TC04106

Appeal number: TC/2013/02984

EXCISE DUTY – production of biofuel - estimated figures in the absence of records - best judgment - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALEXANDER ROSS **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MR SCOTT RAE

Sitting in public at Atholl House, 84-88 Guild Street, Aberdeen on Thursday 23 October 2014

Alexander Ross, the Appellant

Graeme Maciver, Counsel, instructed General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The issue

1. The Officer's Assessment EXA/1003/12 dated 14 January 2013, as modified by the Outcome of Internal Review letter dated 19 March 2013 in the amended sum of £34,578 is the subject matter of this appeal.

2. That sum is the duty due on the fuel estimated to have been produced by the appellant for use in road vehicles between the period 15 January 2009 and 9 February 2012.

3. That assessment was raised after rebated oil, that is to say, oil that has not borne the full rate of excise duty, was detected in a vehicle, owned by the appellant. That is in contravention of sections 12(1)(a) and 12(1)(b) of the Finance Act 1994.

Preliminary and peripheral matters

4. Prior to the hearing, the respondents (HMRC) had lodged with the tribunal and with the appellant an application for permission to produce four pictures of the appellant's premises. The appellant had no objection and accordingly in terms of Rule 5(3)(d) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") the said documents are admitted in evidence.

5. The appellant was unrepresented and had not complied with the Directions of the Tribunal issued on 10 December 2013. In particular, he had not lodged a skeleton argument, any witness statements or lists of documents. He had simply indicated that he would be relying on the documentation already lodged with HMRC and the Tribunal. We had due regard to the Rules and in particular to Rule 2. We decided that it was in the interests of justice to proceed with the hearing.

6. The appellant indicated at the outset that he wished to challenge HMRC's treatment of a friend and other matters. We made it explicit to him that our jurisdiction was limited solely to finding the facts relating to the subject matter of this appeal and then applying the relevant law. Any complaints about HMRC should be directed to the complaints department of that organisation.

7. The appellant articulated a view that HMRC wished to "crucify" him (and others) and therefore he had not explained his entire position before the hearing. He said that he expected that that crucifixion approach would be adopted at the hearing. We made it explicit, and HMRC entirely agreed, that the sole role of the Tribunal was to find the facts and apply the law. The hearing would be conducted, and it was, with complete propriety and respect to all parties. Specifically, Mr Maciver, made it explicit that when he made his submissions about the reliability of evidence it was not a personal attack; it was a series of observations which he was drawing to the attention of the Tribunal.

8. At the conclusion of the hearing, the appellant suggested that perhaps he should have arranged representation. We make it explicit, that precisely because he had not had representation, he had been granted very considerable latitude and indeed the Tribunal had taken him through the pertinent evidence in the bundles and assisted him in presenting his evidence. He had had representation at every interview prior to the

issue of the assessment. Presumably, in part, that was because there could have been more extensive issues for him. His parting comment was that lawyers were expensive. We explained to him at some length that the Tribunal system was designed, at least in part, to enable unrepresented appellants to participate fully. We made every endeavour to ensure that the appellant did so. Where appropriate, and not infrequently, we recapped the evidence, offered him the opportunity to comment and offered explanations. We explained the process and the limits of our jurisdiction.

The Disputed Decision

9. The assessment was based on an estimate of the quantity of biofuel which was likely to have been produced by the appellant in the period to 9 February 2012.

10. In the absence of any records of production other than the clear admission that 1600 litres had been produced in the period from January to 8 February 2012, Officer Bennett had looked at three alternative methods of calculation. The three factors were:-

(a) Methanol and potassium hydroxide are utilised in the production of biofuel so since there was evidence of the quantities purchased by the appellant the likely quantity of end product was extrapolated therefrom.

(b) The fuel pump used in the production had been seized by the officers so the readings thereon, allowing for double handling, were utilised to estimate the likely production.

(c) Although the officer had details of oil uplifted from various suppliers he confirmed that he had discounted that since he did not consider that information to be reliable, as it bore no relation to the other two factors.

11. On review, HMRC decided that the readings from the fuel pump could not be considered to be reliable so that was removed as a basis for calculation. It was also decided that HMRC had failed to have established an "industry standard" for the use of potassium hydroxide and that therefore was also removed as a basis for calculation.

12. The assessment was reduced and it was made explicit that the primary basis for the calculation was predicated on the use of methanol.

The Evidence

13. We heard oral evidence from the appellant and Officer Bennett. Since the appellant commented in detail on the latter evidence it is appropriate to record the appellant's evidence first.

