[2017] UKUT 321 (TCC)

Appeal number: UT/2016/0118

EXCISE DUTY– HMRC's decisions to revoke appellant's status as a registered dealer in controlled oils and to refuse to restore seized road fuel tankers - whether FTT erred in not directing fresh reviews in circumstances where decisions found to be flawed – yes - HMRC directed to review decisions again - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BEHZAD FUELS LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Roger Berner
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 12 April 2017

Michael Patchett-Joyce and Oliver Powell, Counsel, instructed by Imran Khan and Partners, Solicitors, for the Appellant

Matthew Donmall, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2017

DECISION

Introduction and Background

1. This is an appeal by Behzad Fuels (UK) Limited (the "Company") against the decision of the First-tier Tribunal (Judge Jonathan Richards and Ms Rebecca Newns) (the "FTT") released on 24 March 2016 (the "FTT 2016 Decision")

2. The FTT dismissed the Company's appeal against two decisions of HMRC, namely its decision, upheld following a review on 18 February 2014 (the "Revocation Decision"), to revoke the approval of the Company as a registered dealer in controlled oil ("RDCO") under s 100G of the Customs and Excise Management Act 1979 ("CEMA") and its review decision dated 19 December 2014 (the "Restoration Decision") to refuse to restore four road fuel tankers (the "Vehicles") that HMRC had seized from the Company on 5 March 2013.

3. The Restoration Decision was made following directions made by the FTT after a hearing of the Company's appeal against HMRC's original decision dated 15 July 2013 to refuse to restore the Vehicles. In its decision on that appeal released on 28 August 2014 (the "FTT 2014 Decision") the FTT directed that a further review be undertaken in respect of the seizure of the Vehicles taking into account the FTT's findings of fact. It was a differently constituted FTT which made the FTT 2014 Decision.

4. As explained by the FTT in both of its decisions, this appeal arises out of the fact that the Company was found by HMRC to be in possession of fuel which although predominantly "white diesel" also contained "red diesel". As the FTT explained at [2] to [4] of the FTT 2016 Decision, "white diesel" is the diesel that is used in road vehicles and is subject to full excise duty. "Red diesel" is in all material respects an identical product to white diesel, but because it may only be used in agricultural and similar vehicles which are not driven on the road is subject to a much lower rate of excise duty. In order to enable red diesel and white diesel to be distinguished, chemical "markers" and a red dye are added to red diesel; the chemical markers can be detected by chemical analysis.

5. Misuse of red diesel is a significant problem. At one end of the spectrum, there is widespread fraudulent use of red diesel in road vehicles which is a threat to the revenue. Aside from the simple fraud of fuelling a road vehicle with red diesel and hoping that the use will not be identified, there are more sophisticated versions of the fraud which involve seeking to remove either the red dye or the chemical "markers" from diesel to enable it to be passed off as white diesel. This process is known as "laundering".

6. At the other end of the spectrum, there can be inadvertent misuse of red diesel, for example where the two types of diesel become mixed in the same tank, or there can be failure to follow what are known in the industry as "wet line procedures" so as

to ensure that fuel lines which have contained red diesel are thoroughly cleaned before being used to dispense white diesel.

7. Because of the widespread problem of fraud and the need for users of both red and white diesel to have proper procedures in place to keep the two types of fuel separate, HMRC has been given wide powers to seize fuel that consists of a mixture of red diesel and white diesel and vehicles containing such fuel.

8. HMRC has also developed a strategy which has made it more difficult for fraudsters to obtain rebated heavy oil such as red diesel. We were taken to the published strategy, which states that the RDCO scheme has been central to the strategy. The scheme requires suppliers of controlled oils to register with HMRC and submit monthly returns showing how much they have supplied to customers. These returns are analysed and help HMRC target its response to the misuse of rebated fuels and fuel fraud in the supply chain. Registered suppliers are required to take every reasonable precaution to make sure that their supplies of controlled oil are made only to persons who use that oil as permitted by law and to put in place appropriate "know your customer" procedures. Failure to meet the requirements of the RDCO scheme can result in a registered supplier having its registration revoked by HMRC.

9. In this case, in respect of the Revocation Decision, the FTT found that the Company had large quantities of laundered fuel on its premises and that fact alone amply justified HMRC's decision to revoke its RDCO's status. Although the FTT found that the officer who made the Revocation Decision took into account a number of factors that he should not have done in making his decision, the FTT decided that given that the presence of a large amount of laundered fuel on the Company's premises was such a serious matter, it was inevitable that the officer would reach the conclusion he did even if he did not take into account those factors. Accordingly, the FTT did not direct that the decision be reviewed again.

10. In respect of the Restoration Decision, the decision not to restore was made on the basis that this was the third occasion on which the Company's Vehicles were found to contain rebated fuel and HMRC's policy was not to restore vehicles on the occasion of a third "offence", notwithstanding the Company's contentions that the first two seizures should be regarded as a single incident. The FTT did not find it unreasonable for HMRC's starting point to be the application of this policy. Although the FTT found that the officer who made the Revocation Decision had failed to take into account a relevant factor, the FTT found that consideration of this factor would not have made any difference to the officer's decision and therefore did not direct that the decision be reviewed again.

11. Permission to appeal against the FTT 2016 Decision was granted by Judge Berner on 15 July 2016.

The Law

12. The relevant statutory provisions and principles to be applied in considering decisions of the nature with which this appeal is concerned were common ground, as was the case before the FTT.

5 *Provisions relating to the seizure of the Vehicles*

13. HMRC's power to seize goods and vehicles is set out in s139 and s141 CEMA. There was no dispute between the parties that the Vehicles, found to be containing red diesel, were lawfully seized pursuant to these provisions. The seizure was not challenged in the magistrates' court.

10 14. Section 152 CEMA gives HMRC a discretionary power to restore goods and vehicles that have been lawfully seized in the following terms:

> "The Commissioners may, as they see fit—
>
> (a) ...
>
> (b) restore, subject to such conditions (if any) as they think proper, any
> 15 thing forfeited or seized under those Acts."

15. We were shown a section from HMRC's Enforcement Handbook which sets out its policy as in force in November 2014 regarding the restoration of a vehicle which has been seized because of the vehicle's involvement in the misuse of controlled oil.

16. This document sets out the policy that was applied in this case, namely where 20 the taxpayer has a vehicle seized for the third time because of his involvement in the misuse of controlled oil the vehicle will not be restored.

17. We observe that the introductory section of this policy states:

> "Vehicle seizure causes significant disruption to fraudsters and has an important part to play in making oils fraud unattractive. It also sends a strong deterrent 25 message to others who are or may become involved in oils fraud."

18. The policy then refers to the fact that misuse of rebated fuel is an offence under s 13 of the Hydrocarbon Oil Duties Act 1979 ("HODA"). In fact, misuse of rebated fuel can only amount to a criminal offence when the fuel is misused with intent to contravene the restrictions on its use: see s 13(3) HODA. Section 13(1) HODA gives 30 HMRC power to impose civil penalties in the case of misuse of fuel. That provision would apply whether or not the misuse was deliberate, but HMRC's policy makes it clear that it is not current policy to impose civil penalties either instead of or in addition to seizure of vehicles.

