke the Appellant's licence was founded purely on the three seizures. The officer who made the decision, Anne-Marie Dinsmore, said:

> *"I took into consideration the fact that there have been three seizures of fuel from the business. There had been warning letters issued on 3 May 2011 and 29 January 2013 by officer O'Hare and the detection had taken place whilst the company was on special conditions (weekly returns)".*

38. The forfeitures of fuel are all forfeitures carried out against the Appellant. Neither the Appellant nor any third party challenged the forfeitures or asserted contemporaneously that any fuel seized did not belong to the Appellant. There has been no challenge to the fact that the fuels were contaminated with red diesel.

39. With regard to the seizure of 5,500 litres of contaminated fuel on 18 May 2012, where the fuel was found and who owned the land on which it was found were not issues raised when the Appellant sought a review on 2 October 2013. Moreover, the Appellant did not assert in its notice of appeal that the fuel did not belong to the Appellant.

40. HMRC contend that it is highly improbable the fuel did not belong to the Appellant. The Appellant was found to have contaminated fuel on two subsequent occasions. It would seem striking that on this occasion there was also contaminated fuel just next door.

41. Neither the tenancy agreement nor any other evidence determines who possessed the land on which the fuel was found. Possession of land is in any event irrelevant: The issue is who owned the fuel.

42. The fuel seized is clearly that of the Appellant, as evidenced by the fact that SP McKeown (accountants to the Appellant) faxed through three delivery dockets at the time relating to fuel deliveries (there was no paperwork for any fuel on site). All were made out to the Appellant. They were produced to prove legitimate ownership of the fuel. The Appellant has clearly admitted by implication that the fuel in the IBCs at the time was the Appellant's.

43. With regard to the seizure of 1,400 litres of contaminated fuel on 3 July 2012, the Appellant did not raise any concerns in relation to this seizure when it sought its initial review.

44. The Appellant conceded that the fuel was contaminated, and that the presence of two vehicles with contaminated fuel was not part of the decision to revoke the licence; it was the seizure of 1,400 litres of fuel. However HMRC would have been reasonably entitled to take into account the circumstantial evidence that two vehicles containing contaminated fuel were at a petrol station which had in its tanks contaminated fuel if it had doubts.

45. Though the Appellant produced receipts from Doherty Oils Ltd, this does not prove that Doherty supplied the contaminated fuel. The Appellant has not disclosed any records of fuel deliveries or sales, delivery notes, invoices or the like to show that only Doherty could have delivered that fuel. No analysis has been provided from any expert to show that only Doherty could have supplied that fuel, and there is no evidence of complaints to Doherty (or any evidence of legal action against Doherty) for the supply of contaminated fuel. At the very least, one might have expected a strongly worded complaint to the supplier. There is no information from the Appellant as to whether it stopped using Doherty, and if so, when and why, and no evidence from Doherty conceding it supplied the contaminated fuel. There is no evidence either way on which to judge the reputation of Doherty to determine whether it was a reputable fuel wholesaler or not.

46. The Appellant has not demonstrated how one cannot rule out contamination by an agent or employee of the Appellant or a third party. In any case, that is irrelevant; the Appellant is responsible for the goods it sells. It was dispensing contaminated fuel.

47. With regard to the seizure of 500 litres of contaminated fuel on 24 May 2013, the Appellant admits the fuel was contaminated. It has produced no evidence that the contaminated fuel came from the named supplier SAFE fuels.

48. There is no evidence that the contamination was low as argued. The crucial point is that the fuel was contaminated and should not have been. Fuel must not be contaminated, it cannot be contaminated a bit.

49. The Appellant's argument that, if the seizure of 18 May 2012 is not taken into account, HMRC acted unreasonably in revoking the Appellant's RDCO licence. However, if the seizure of 18 May 2012 is discounted, revocation was still an inevitable outcome: see judicial review case *Regina (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 EWCA at [10].

50. The policy on breaches of RDCO scheme is set out at Notice 192 at 8.1 onwards. There is no policy of there being a certain number of strikes before a warning letter is given. HMRC merely have to take such action as is reasonable: see *F McGleenan T/A F M G Fuels* [EO1046].

51. Even if the 18 May 2012 seizure is discounted, there was a seizure of contaminated fuel on 3 July 2012, six months before the warning letter. Furthermore, on 30 January 2013, the Appellant was put onto special conditions which were affirmed on review, and while subject to special conditions there was a second seizure of contaminated fuel.

52. HMRC's guidance on when it would approve the grant of an RDCO licence is also relevant to assessing reasonableness. It involves a published "fit and proper test" by which the applicant is measured. HMRC indicate in the Notice that they would be very unlikely to approve an applicant if it or anyone with an important role in the business had "had oils or vehicles or any other revenue goods seized from them".

53. There is in this case significant evidence which demonstrates a risk to the revenue if the approval remained in place. HMRC guidance states -

> *"This is appropriate where there is persistent and/or significant non-compliance resulting in the risk of or actual misuse of rebated oil and for the failure by suppliers of red diesel to private pleasure craft to pay duty due. Withdrawal of approval should be the culmination of an escalating and fully recorded process of proportionate action including education, warning letters and penalties as well as a period of additional conditions if it is considered likely to resolve the issues causing concern."*

54. The decision to revoke the Appellant's approval was based on seizures following its non-compliance of failing to correctly record details of sales, as detailed in Officer Martina O'Hare's letter of 3 May 2011. It follows that after the seizure of 3 July 2012, the Appellant would have fallen foul of the above provision and HMRC would have been unlikely to approve the Appellant for an RDCO licence. It further follows that revocation of the Appellant's licence was inevitable after a seizure following a formal warning letter, and whilst subject to special conditions.