The Appellant

14. As indicated above we had very limited information about the appellant's case prior to the hearing. The appellant was very articulate and explained in some detail, and with some force, his stance.

15. At the core of his argument, and repeated frequently, was his averment that if he did not have vegetable oil he could not produce biofuel. Specifically, he said that he did not have vegetable oil (or base product) in the summer of 2011.

16. His evidence was difficult because it was frequently inherently inconsistent.

17. The Tribunal repeatedly tried to elicit details of what actually occurred. That was less than easy. As a very simple example, he consistently argued that he had kept production records on his telephone. In the face of clear and specific questioning he stated that he had recorded production details on the telephone on the day it happened. Since he had his telephone with him, with the consent of HMRC, we accepted his offer to look at the telephone.

18. We were shown one item, and he said that it was the only one, on "notes" headed 8 February 2014. There were four entries below that showing production of 400 litres of fuel on each of 25 January, 30 January, 1 February and 8 February 2014. He had stated that he had made a record on his telephone each time that he produced the biofuel. In the face of sight of his own telephone he conceded that that was incorrect and that he had compiled the information on one evening only. He could offer no explanation as to why that was the only record that he had made nor why he had made that record on the night before the HMRC visit to his premises on 9 February 2012 (see paragraph 29 below).

19. He stated that his suppliers would telephone him to ask him to collect vegetable oil. He never paid for it. He said that perhaps he would collect oil every three weeks or so. His rationale was that many of his suppliers were friends so they did not want payment because they would "scratch each other's backs". He cited as an example a Chinese take away where he would get food and he collected the oil. He argued that it was difficult and expensive for the suppliers to dispose of the oil so basically he was doing them a favour. He could not reconcile that assertion with his other assertions that he found it difficult to source oil and some other producers paid for the oil.

20. In his oral evidence he suggested that he never picked up from any supplier more than once a month. When it was put to him, by the Tribunal, that the quantities suggested in his supply sheets might be implausibly small he said that times were hard, his suppliers changed their oil every six weeks instead of the recommended three, and the water content could be as much as 50% of the volume.

21. In response to many questions he simply said that he could not remember.

22. A particular problem was in regard to the record of interview. He said that he had not signed it at the time but that after going through it with his solicitor he had signed a copy and that it was an accurate record. He confirmed that on a number of occasions he offered evidence that conflicted with that record. For example, when he was taken through that document he denied that he had said that he produced two batches per month.

23. He stated he had not received any sample of the fuel taken from his vehicle by HMRC on their visit of 9 February 2012(see para 29 below) and he denied that he had received the Notice of Sampling issued by HMRC under The Hydrocarbon Oil Duties Act, 1979, Schedule 5.

24. He agreed that for the production of biofuel the ratio of methanol to oil was 1:5.

25. He stated that his wife maintained the records of oil uplifted. He gave her a note of the quantities and she completed the forms on the day in question.

26. His most remarkable evidence was when he offered two alternative explanations for having purchased more methanol and potassium hydroxide than would be required for production of biofuel. Firstly, he stated that he had been experimenting with potassium to make a gas to run the car. He said that he had been doing that for years but he could not recall the name of the gas or any other details. Secondly, he said that he had been experimenting with the use of methanol in fuel for a fishing vessel and that he had used 3500 litres (in three batches of 1000 litres and one of 500 litres) for that purpose. He could not remember when he had done so or any other details beyond the details of the vessel. He said that he had not offered that explanation to HMRC because he did not trust them. He also confirmed that he had not told his solicitors.

Officer Bennett

27. The Officer's evidence was clear, succinct and simply confirmed the contents of his witness statement and the rationale for his decision. The appellant had been taken through that statement and agreed with the terms thereof.

28. Officer Bennett observed that in his experience the pictures of the plant appeared to him to be similar to those of a commercial plant. The size of the containers was not what he would expect to find in a plant operated by an individual producing biofuel for his own use. Indeed they were perhaps four or five times bigger.

Findings in Fact

29. On 9 February 2012, Officers Allan and Abercrombie from HMRC's Road Fuel Testing Unit ("RFTU") attended Unit 13, Broad Place, Peterhead. The appellant rented those premises but was not present. Accordingly, in the presence of a police officer, the officers tested the fuel in the running tank of the appellant's vehicle registration number SW51 GWV ("the vehicle"). The fuel tested positive for kerosene.

30. The appellant returned to the premises at 11.57 am. The officers cautioned him. He confirmed to the officers that he was the owner of the vehicle, that he produced biofuel at those premises, that he was trialling the use of kerosene as an additive and that the biofuel was for his own use. He was not registered with HMRC for the production of biofuel and payment of excise duty.