19. There is therefore an implication from the way the policy is drafted that the 35 strict "3 strikes" policy applies in cases where HMRC would have the right to prosecute pursuant to s 13(3) HODA. The policy contains nothing specific about the situation where the misuse of the fuel is not deliberate. Clearly, there is a power to

seize a vehicle found to be misusing rebated fuel but the policy gives no indication as to how, if at all, restoration would be appropriate where the misuse is found to have been inadvertent or negligent.

20. We accept Mr Donmall's submission, based on the FTT's decision in *Pioneer Traders (UK) Ltd v HMRC* [2014] UKFTT 552 (TC), that once goods have been lawfully seized it is incumbent on the person claiming restoration to advance compelling reasons as to why the normal policy of HMRC not to restore lawfully seized goods should be modified, and the goods be restored to their owner: see [26] of that decision. However, in applying that principle, it is important to recognise that HMRC's restoration policy applicable in this case includes the requirement to act proportionately as well as to follow the specific provisions of the policy. It is, of course, also open to a taxpayer to challenge HMRC's policy on the grounds that the policy itself is unreasonable.

Provisions relating to the Company's RDCO status

21. The effect of s 100G and s 100H CEMA when read together with regulations made thereunder in the Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002 is to permit HMRC to approve any person as an RDCO and to revoke that status.

22. HMRC have published guidance in Public Notice 192 as to circumstances in which an approval of a person as an RDCO may be revoked. The guidance in force at the time the Revocation Decision was made provided:

> "We are likely to cancel your approval if:
>
> - it is considered necessary for the protection of the revenue because, for example, you have been involved in the misuse of controlled oil. In such cases, we are likely to prosecute you
>
> - you persistently fail to meet the requirements of the scheme. However, this is likely to be the final step following a series of warning letters and civil penalties…"

23. In this case, the Revocation Decision was made on the basis that it was considered necessary for the protection of the revenue. As we observed in relation to the restoration policy, prosecution is only possible where the misuse of fuel is deliberate and so, as with the restoration policy, the implication is that normally cancellation of approval would only take place in circumstances where it would be possible to prosecute for a criminal offence under s 13 HODA and no specific provisions are set out to cover the circumstances where the misuse of the fuel was not found to be deliberate.

24. A new version of Public Notice 192 was issued in May 2014, a few months after the Revocation Decision was made. A significant difference between this version and the previous version is that it introduces a fit and proper test for an applicant for approval and also introduces as an additional ground for revocation the fact that

HMRC are no longer satisfied that the person is fit and proper to hold an RDCO approval.

25. The fitness and properness criteria include exercising appropriate control over the product, persons and vehicles entering and leaving the dealer's premises and whether the dealer has been involved in fuel laundering. The guidance states that HMRC will consider that to be the case where the dealer is linked to any of the following:

(1) seizures of laundering equipment;

(2) premises on which laundered fuel (or unlawfully mixed fuel) has been found;

(3) premises from which laundered fuel (or rebated/other blend of fuel) has been supplied; or

(4) deliveries of rebated fuel to places where laundering or unlawful mixing has taken place.

Rights of appeal and powers of the FTT in determining an appeal

26. Section 16 of the Finance Act 1994 ("FA 1994") sets out the rights of appeal to the FTT that apply in relation to excise duty decisions. The right of appeal may only be exercised in respect of a review decision, as was the position in this appeal in respect of both the Restoration Decision and the Revocation Decision. Section 16 provides, relevantly, as follows:

> "(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> …
>
> (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 that 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 review or further review as appropriate 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 review or further review as appropriate, 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.

27. The combined effect of s16(9) FA 1994, paragraph 2(1)(r) and paragraph 2(1)(p) of Schedule 5, FA 1994 is that both the Revocation Decision and the Restoration Decisions are decisions as to "ancillary matters".

28. Consequently, the FTT only has a supervisory rather than a full merits jurisdiction in relation to the decisions which are the subject of this appeal. As the FTT correctly identified at [92] of the FTT 2016 Decision, the correct approach to determine the question as to whether the decision concerned could not reasonably have been arrived at is that set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 which is to address the following questions:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

29. As the FTT also correctly identified at [93] of the FTT 2016 Decision, in *Balbir Singh Gora v C&E Comrs* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal. In our view, this principle is equally applicable in the case of a decision to revoke a supplier's RDCO status.

30. Section 16(4) FA 1994 confers a power on the Tribunal to give certain directions if HMRC make an unreasonable decision. However, it does not require the Tribunal to order a further review in every case in which HMRC reach a decision that is unreasonable in the sense outlined at [28] above. Thus, in *John Dee Ltd v CCE* [1995] STC 941, a case which concerned an appeal originating in the VAT and Duties Tribunal, the Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial information. Neill LJ (with whom the other Lords Justices agreed) held that counsel for the company contesting the security requirement in that case had been right to concede that where it is shown that, had the additional material been taken into account the decision would inevitably have been the same, a tribunal can dismiss an appeal.

31. Nevertheless, in our view where the tribunal has found a decision to be unreasonable in the sense outlined at [28] above then unless the circumstances clearly demonstrate that HMRC would be bound to make the same decision the proper course to take is for the Tribunal to direct that the decision concerned should be reviewed

again. If there is any doubt on the point, the matter should be determined in favour of directing a further review.

32. This approach is consistent with the decision of the FTT in *Tomex Trans FHU Tomasz Bomba v HMRC* [2017] UKFTT 212 (TC), a case involving a vehicle seized on suspicion of carrying diesel fuel whereas the appellant believed that the load was lubricating oil on which excise duty was not due. The decision letter made it clear that the decision in question was made on the basis that the appellant was fully aware that the liquid being transported was not lubricating oil. The FTT found as a fact that the appellant was not so aware and therefore, applying the principle in *Gora,* the decision in question took into account, to a material degree, an irrelevant consideration – the incorrect supposition that the appellant was aware that the load was mostly diesel fuel, with the consequence that the decision was unreasonable.

33. In concluding that it was not inevitable that HMRC would, on the other facts found, inevitably come to the same decision as before, the FTT said at [45]:

> "Inevitability is a high bar. We could see ourselves reaching it if we had, as a matter of evidence, a clear understanding of HMRC's policy in cases such as these, such that we could anticipate to a high degree of certainty, how HMRC would apply their policy to the facts as we have found them."

34. Finally, where, as in this case, there are challenges to the FTT's findings of fact then for the challenge to be successful and thereby amount to an error of law on the part of the FTT the facts found must be such that no person acting judicially and properly instructed as to the relevant law could have come to the determination that it did. Putting the principle another way, we would need to be satisfied that the relevant findings made by the FTT were ones which the FTT was not entitled to make on the evidence before it. If there was no evidence, or the evidence was to the contrary effect, the FTT would not be so entitled: see Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36.

The Facts

35. Because some of the Company's grounds of appeal challenge the FTT's findings of fact on the grounds of perversity it is necessary for us to set out the factual findings in the FTT 2016 Decision and (to a lesser extent) the FTT 2014 Decision in some detail.