55. The burden of proof rests on the Appellant, (FA s 16(6)) to show why HMRC were wrong in revoking its licence. It has not discharged that burden.

Conclusions

56. The decision of HMRC is "an ancillary matter" under s 16(8) FA 1994 and Schedule 5 paragraph 2(1)(q). The Tribunal's powers are given by s 16(4) which provides as follows:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making the decision could

not reasonably have arrived at it, to do one or more of the following, that is to say

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

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

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

57. Thus the Tribunal can effectively quash a decision or direct reconsideration but it cannot declare or affirm that the Appellant is entitled to have an RDCO licence, or prevent HMRC subsequently revoking the licence if the decision is quashed.

58. In determining whether the decision was unreasonable we have to be satisfied that HMRC have acted in a way in which no reasonable panel of Commissioners could have acted; we have to be satisfied that the reviewing officer did not take into account some irrelevant matter or did not disregard something to which she should have given weight. In this regard we have to bear in mind that a decision will be unreasonable if it is disproportionate.

59. As stated by Sir Stephen Oliver in *F McGleenan T/A F M G Fuels*

> "The opportunities for misuse of rebated oils are self-evidently so great that a tough compliance regime is essential. The principle has to be that any one dealing in controlled oil will be operating lawfully only if he complies to the letter with the terms of the RDCO Scheme. RDCO Scheme is regulatory in nature and the Customs are the regulator. The regulatory framework is contained in HODA, as amended by FA 2002 and in CEMA section 100G and the RDCO Regulations. No issue of construction arises on these provisions, but the relevant parts are set out in the Appendix to this Decision. It will be noted from, for example, subsections (4) and (5) of section 100G that the Customs as regulators are empowered to approve and regulate a person on such terms as they may think fit and they may at any time for reasonable cause revoke or vary the terms of approval.
>
> Withdrawal of approval is a means of protecting the revenue by ensuring that non-compliant dealers are not permitted to continue to trade. The Customs' power to approve a dealer is restricted to approval of those who appear to them to satisfy the criteria for approval. Correspondingly the Customs would be failing to carry out their regulatory duties if they were to allow a dealer to continue to trade in circumstances where it was clear that his non-compliance presented a continuing risk to the revenue……"

60. The Certificate of Approval for the Appellant states specifically that approval is granted subject to compliance with, first, the requirements of Notice 192, second, the submission of correct returns and, third, regular checks being made that customers were entitled to receive oil.

61. The Appellant's returns exhibited poor compliance in a failure to record all of the necessary information relating to the sale of fuel and a failure to render returns on time. There were three seizures of contaminated fuel linked to the Appellant and none of the seizures have been contested. Two warning letters had been issued and the third seizure occurred while the Appellant was subject to special conditions.

62. Contrary to the Appellant's assertions, the review officer's decision to confirm revocation of the Appellant's licence was not founded purely on the three seizures, but also on the Appellant's poor compliance record. There had been three warning letters and the detection had taken place whilst the company was on special conditions.

63. Neither the Appellant nor any third party challenged the forfeitures or the fact that the fuels were contaminated with red diesel.

64. With regard to the seizure on 18 May 2012, the premises on which the fuel was found and who owned the land on which it was found, were not issues raised when the Appellant sought a review. The tenancy agreement (which was unsigned) relating to the Appellant's premises is in our view irrelevant. As HMRC say, the issue is who owned the fuel. In any event, it is highly improbable that the fuel seized on 18 May 2012 did not belong to the Appellant. The Appellant was found to have contaminated fuel on its immediately adjoining premises on two subsequent occasions. The Appellant did suggest that the fuel did not belong to the Appellant at the time. The fact that 34 Edenappa Road, Jonesborough is completely separate to the Appellant's premises and is served by a separate entrance is in our view also irrelevant.

65. No expert analysis, nor any records of fuel deliveries and delivery notes have not been disclosed to show that only the supplier could have delivered the contaminated fuel. Given past seizures it seems inherently improbable that contaminated fuel should be stored on the Appellant's premises or on nearby premises without their knowledge and without seemingly any evidence of precautionary measures having been taken to avoid that happening. As HMRC say, there is no evidence of any complaint to or action against the supplier in respect of contaminated fuel. No explanation has been offered as to how the fuel could have been contaminated by a third party.

66. As to the question of whether Customs acted unreasonably or disproportionately, HMRC are simply required to take such action as is reasonable. The Appellant did not comply with the provisions of Notice 192 and did not heed the warning letters sent to it. The Appellant was warned of the risks of non-compliance and the likelihood of revocation of its licence in the event of non-compliance. It is fair to say that the Appellant's attitude to compliance was reckless and necessarily presented a risk to the Revenue.

67. It is difficult to see how HMRC could be regarded as acting unreasonably in revoking the Appellant's RDCO licence even if the first seizure is not taken into account. There was clearly persistent and significant non-compliance. Withdrawal of approval was the culmination of a fully recorded process of proportionate action, including warning letters and a period of special conditions. Revocation of the

Appellant's licence was inevitable after a seizure following a formal warning letter, and whilst subject to special conditions.

68. For the reasons identified above, in our view, the Appellant has not shown that the review officer could not reasonably have come to the decision that she did.

69. For the above reasons we dismiss the appeal.

70. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 3 February 2015