31. The officers remained at the appellant's premises for some considerable time and since they suspected that the equipment in the unit was being used for commercial purposes they dismantled the production facility and seized all materials associated therewith on the basis that they were liable to forfeiture. They also seized the vehicle with the fuel in the vehicle.

32. On 10 February 2012 in the presence of his solicitor, the said officers from RFTU interviewed the appellant under caution. The interview commenced at 1655 and finished at 1850. Prior to the interview, Notices of Seizure and Sampling, Notice to Produce and Restoration documentation were handed to the appellant and/or his solicitor. The vehicle was restored to the appellant on payment of a restoration penalty of £520 for using rebated heavy oil as a road fuel. The appellant paid and signed the restoration document in the presence of Officer Allan that afternoon.

33. At the end of the interview, there was a discussion about whether or not the appellant would sign the record of the interview. He declined on the basis that he wished to read it over with his solicitor. The copy of the said record, which was furnished to us, was the unsigned version but the appellant repeatedly informed the Tribunal that he had signed it after discussion with his solicitor.

34. Since the appellant had refused to sign the record the officers took advice from a superior and went to Peterhead police station forthwith. At 1920 a senior police officer countersigned each page on the original.

35. In the course of that interview, the appellant confirmed that: -

(a) He had commenced a business buying and selling second hand small plant etc with effect from January 2010.

(b) Prior to commencement of that business, he had been unemployed since February 2010 when his previous business had become defunct.

(c) In that period he had not been in receipt of benefits but had been supported by his wife who worked as a care worker.

(d) He paid £230 per calendar month in rental for Unit 13.

(e) He had rented the unit for approximately 10 years.

(f) He had operated a biofuel plant there since October 2008 (he described it as biodiesel).

(g) He had done so in order to save some money.

(h) The approximate cost of the equipment was “maybe £2,500”.

(i) He did not own all of the equipment that had been seized.

(j) In particular one John Aitken had lent him the meter (which incorporates the pump) some two years previously.

(k) The appellant could not furnish an address for him or to provide any other details other than that he was younger than him and he had had a unit in Broad Place.

(l) He described the manufacturing process in detail. In particular he stated that he added methanol to the vegetable oil in a ratio of 1:5.

(m) “A batch is always 400 litres of base product. The outcome is roughly 300 litres.”

(n) He would produce “… maybe two batches per month” depending on the availability of the base product.

(o) He was asked if he could explain why the officers might have evidence that he was selling fuel at 90p per litre; his answer was simply “No”.

(p) He stated that this had been the first time he had trialled the use of kerosene as an additive.

(q) He sells waste products to Makro for 10p per litre and he does so maybe every three months taking them a 1000 litre IBC container. He did not keep receipts.

(r) He stated that he was aware of the rules in regard to the manufacture of biodiesel and that he was required to keep records. He stated that he did have records on his phone.

(s) He confirmed that he had manufactured 1600 litres in the period January 2012 to 9 February 2012.

(t) He produced no more than 3000 litres per annum.

36. The RFTU officers then consulted with senior officers and decided that the matter should be referred to the excise team for compliance audit. Officer James Bennett conducted that audit with effect from 23 May 2012 and he was the officer who issued the disputed assessment.

37. He reviewed the record of the interview and the case papers and decided that the audit should focus on determining the volume of biofuel produced. The rationale for that decision was that the volume of related oil, which had been used as road fuel, appeared minimal and the available evidence suggested that the appellant had produced biofuel on a commercial basis.

38. On 22 August 2012, he issued a standard letter to the appellant requesting that he contact him within 10 days to arrange a suitable meeting. That letter enclosed four factsheets on compliance checks and he drew the appellant's attention to the necessity of reading and understanding same. Those factsheets covered HMRC procedure, Human Rights and penalties. Included therein is the suggestion that a taxpayer may wish to consult a professional adviser, if they do not already have one, and that the taxpayer must provide information or documents which already exist, if requested.

39. At a meeting on 11 October 2012 with the appellant, in the presence of his solicitor, the appellant confirmed that he had read and understood the fact sheets. The appellant claimed that he produced less than 2500 litres of biofuel each year for his own use. He agreed that the most that he would be able to save on producing and using biofuel as road fuel as opposed to purchasing DERV from a retail outlet would be roughly £3000. Officer Bennett put it to him that the costs were greater than the potential savings. The response was that he was in business and that biofuel production was a hobby.