36. We set out at [34] to [45] below a summary of the events leading up to the making of the Restoration Decision and the Revocation Decision. This draws significantly on Mr Patchett-Joyce's helpful summary of the FTT's findings in this respect as set out in the Chronology attached to his skeleton argument.

37. The Company was incorporated in 2008 as a wholly-owned subsidiary of Behzad Corporation, a business conglomerate based in Doha with a substantial turnover. The Company made bulk supplies of diesel and kerosene to various market sectors. On 24 June 2008, the Company obtained RDCO status.

38. On Friday, 12 June 2009 the Company made a delivery of fuel to a garage near Liverpool, but the customer alleged that the fuel delivered was not roadworthy. The Company informed HMRC of the allegation and asked HMRC to carry out tests on the fuel. HMRC found no problem with the fuel in the container pots of the vehicle used to deliver the fuel, but that the fuel in the running tank was contaminated with red diesel.

39. HMRC seized the vehicle, but entered into a "restoration agreement" on payment of a fee. The agreement contained an acknowledgement that all traces of fuel must be removed from the vehicle's running system within 24 hours from release, and contained a warning about the consequences of misuse of rebated fuel being detected on future occasions. The vehicle returned to the Company's depot, where it remained stationary from 12 to 17 June 2009.

40. On 16 June 2009 HMRC visited the Company's depot and tested the running tank of the seized vehicle. Traces of red diesel were found in the running tank. HMRC again seized the vehicle and entered into a restoration agreement on payment of a further fee, which contained a warning about the future detection of the misuse of rebated fuels on the footing of there having been a second detection. The Warning read:

> "THIS IS THE SECOND OCCASION that you have been detected with a vehicle fuelled on rebated fuel. You are therefore advised that on any future occasion if this vehicle or any other vehicle driven by Behzad Fuels is detected misusing rebated fuels, HM Revenue and Customs will seize the vehicle and will not return it to you, as well as assessing you to the rebate you have fraudulently taken."

41. The Company wrote to HMRC asking for the further fee to be returned, stating that the running tank had been emptied "to the extent physically possible" and refilled and that the positive test was a result of residual contaminating particles being present. HMRC refused the request and the Company did not require HMRC to institute condemnation proceedings.

42. As found by the FTT at [21] and [25] of the FTT 2014 Decision, which the FTT at [40] of the FTT 2016 Decision adopted as established facts for the purposes of its decision, a former employee of the Company had, without authorisation from, or knowledge of, the Company or Behzad Corporation, shortly after the Company began trading, conducted experiments on the purification of biodiesel that involved the use of bleaching agent. Two 25kg bags labelled "bleaching earth" or "bleaching agent" were found on the Company's premises during HMRC's visit of 4 March 2013 referred to below.

43. On 4 March 2013 HMRC Road Fuel Testing Officers visited the Company's premises. The presence of red diesel was detected in the white diesel bulk storage tank and the running tanks of four road tankers on site. HMRC issued a Seizure Information Notice in respect of the fuel in the white and red diesel storage tanks ("the Fuel") and the Vehicles. On 5 March 2013 HMRC seized the Vehicles and the Fuel as liable to forfeiture under s 139 CEMA.

44. On 3 April 2013 HMRC refused the request to restore the Vehicles and the Fuel to the Company. The Company requested a review of this decision which was upheld on review in a letter from HMRC to the Company dated 15 July 2013.

45. As recorded by the FTT at [36] of the FTT 2014 Decision, the basis of the review decision was that the evidence suggested that laundering of fuel was taking place at the Company's site, bearing in mind the presence of a bag labelled "bleaching earth". At [41] of the FTT 2014 Decision, the FTT records that the Company accepted that the white diesel contained in the white bulk storage tank was contaminated with red diesel at a level of about 4% and that a similar level of contamination was present in the running tanks of the Vehicles. Although an expert's report prepared for the Company concluded that the level of contamination was more likely to have been caused by errors or poor practice rather than by a determined effort to launder rebated fuels it accepted that laundering was a possibility.

46. Consequently, the FTT at [49] of the FTT 2014 Decision, found that there was evidence on which the review officer could conclude that laundering had taken place. That led the FTT to conclude that the decision not to restore the Fuel was reasonable and proportionate.

47. In relation to the Vehicles, the FTT made the following findings at [52] to [54] of the FTT 2014 Decision:

> "52. Mr Hays contends that given Ms Bines conclusion that red diesel was being used or misused it was, looking at the circumstances as a whole and in particular the presence on the site of laundered fuel, reasonable for her to conclude that the vehicles should not be restored.
>
> 53. As Mr Powell submits, there is no evidence that vehicles BX05 RYT or V407 ECY were being used for laundering or transporting contaminated fuels. Also it is accepted that four of the five pots of vehicle PK51 DNO were not contaminated and that the explanation for the contamination of pot 3 of that vehicle, the arson attack for which a police crime number was obtained, was perfectly plausible as was the explanation for the contamination of the pots in vehicle MX54 EEU, ie the erroneous delivery and transfer of fuel. He contends that that Ms Bines failed to acknowledge the explanations given at the interviews on 7 March 2013 or that she failed to give sufficient weight to them and as such her decision to uphold the decision not to restore the vehicles was unreasonable.
>
> 54. We agree with Mr Powell that the explanations given for the contamination of vehicle MX54 EEU, the wrong delivery, and PK51 DNO, the arson attack, are credible and plausible, especially given that these are supported by contemporaneous documentary evidence which does not appear to have been given due consideration by Ms Bines. It therefore follows that the decision not to restore the vehicles could not have been arrived at reasonably. Even if this were not the case we consider that a proportionate response would have been to consider restoration of the vehicles for a fee, indeed during cross-examination Ms Bines herself accepted that this "may have appeared more proportionate."

48. Therefore, the FTT directed that a further review of the decision not to restore the Vehicles be undertaken, such review to take into account the explanation regarding the presence of bleaching agent at the site, and the explanations recorded at [53] and [54] of the FTT 2014 Decision and to consider whether it would be proportionate in the circumstances to return any or all of the Vehicles for a fee.

49. We set out at [50] to [62] below a summary of the further findings of fact made by the FTT in the FTT 2016 Decision.

50. At [9] the FTT recorded that the Company accepted that fuel found in the white diesel storage tank at its premises and in the running tanks of the Vehicles contained markers for red diesel but maintained that this was merely because white diesel had been contaminated by red diesel by poor wet line procedures, the Company denying that any of the fuel in question was laundered in the sense described at [5] above.

51. At [11] and [12] the FTT referred to the statement by the FTT in the first sentence of [53] of the FTT 2014 Decision (see [47] above) and concluded that this statement did not amount to a positive finding that the Company's vehicles were not being used for laundering. The FTT interpreted that statement as simply being a summary of the submissions that had been made to it by Mr Powell, counsel for the Company, rather than a finding of fact, noting that the FTT made no direction requiring HMRC to take this matter into account when performing their re-review.