40. The appellant stated that he had records that would prove that he was only producing enough for his own use. He was given 21 days to produce same. On 1 November 2012, Officer Bennett collected bank statements, purchase invoices of chemicals, including methanol, used in the production of biofuel, and records of uplift of vegetable oil.

41. Officer Bennett formed the view, having reviewed same, that there were no actual records of production.

42. On 26 November 2012, Officers Bennett and Wood met the appellant, in the presence of his solicitor, and the appellant denied that he had produced biofuel for commercial purposes. He advanced a number of arguments as to why there were discrepancies in the evidence. He suggested that he had used methanol as a cleaning agent for second-hand plant that he was buying and selling in his business.

43. His solicitors formally advanced that argument on his behalf in their letter of 4 February 2013.

44. Following that meeting, Officer Bennett wrote to the appellant at some length on 28 December 2012, explaining that an assessment would be issued and setting out the reasons why and how the excise duty had been calculated. There was no response. On contacting the appellant's solicitor, it was suggested that the letter had not been received. The assessment was then issued on 14 January 2013 together with an explanatory letter and calculation.

45. On 4 February 2013, the appellant's solicitor requested a review of that decision.

46. On 19 March 2013, the review officer wrote to the appellant reducing the assessment on the basis that two of the methods of calculation were inappropriate (see paragraphs 11 and 12 above).

47. It is not disputed that the appellant purchased 8640 litres of methanol between 22 February 2010 and 9 February 2012. The RFTU Officers removed 830 litres on 9 February 2012 meaning 7810 litres were utilised by the appellant for some purpose.

Reasons for Decision

48. The law is clear that the burden lies on the appellant to establish the correct amount of tax that is due (paragraph 14, *Pegasus Birds Ltd v CEC* [2004] EWCA Civ 1015 *("Pegasus"*). He relied on his oral evidence and the information previously produced. The appellant's closing argument was "The only thing they have on me is methanol." We do not accept that. We repeatedly made it explicit to the appellant that the Tribunal would look at all of the evidence and then apply the relevant law.

49. However, turning first to methanol, it was a matter of agreement between the parties that the ratio was undoubtedly 1:5. Accordingly, at that ratio if all of the methanol had been utilised for the production of biofuel then 39,050 litres of road fuel would have been produced over the 717 day period between 22 February 2010 and 9 February 2012 and that, on average, equates to 54.46 litres of fuel per day. Therefore, over the period of assessment (1120 days) the appellant would have produced 60,995.20 litres of road fuel and the duty evaded on that equals £34,578. In that event the amended assessment would be confirmed.

50. On the balance of probability, was all of the methanol utilised for the production of biofuel? The appellant himself, and through his solicitor, argued that as a dealer in second-hand plant, some of the methanol had been used as a cleaning agent although the amount could not be quantified. That is simply not credible. Firstly, when interviewed under caution, the appellant told the officers that he had only started that business in January 2012. Secondly, at the hearing the appellant argued that he had barely left the house, even to uplift fuel, in the period from February 2010 when his previous business collapsed because he had been suffering from depression. He stated that his wife's earnings had supported him. Lastly, as an experienced businessman who had suffered a collapsed business he would have been expected to have had records of the amount of methanol utilised in order to claim a deduction in his accounts. We do not accept that he used it as a cleaning agent for his business prior to 2012.

51. The next argument was the 3500 litres allegedly used for the fishing vessel. That is almost half of the amount in question. He conceded that he knew that he had to co-operate with HMRC and indeed he asserted that he had done so. Given that the

appellant was well aware that it was important to establish any use for the methanol, we find it quite extraordinary, and inherently incredible, that if he had utilised 3500 litres for any other purpose, that he did not offer that explanation before this hearing. He was professionally advised at each of the meetings with the Officers. His solicitor specifically addressed use of methanol. Whether or not he trusted HMRC, is completely irrelevant. He did not tell his solicitor or HMRC. On the balance of probability, we find it implausible that 3500 litres were used for that purpose.

52. There is absolutely no evidence that he sold the methanol to any third party other than his assertion that he did so. Since we did not find him to be a reliable witness, we do not accept that.

53. As we indicate above, at the heart of the appellant's appeal, and often repeated by him, was the assertion that he would have been wholly unable to have sourced sufficient used vegetable oil in order to produce greater quantities of biofuel. We do not accept that. The only evidence, in relation to the uplift of vegetable oil, was the sheets produced by his wife. Even if those are accurate, and we doubt that they are, they do not support his assertion that he had been unable to source any oil from and after the summer of 2011. Even on the basis of those sheets he had uplifted 1080 litres of oil from June to September. When that was put to him, his only explanation was that those were approximate figures and the oil had included up to 50% water.