52. Having reviewed expert evidence from both parties as regards the samples of fuel taken from the white diesel storage tank and the running tanks of the Vehicles following the visit on 4 March 2013, the FTT made a summary conclusion at [49] that "all of the samples … contained laundered fuel". However, in its reasoning for this conclusion the FTT stated at [52] that "on the balance of probabilities the fuel was laundered", but started its consideration of the question whether there was an alternative explanation to that of the fuel being laundered, namely that white diesel had been merely inadvertently mixed with small quantities of red diesel (an explanation which the FTT rejected) with a statement at [53] that they had reached "a positive conclusion that the fuel samples…. contained laundered fuel."

53. The FTT then made findings as to whether the Company was itself involved in the laundering of the fuel that it had found had been laundered.

54. At [64] to [69] the FTT referred to evidence tending to suggest that the Company could have been involved in laundering, including sludge from a container pot on one of the Vehicles containing markers for red diesel which could have been bleaching earth and the fact that two 25kg bags of bleaching agent had been found during HMRC's visit in 2013. The FTT then referred to evidence tending to the contrary. In particular, there was no evidence of toxic chemicals having an impact on the environment of the yard and no evidence of laundering or laundered fuel was found during an HMRC visit in 2011. The FTT also found that the Company had shown itself to be honest in its dealings with HMRC. It then made these equivocal findings at [69] and [70]:

"69. We did not consider that the evidence at [63(1)], [63(2)] and [63(3)] pointed strongly in either direction. If the Company were engaged in laundering, it might simply have chosen a more discreet spot than its own business premises to undertake that laundering. Equally, if the Company were laundering fuel, it might reasonably be expected to hide any laundering agents before Dr Stinton's visit which took place several months after the seizure. The fact that no evidence of laundering was found in 2011 does not preclude the possibility that the Company was laundering fuel in 2013.

70. Therefore, if matters stopped there, we would have concluded on a balance of probabilities (based on the evidence of the sludge and the presence of fuller's earth at the Company's premises) that the Company was laundering fuel particularly given the absence of any other explanation as to how laundered fuel came to be present in the Company's white diesel storage tank. However, the Company's evident honesty in its dealings with HMRC referred to at [63(4)], and the fact that we considered the Company's witnesses to be honest and reliable has caused us to stop short of making a positive finding that the Company was involved with laundering. We have not made a positive finding that the Company was <u>not</u> involved with laundering partly because of the points made at [64] to [69] and because we consider that it was possible for the Company to be involved in laundering without Mr Menon, Mr Kumaran or Mr James being aware of this. Mr Menon is based in Doha and said in his evidence that he did not know about the experiments that Mr Makkatu was performing with biodiesel which demonstrated that Mr Menon could not know about everything that was going on at the Company. Both Mr Kumaran and Mr James were based in the UK but said that, while they were aware that Mr Makkatu was performing experiments on biodiesel, neither of them knew that those experiments involved bleaching earth. Therefore, even people based in the UK were not aware of precisely what was going on at the Company's premises. Overall, therefore, the Company has not discharged the burden of proving that none of its agents or employees were involved in the laundering of fuel."

55. The FTT then made findings relating to the Revocation Decision. It set out at [71] the material part of the letter to the Company dated 5 November 2013 in which HMRC made the Revocation Decision as follows:

- On the 04/03/13 HMRC officers detected mixing and laundering of fuel. Fuel uplifted shows that you were mixing ultra low sulphur diesel with laundered gas oil and extending gas oil with kerosene.
- At Behzad Fuels HMRC Officers seized 16,600 litres of laundered fuel from the bulk tank and 6000 litres of Gas Oil.
- HMRC also seized 4 HGV road fuel tankers, 2 full, 1 empty and 1 being used for laundering. The marked rebated oil was being passed from pod to pod along the tanker as it moved through the laundering process. Waste bleaching earth was sampled from around the sides of the pods as well as 2 full bags of bleaching earth were also uplifted from inside a locked container and hidden in an old washing machine.

- Purchase and sales invoices were scheduled and there are discrepancies with the different type of fuel purchased and sold.

As a consequence in order to protect the Revenue your approval as a Registered Dealer in Controlled Oils is revoked with immediate effect by virtue of the Customs and Excise Management Act 1979, section 100G (5).

56. This decision (which was upheld on review on 18 February 2014) was made before the FTT 2014 Decision had been released and, as recorded by the FTT at [72], the decision-making officer (Officer Sayers) during cross examination accepted that he had relied on matters that in the light of the FTT's findings of fact in the FTT 2014 Decision would now be unreasonable to rely on. Consequently, as found by the FTT at [73] of the FTT 2016 Decision, by the time of the hearing in 2016 Officer Sayers was of the view that revocation of the Company's RDCO status was appropriate on the basis only that laundered fuel was found in the white diesel storage tank and in the running tanks of the Vehicles.

57. Finally, the FTT made findings relating to the Restoration Decision which was a review decision made by Officer Brown in a letter to the Company dated 19 December 2014.

58. At [74] the FTT referred to a statement by Officer Brown in that letter to the effect that the FTT in the FTT 2014 Decision had directed that "there is no evidence of the vehicles being used for laundering or transporting contaminated fuels" and noted that the statement was mistaken for the reasons explained at [51] above.

59. At [75] the FTT records Officer Brown's conclusions in the letter that the Vehicles should not be restored because the latest seizure was the third occasion on which contaminated fuel had been found in the running tanks of vehicles owned and operated by the Company and that the Company had been warned that a "strict non-restoration policy" would be applied on the occasion of a third seizure.

60. The FTT records at [76] that in her evidence before the tribunal Officer Brown accepted that there were four components underpinning her decision as follows:

> "(1) that this was the Company's third offence,
>
> (2) that four vehicles (rather than just one) were involved,
>
> (3) that there were a number of factors suggesting that laundered fuel was on the site (and it did not matter whether it was the Company or someone else who had done the laundering),
>
> (4) that it was proportionate not to restore."

61. It was apparent that Officer Brown was cross-examined as to whether she had appreciated that she had a discretion to depart from HMRC's policy and the FTT records at [77] that she answered that she just "stuck to the policy".

62. The FTT made conclusions on this issue at [78] to [80] as follows:

> "78. The evidence summarised at [77] was contradictory. However, we have concluded that Officer Brown did have in mind, when she performed her review, that she had the discretion to restore the Vehicles if she chose to. We have reached that conclusion in part because HMRC's policy, as set out in their Enforcement Handbook which was made available at the hearing makes it clear that officers should always consider questions of proportionality and human rights when making any restoration decision. Therefore, HMRC's policy was not to refuse restoration in all cases involving a third offence and consideration of questions of proportionality was built into that policy as what Mr Donmall referred to as a "safety valve". Therefore, even if Officer Brown did "stick to the policy", by doing so she would inevitably be considering whether it was proportionate to refuse to restore the Vehicles or not. Moreover, this Tribunal in the First FTT Decision specifically directed HMRC to consider the question of whether it was proportionate to restore the Vehicles for a fee. Since HMRC's policy on a third offence would typically be to refuse to restore the seized vehicle altogether, Officer Brown must have been aware that she was being asked to consider a course of action which differed from HMRC's usual policy not least since she was careful in her letter to set out the various directions that this Tribunal made as to the conduct of the further review.
>
> 79. We accepted Officer Brown's evidence that she took into account that the two previous "offences", on which she relied as justifying the decision not to restore the Vehicles, were a matter of days apart and arose from the same set of facts in 2009. She rejected Mr Powell's suggestion in cross-examination that these should just be regarded as a single offence saying that the evidence before her was that the fuel tank of the vehicle concerned was full when it was seized on 16 June 2009.
>
> 80. Officer Brown said that, at the time she made her decision, she was not aware that the Company had, on 12 June 2009 specifically asked HMRC to perform tests on fuel that it was supplying and that, but for this "self referral", HMRC would in all likelihood not have tested the fuel in the running tanks of the Company's vehicles in 2009. However, she said it would not have affected her decision on the grounds that "previous good behaviour does not negate later bad behaviour". We accepted that this was her genuine opinion. We will address the reasonableness of her decision in later sections."