54. He was unable to explain why there were no sheets for 2012 or why he had suddenly been able to source enough oil to produce 1600 litres in a period of two weeks. His argument that times have changed and people were being forced out of business in this field because of the lack of oil does not sit well with that level of production. At that rate of production, he would produce 14,600 litres per annum.

55. Although at the hearing he alleged that he had not told the officers that he produced two batches per month, which is noted in the record of interview, we do not accept that the record of interview is deficient. As we indicate above, he also said that at that interview he had not been given the Notice of Sampling. We do not accept that either. It is recorded that the Notice of Sampling was given to him at the same time as the Restoration paperwork. He certainly signed the latter and paid for the restoration. We find it inherently unlikely that he was not given the Notice of Sampling

56. The record makes it very clear that the officers left the meeting, made a telephone call and were in the police station within less than 20 minutes. The senior police officer had countersigned the record of the interview in less than 25 minutes after the officers' interview with the appellant terminated. We take the view that that record of interview was certainly not amended and is an accurate account of the proceedings. In any event, the appellant repeatedly confirmed that, after discussion with his solicitor, he had signed a copy.

57. In the letter with the Notice of Appeal, the appellant denied that he had told Officer Bennett that he sold 1000 litres of waste oil to Makro every three months. That is true. However, he did say that at the first interview under caution. In that letter he said that he would obtain confirmation from Makro. He did not. He confirmed to the Tribunal that he did sell the waste product to Makro but offered no detail.

58. Amongst the key statements recorded at the interview on 10 February 2012 are the facts that he sold 1000 litres of waste product to Makro every three months and that

from every 400 litres of oil he produced 300 litres of biofuel. If one looks at the sheets produced by his wife, in 2009, he allegedly uplifted a total of only 3960 litres of oil. That does not sit well with any of the other evidence. We do not accept that the sheets recording uplifts of oil are accurate.

59. The appellant is incorrect in saying that he can make 2500 litres per year in terms of the relevant law. Similarly, his solicitor is incorrect in asserting that the appellant has an "exempt personal allowance" of 2500 litres per annum. Individuals producing less than 2500 litres per annum do not need to make entry of the premises for the purposes of oil production but they are required to maintain records. If a producer produces more than 2500 litres in a year then all of the oil produced is liable to excise duty.

60. Lastly, in the letter attached to the Notice of Appeal the appellant addressed HMRC's argument that since he was paying rent of £2,760 per annum and had production costs his motivation could not be to "save" at maximum £3,000 by producing biofuel for his own use. He stated that he had been renting out his unit. In his oral evidence he contradicted that and said that he had allowed a Polish man (whose surname he did not know) to use the unit to repair cars on two or three nights per month. That gentleman gave him money to cover the electricity. He described it as "peanuts". We do not accept his argument that he produced the biofuel to save money on his personal expenditure on fuel.

61. In summary, we find that the appellant's evidence was inconsistent and inherently incredible. We find that on the balance of probabilities the 7810 litres of methanol were used to produce biofuel. Therefore, the calculations underpinning the amended assessment are correct.

62. It is quite clear that the appellant failed to make or keep records of production of biofuel. Regulation 13 of the Biofuels & Other Fuel Substitutes (Payment of Excise Duties etc) Regulations 2004 imposes an obligation to keep such records. In the absence of those records HMRC has the power to raise an assessment. The assessment was raised in terms of section 12 Finance Act 1994 and for completeness, we annex at Appendix 1 the full terms thereof.

63. We have no hesitation in finding that both Officer Bennett and the Review Officer made "an honest and genuine attempt to make a reasoned assessment" and came to a view as to the amount of tax due, to the best of their judgment, on the basis of the available information. That is the standard that should be applied as is made clear in *Rahman (trading as Khayam Restaurant) No 2 v CEC* (2003) STC 150 and *Pegasus.* We accept that all of the available evidence was carefully assessed and weighed in the balance by the Officers, as we also have done, and the amended assessment is a reasonable judgment of the tax due and payable.

64. Accordingly, for all of these reasons this appeal fails and the amended assessment is upheld.

65. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 6 November 2014

APPENDIX 1

Section 12 Finance Act 1994

12. – Assessments to excise duty.

(1) Subject to subsection (4) below, where it appears to the Commissioners –

(a) that any person is a person from whom any amount has become due in respect of any duty of exise; and

(b) that there has been a default falling within subsection (2) below, the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

…

(2) The defaults falling within this subsection are –

(a) any failure by any person to make, keep, preserve or produce as required or directed by or under any enactment any returns, accounts, books, records or documents: …