The FTT 2016 Decision

63. At [97] to [100] the FTT set out its reasons for not directing that HMRC conduct a further review of the Revocation Decision.

64. At [97] the FTT expressed the view that it was entirely reasonable that an RDCO should satisfy high standards in order to be awarded, and maintain, its status and HMRC are entitled to expect that an RDCO will not, whether knowingly or otherwise, supply laundered or contaminated fuel to its customers or use laundered or contaminated fuel itself. It then concluded at [98] to [100] as follows:

> “98. We have found that the Company had large quantities of laundered fuel on its premises. That fact alone amply justifies HMRC’s decision to revoke its RDCO status. The fact that the Company has not been charged with a criminal offence is not relevant: given the trust that HMRC put in RDCOs, it is reasonable to expect them to comply with much higher standards than merely refraining from committing criminal offences. Even if we had made a positive finding that the Company was not involved in the actual laundering of fuel, HMRC’s decision would still have been reasonable as the presence of laundered fuel on the premises would indicate that the Company’s procedures, due diligence or monitoring of staff were not of sufficient standards to justify the high level of trust that HMRC had put in it. It was, therefore, entirely reasonable of HMRC to form the view that, in order to protect the revenue, they needed to revoke the Company’s RDCO status with immediate effect. Given the seriousness of the matter, it was not disproportionate to revoke that status without issuing a warning first.
>
> 99. We do not consider that Officer Sayers’s decision contained any error of law. We do not consider his decision was one that no reasonable officer could have reached.
>
> 100. As noted at [72], Officer Sayers accepted that he should not have taken into account various factors. For example he accepted that he should not have taken into account his belief that the Company was itself using the Vehicles to launder fuel (although, given what we have said at [12], we do not consider he necessarily needed to accept that point). He was, however, right to accept that he should not have concluded that there were “discrepancies” in the Company’s paperwork without looking at that paperwork. He has, therefore, made a decision that was “unreasonable” in the sense outlined at [92] as it took into account irrelevant considerations. However, given that the presence of a large amount of laundered fuel on the premises of an RDCO was such a serious matter, we consider that it was inevitable that Officer Sayers would reach the conclusion he did even if he did not take into account those factors. Accordingly, despite Officer Sayers’s frank admission, we will not direct that his decision be reviewed again applying the principles set out at [94] and [95].”

65. At [101] to [108] the FTT set out its reasons for not directing that HMRC conduct a further review of the Restoration Decision.

66. Having made reference at [101] to the Company’s submissions that it was wrong to conclude that the seizure of the Vehicles was the Company’s third “offence” as the two seizures in 2009 should be regarded as a single incident, the fact that those seizures took place following a “self-referral” and the fact that the Company was an honest trader, the FTT said at [102] that Officer Brown’s conclusion that this was the Company’s third offence was “certainly at the tougher end of the spectrum” but not unreasonable.

67. The FTT came to the following conclusions on the “three strikes” policy at [103] as follows:

> “103. As a preliminary point, we do not consider that it is unreasonable for HMRC’s starting point to be, in accordance with their policy, that the Vehicles

> would not be restored on the occasion of a third "offence". It is appropriate that sanctions should increase in severity and HMRC had given a clear warning on 16 June 2009 that restoration of vehicles subsequently seized was unlikely. The result of this policy is that the sanctions for a third seizure are tough and it is, therefore, important that HMRC consider questions of proportionality before applying these tough sanctions. However, HMRC's policy itself recognises this as noted at [78]. Therefore, we do not consider that HMRC's policy on a third seizure is inherently unreasonable."

68. At [104] the FTT reiterated its conclusion at [78] that Officer Brown had considered whether to exercise her discretion to restore. At [105] the FTT held that Officer Brown's conclusion that the two seizures in 2009 were separate rather than a single incident was not unreasonable, bearing in mind that the Company had been told specifically that it should remove all traces of red diesel from the running system of the vehicle concerned but had not done so.

69. The FTT did, however, accept that Officer Brown did not take into account a relevant factor in making her decision, namely the question of the "self-referral." Its conclusions on this issue were set out at [10 6] and [107] as follows:

> "106. Officer Brown accepted that she did not take into account at the time of her review the fact that the Company had initiated the process in 2009 that led to the fuel in its vehicle's running tank being tested. Mr Powell overstates matters when he refers to this as a "self-referral" as the Company was inviting HMRC to test the fuel in its vehicle's storage tank (that it was supplying to its customer) and not the fuel in the running tank. Nevertheless, we agree that the fact the Company contacted HMRC suggests that those staff members in the vehicle at the time (and those making the decision to contact HMRC) were not aware of the presence of contaminated fuel in the vehicle's running tank as, if they were aware, they surely would not have wished HMRC's officers to perform tests on any of the Company's fuel. However, this does not demonstrate that everyone at the Company was unaware of the presence of contaminated fuel. Nor does it suggest that the Company took any particular steps to ensure that it was not using contaminated fuel in its vehicles. Therefore, even if Officer Brown had taken into account the evidence of the "self-referral" at the time of her review decision, she would have noted only that, at the time of the two seizures in 2009, there were doubts as to whether the Company was aware of the presence of contaminated fuel in the running tank of its vehicle.
>
> "107. As noted at [80], we accept Officer Brown's evidence that knowledge of the "self-referral" would not have made any difference to her decision. We also consider that was a reasonable stance to take. Even if the Company had demonstrated that it was completely unaware that it was using contaminated fuel in 2009, there were aggravating factors associated with the seizures of the Vehicles in 2013. Firstly, those seizures involved four vehicles and so were not merely an isolated incident. Secondly, the fuel found in the running tanks of the Vehicles was not merely contaminated: it was positively laundered and the Company has not satisfied us that it was not involved in the laundering. Officer Brown had assumed in her review that it was not open to her to take account of suspicions that the Company was involved in the laundering. For reasons set out at [12], she was wrong to make that assumption and, for reasons set out at [70], it would have been reasonable for her to conclude that the Company was involved

in laundering. Thirdly, the Company had RDCO status and it was reasonable to assume that the fuel found in the running tanks of the Vehicles had ultimately come from the Company's white diesel storage tank and was thus the same fuel that was being sold to the Company's customers. Given that HMRC's stated policy is to refuse to restore vehicles following a third seizure (subject to questions of proportionality and human rights), we consider that, even if she had considered the "self-referral" at the time she would inevitably have come to the same conclusion, given the findings of fact that we have made, and such a conclusion is both reasonable and proportionate."

70. Consequently, at [108] the FTT declined to direct that Officer Brown's decision be reviewed again.

Grounds of Appeal and issues to be determined

71. The Company advances four grounds of appeal against the FTT 2016 Decision as follows:

Ground (1): The FTT acted perversely in opening up the earlier finding of fact (made in the FTT 2014 Decision) that "there is no evidence that [relevant vehicles] were being used for laundering or transporting contaminated fuels";

Ground (2): The FTT acted perversely in concluding that the fuel was laundered and that the Company had failed to demonstrate that it was not involved in the laundering;

Ground (3): The FTT acted perversely in concluding that HMRC's decision not to restore the Vehicles was reasonable and/or proportionate; and

Ground (4): The FTT acted perversely in concluding that the revocation of the Company's RDCO was reasonable and/or proportionate.

72. In his submissions before us, Mr Patchett-Joyce supported the grounds of appeal with an overarching submission that the FTT erred in law on the question as to whether it was inevitable, notwithstanding the unreasonableness of the decisions made by HMRC, that the decisions would have been the same were a further review to be directed.

73. We agree with Mr Patchett-Joyce that if the FTT made errors of law which bore on the question as to whether the FTT was correct in its assessment that it was inevitable that either of the decisions would have been the same, then that would be an error of law which was so significant that we should set the FTT's decision aside and exercise our powers under s 12 of the Tribunals, Courts and Enforcement Act 2007 either to remake the decision or remit it to the FTT. In those circumstances, we shall proceed to deal with the FTT's approach to the inevitability question first in relation to each decision before turning to the specific grounds of appeal.

Discussion

Revocation Decision

74. Mr Donmall submits that the FTT was entitled on the evidence to make the findings of fact which the Company challenges in its first and second grounds of appeal and that the FTT was entitled on the facts to conclude that the revocation of the Company's RDCO status was proportionate.

75. Mr Donmall's submissions can be summarised as follows:

(1) at no stage did the Company provide any explanation for the presence of laundered fuel within the white diesel storage tank or the Vehicles;

(2) nor did the Company provide any evidence regarding its due diligence in respect of, for example, procedures to avoid, or detect, dealing in contaminated or laundered fuel, including in respect of supervision of its employees, loading and unloading processes, supplier due diligence et cetera;

(3) as the FTT found at [98] of the FTT 2016 Decision, the presence of laundered fuel at the Company's premises would indicate that the Company's procedures were not of sufficient standards to justify the high level of trust HMRC had put in it;

(4) it was not necessary for HMRC to find intentional misuse of controlled oil or excise fraud before withdrawing RDCO status. HMRC may go straight to withdrawal if that is reasonable in the circumstances;

(5) the FTT was right to read [52] to [54] of the 2014 FTT Decision in the way that it did. In any event, neither the Restoration Decision nor the Revocation Decision was reached on the basis that either of the two vehicles concerned were used for laundering fuel or transporting contaminated fuel and the consideration of this point was not part of the ratio of the FTT 2016 Decision;

(6) when the FTT 2016 Decision is read as a whole, it is clear that the FTT appreciated that only some of the fuel in the white diesel storage tank and the fuel in the Vehicles seized in 2013 was laundered. The first sentence of [98] of the FTT 2016 Decision should be read in light of its conclusion at [49] that the samples of fuel tested "contained laundered fuel";

(7) HMRC do not rely on any finding that the Company was positively involved in the laundering of fuel as the basis of the Revocation Decision and neither did the FTT (as it made clear at [98] of the FTT 2016 Decision). HMRC do not need to establish that an RDCO has itself laundered fuel before revoking its status;

(8) if the Company wished to rely on the fact that it was not involved in the laundering of fuel the burden was on the Company to establish that fact and therefore there is no basis to argue that the FTT erred in law in not approaching the Revocation Decision on the basis that the Company had established that it positively was not involved in laundering;

(9) the issue as to whether the Revocation Decision would have been the same had the findings made by the FTT been taken into account is a factual one for determination by the FTT;

(10) the FTT was entitled to find that Officer Sayers genuinely held the view that revocation was appropriate on the basis only that laundered fuel was found in the white diesel storage tank and in the running tanks of the Vehicles; and

(11) the FTT was entitled to consider the May 2014 version of Public Notice 192 because that policy was in force by the time of the hearing before the FTT. In any event, it is denied that Public Notice 192 established as a pre-condition to revocation, involvement in the misuse of controlled oil. It would be reasonable and not disproportionate to revoke the licence of an honest dealer who was inadvertently dealing in laundered oil where that dealer could not establish that all due diligence, investigation, and monitoring of employees was undertaken: in such circumstances, there would still be danger to the revenue, because contaminated (and laundered) fuel would be being used as fuel for road vehicles, at a loss to the revenue.

76. It is clear from the findings the FTT made with respect to Officer Sayers' evidence at [73] of the FTT 2016 Decision that by the time of the hearing Officer Sayers had formed the view that the fact that laundered fuel was found in the white diesel storage tank and in the running tanks of the Vehicles was sufficient without more to justify the revocation of the Company's RDCO status. It is clear also from the reasoning in [98] of the FTT 2016 Decision that the FTT based its decision not to direct a further review of the Revocation Decision solely on the basis that the Company "had large quantities of laundered fuel on its premises" because the presence of such fuel would indicate that the Company's procedures, due diligence or monitoring of staff were not of sufficient standard. It is implicit in the FTT's reasoning that notwithstanding the fact that it found that Officer Sayers took into account factors which, following the FTT's findings of fact, were not relevant, the large quantities of laundered fuel found and the presumption of a lack of due diligence would inevitably mean that any officer carrying out a further review would be bound to come to the same conclusion.

77. It is clear that there will be many different sets of circumstances concerning an RDCO that will call into question whether its status should be revoked. Mr Patchett-Joyce was right to refer to a spectrum of circumstances, at one end there being the deliberate fraudster who knowingly supplies fuel passed off as white diesel which in fact consists entirely of red diesel which he himself has laundered. Slightly further down the spectrum would be a dealer who supplies fuel which he knew to be laundered, even if he had not laundered it himself. Bearing in mind the risks to the revenue in those circumstances and the widespread misuse of red diesel, if the FTT had found facts that led it to conclude that such circumstances existed in this case, then a conclusion that any officer reviewing a decision with that factual scenario would inevitably come to the same decision would be a rational one, and not one that was capable of being challenged as an error of law.

78. The question becomes more problematic once, as in this case, deliberate behaviour is taken out of the equation. In a case where the FTT finds that the Company and its witnesses are honest but that it has failed to take reasonable steps to avoid the misuse of controlled oil then again there can be a spectrum of circumstances, some of which may inevitably lead to a decision to revoke and some of which may not.

79. For example, if the dealer is found in possession of a large quantity of fuel which consists entirely of laundered fuel which it acquired without carrying out proper checks as to its supplier and which it has been supplying to its customers in ignorance of the position then again it can be seen that the risks to the revenue are very significant and could well justify a conclusion by a tribunal that a further review of a flawed decision would inevitably come to the same conclusion.

80. Further down the spectrum, if the dealer is found in possession of a large quantity of white diesel which appears to have been inadvertently mixed with a relatively small amount of laundered red diesel, where there is no evidence that large quantities of such fuel has been supplied to customers and where there is no evidence that the dealer's due diligence procedures are seriously deficient, then in our view it cannot be said that for the protection of the revenue revocation of the dealer's status would inevitably follow.

81. This is also against a background where, as we have noted at [23] above, HMRC's policy does not specifically indicate the circumstances in which revocation as an RDCO is justified in circumstances where no deliberate finding of the misuse of controlled oil has been made.

82. In this case, there is no evidence from the decision letter dated 5 November 2013 that Officer Sayers had given any consideration to the spectrum of circumstances which we have outlined above. As Officer Sayers stated in his evidence to the FTT, the decision was based purely on the finding of a large amount of white diesel which was mixed with laundered red diesel on the premises.

83. In our view, it cannot be said that there has been proper consideration of the question of proportionality in a case where all that is relied on is the fact of the amount of the fuel and its nature which has been found on the relevant premises and there has been no consideration of all the relevant circumstances. There is no evidence in the decision letter, or the review decision in the letter dated 14 February 2014, that proportionality has been considered. Furthermore, the expression by Officer Sayers, when cross-examined, of his view that the presence of laundered fuel on the premises and in the vehicles was sufficient to justify revocation indicates that in coming to that conclusion the officer had not considered the question of proportionality.

84. In those circumstances, not only must such a decision be regarded as flawed but there can be no basis for it being said that it would be inevitable that, had Officer Sayers considered the question of proportionality, his decision would have been the same. On that basis, in our view the FTT made an error of law when it concluded at [100] that given that the presence of a large amount of laundered fuel on the premises

was such a serious matter, it was inevitable that Officer Sayers would reach the same conclusion. We have indicated that HMRC's policy in relation to revocation on the grounds of involvement in the misuse of controlled oil which is not deliberate is not clearly stated and, as was held in *Bomba*, where a tribunal cannot anticipate to a high degree of certainty how HMRC would apply their policy to the facts as found it is not open to the tribunal to find that the high bar of inevitability has been successfully mounted: see [33] above.

85. It follows from what we have said above that we do not accept Mr Donmall's submission that the issue of inevitability is purely a question of fact. It is clearly a question of law where, as in this case, the FTT has erred in its approach to determining that issue.

86. Neither do we accept Mr Donmall's submissions that in this case the burden was on the Company to provide evidence as to its due diligence procedures. Officer Sayers did not base his decision on the fact that the Company's procedures were deficient. It is reasonable to expect that an RDCO will base its challenge to a revocation decision on responding to the reasons given by HMRC in making that decision, and it would be unreasonable to criticise an RDCO for failing to provide evidence in respect of something that did not bear on the decision in question.

87. In this case, the original decision was based on a number of factors which had ceased to be relevant by the time of the hearing before the FTT of the appeal against the Revocation Decision. In particular, the decision letter suggests deliberate behaviour on the part of the Company in mixing white diesel with laundered red diesel. We can see that the effectiveness of due diligence procedures can be a highly relevant factor in circumstances where revocation is sought to be justified on the basis that controlled oil has been inadvertently or negligently misused, but that was not the basis of the decision and, as Officer Sayers indicated in his evidence, would not have been the basis of any decision which did not take into account the factors which were no longer relevant. The Company therefore had no opportunity to make representations or submissions on the quality of its due diligence and therefore in our view the FTT was wrong to have made a presumption, as it did at [98] of the 2016 FTT decision that the Company's procedures, due diligence or monitoring of staff were not of sufficient standard.

88. It follows from the above that in our view, in respect of the Revocation Decision, the Company has made out its case on Ground 4 of its grounds of appeal, that is on the question of proportionality. In those circumstances, it is not necessary to consider Grounds 1 and 2, which relate to the FTT's findings in the FTT 2016 Decision as to whether there was evidence that the Vehicles were being used for laundering or transporting contaminated fuels or that the fuel was laundered as opposed to white diesel being contaminated with laundered fuel, as well as the FTT's conclusion that the Company had failed to demonstrate that it was not involved in the laundering.

89. In that respect we would say only this. In our view the highest criticism that can be levelled at the FTT is that it was somewhat loose in its language when referring to

"laundered fuel". We think it is clear from the findings of the FTT which we refer to at [49] above that the FTT was fully aware that not all the fuel seized was laundered, but consisted of fuel which contained some laundered fuel. Neither in our view are the issues as to (i) whether or not the FTT in the FTT 2014 Decision had made a finding as to whether any of the vehicles had been involved in the laundering of fuel or (ii) the FTT in the FTT 2016 Decision expressing the view that it had not been shown that the Company was not involved in laundering fuel relevant, bearing in mind that HMRC does not rely on any of those matters in relation to the Revocation Decision.

Restoration Decision

90. In response to a number of criticisms of the FTT's findings made by Mr Patchett-Joyce, Mr Donmall submits as follows:

(1) the FTT was entitled to make the following findings of fact on the evidence:

(a) the finding at [107] of the FTT 2016 Decision that had Officer Brown known of the self-referral aspect of the first 2009 incident it would have made no difference to her decision;

(b) the finding at [107] of the FTT 2016 Decision that the second seizure in June 2009 was a separate incident to the first seizure in circumstances where after the first seizure the Company had been instructed to remove all traces of red diesel from the Vehicles;

(c) the finding at [106] of the FTT 2016 Decision that despite the fact that the Company contacted HMRC regarding the June 2009 incident indicating that at least some of its staff were not aware of the misuse of controlled oil, this did not demonstrate that everyone at the Company was unaware of the presence of contaminated fuel;

(d) the finding at [78] of the FTT 2016 Decision that Officer Brown was aware of her discretion to restore when carrying out the review;

(2) the FTT did not err in finding at [78] of the FTT 2016 Decision that, even if Officer Brown did "stick to the policy", by doing so she would inevitably be considering whether it was proportionate to refuse restoration of the Vehicles;

(3) the FTT did not err in finding at [107] of the FTT 2016 Decision that the seizures involved four vehicles and therefore was not an isolated incident notwithstanding the Company's assertion that it was highly probable that the fuel had all come from one common source with the effect that there was one incident, manifested in four vehicles.

91. Consequently, Mr Donmall submits that the FTT did not act perversely in concluding that HMRC's decision not to restore the Vehicles was reasonable and/or proportionate.

92. For similar reasons that we have given in relation to the Revocation Decision, we have concluded that the Company has made out its case on Ground 3 of its grounds of appeal, that is on the question of proportionality.

93. Our observations at [77] to [80] above in relation to a spectrum of circumstances that can give rise to consideration as to whether RDCO status should be revoked are equally applicable to a decision whether or not to restore vehicles that have been seized under the "three strikes" policy.

94. This is against a background where, as we have observed at [19] above, HMRC's policy does not specifically indicate the circumstances in which refusal to restore is justified in circumstances where no deliberate finding of the misuse of controlled oil has been made.

95. In this case, there is no evidence from the decision letter dated 19 December 2014 that Officer Brown had given any consideration to the spectrum of circumstances which we have outlined above. It is clear from Officer Brown's evidence to the FTT that the decision was made by strict application of the "three strikes" policy and even if she had, as the FTT found, considered the question of proportionality, she clearly had not considered it on the basis that the policy might be applied differently in cases of non-deliberate behaviour.

96. In those circumstances, the self-referral question, whether the two seizures in June 2009 can be regarded as a separate incident and whether the fact that the fuel that filled the four vehicles came from the same source and there was one incident, manifested in four vehicles, takes on greater significance and could well result in a different decision by a reviewing officer considering the question of proportionality in the context of a policy that makes no clear distinction between incidents resulting from deliberate behaviour as opposed to negligent or inadvertent behaviour.

97. Consequently, with respect to the Restoration Decision, as with the Revocation Decision, in our view the FTT could not have anticipated to a high degree of certainty how HMRC would apply their policy to the facts as found and it was therefore not open to the FTT to find that the high bar of inevitability has been successfully mounted. Accordingly, we find that the FTT has made an error of law in that respect.

Remaking the FTT 2016 Decision

98. As we have found that the making of the FTT 2016 Decision involved the making of an error on a point of law, s 12 (2) of the Tribunals, Courts & Enforcement Act 2007 ("TCEA") gives us a discretion to set aside the decision.

99. In our view, the errors of law are significant such that we should exercise our discretion to set the decision aside. We then need to consider whether we should remit the case to the FTT or re-make the decision ourselves.

100. We have decided that the appropriate course is to re-make the decision. Bearing in mind the limited jurisdiction provided by s 16 FA 1994, we should remake the decision by setting aside both the Revocation Decision and the Restoration Decision and by directing that HMRC undertake a further review of each of those decisions pursuant to the powers contained in s 16(4)(b) and (c). Our detailed directions in that regard are set out below, together with our consideration as to whether it is necessary to make any further findings of fact or remake any of the findings of fact made by the

FTT in the FTT 2016 Decision pursuant to our powers in that respect contained in s 12(4) TCEA.

Directions

101. As is usual practice when a tribunal directs a further review of a decision in accordance with s 16 FA 1994, we propose to make a direction as to the findings of fact that HMRC should take into account in reviewing the decision concerned.

102. It is clearly appropriate that the review should take into account the findings of fact made by the FTT in both the FTT 2014 Decision and the FTT 2016 Decision. We have considered whether we should remake any of those findings in the light of the submissions of the parties on this appeal.

103. We turn first to the FTT's equivocal findings regarding the question as to whether the Company was involved in the laundering of fuel at [69] and [70] of the FTT 2016 Decision which are set out at [54] above.

104. We agree with Mr Patchett-Joyce that, having found on the balance of probabilities that the Company's witnesses were honest and having made a corresponding finding in respect of the Company's "evident honesty in its dealings with HMRC" and that therefore it could not find, on the balance of probabilities that the Company itself had been involved in the laundering of fuel, then it should have let matters rest at that point. Therefore, and also bearing in mind, as we stated at [89] above that HMRC's case is not dependent on whether the Company itself has been involved in the laundering of fuel, the new reviews should be conducted on the basis that the Company was not involved in the laundering of fuel. Similarly, with respect to the question as to whether there was a finding in the 2014 FTT Decision that any of the vehicles had been involved in the laundering of fuel, the review should proceed on the basis that none of the Company's vehicles had been involved in the laundering of fuel.

105. It follows from our conclusions at [104] above that, in the light of the FTT's findings as to the honesty of the Company and its witnesses, in carrying out the reviews HMRC should take no account of the observation at [106] of the FTT 2016 Decision that it has not been demonstrated that at the time of the seizures in 2009 that everyone at the Company was unaware of the presence of contaminated fuel. The FTT did not find, on the balance of probabilities, that any member of staff of the Company was aware of that fact and the reviews should therefore proceed on that basis.

106. We turn now to the question as to whether the review of the Restoration Decision should proceed on the basis of there having been two separate seizures in 2009 rather than one and whether the events in 2009 should be regarded as an isolated incident which happened to be manifested in four vehicles.

107. We do not think that we should make any definitive findings on that issue. If we were to do so, we would in effect be treating HMRC's restoration policy as legislation, to be construed as such. We agree with the assessment of the FTT at [103] of the FTT 2016 Decision, as set out at [67] above, that the "three strikes" policy is

not inherently unreasonable but it is inherent in the policy that there should be a degree of flexibility around it and HMRC is not bound to apply it inflexibly or interpret its provisions on purely literal basis. We are, however, of the view that HMRC should in its consideration of how to apply the policy give weight to the fact that the two separate seizures did arise from the same incident within a short period of time and that the second seizure arose as a result of the vehicle concerned merely containing residual contaminating particles following the Company's efforts to empty the tank to the extent physically possible.

108. As regards the findings of the FTT at [107] of the FTT 2016 Decision, in our view the FTT has overstated the position by finding that there were aggravating factors associated with the seizures of the Vehicles in 2013. In our view, the evidence clearly points to a conclusion that there was a single incident involving the running tanks of four vehicles rather than the container pots of those vehicles. Neither, in the light of our conclusions at [104] above, should it be regarded as an aggravating factor that the Company had not satisfied the FTT that it was not involved in the laundering of fuel.

109. Finally, bearing in mind that there has been a change in HMRC's policy regarding the revocation of RDCO status since the Revocation Decision was made, we have considered whether HMRC's review should proceed on the basis of the new policy as set out in Public Notice 192 rather than the terms of Public Notice 192 as it was in force at the time of the Revocation Decision.

110. In our view, it would be appropriate to apply the previous policy because the sole reason HMRC gave for the revocation was the need to protect the revenue, which continues to be a ground for revocation under the new policy. However, because HMRC seeks to revoke the Company's RDCO status in circumstances where it does not allege deliberate misuse of controlled oil, we think the quality of the Company's due diligence policies and procedures and monitoring of staff designed to ensure that rebated fuel is not misused will be relevant to HMRC's review decision and the FTT had no evidence on those procedures before it. We will therefore give the Company the opportunity of making further representations to HMRC as to those procedures and policies as they were in force at the time of the seizure in 2013.

111. Accordingly, we direct that:

(1) Both the Revocation Decision and the Restoration Decision are set aside and cease to have effect;

(2) HMRC must undertake a new review of those decisions, to be undertaken by a Reviewing Officer other than Officer Brown or Officer Sayers within the period prescribed at (7) below;

(3) The Company may within 28 days of the release of this Decision provide HMRC with evidence regarding its due diligence policies and procedures regarding its handling of controlled oil as were applicable in June 2013;

(4) The new reviews must proceed on the basis of the findings of fact made by the FTT in the FTT 2014 Decision and the FTT 2016 Decision, but subject to the further findings of this tribunal set out at [104] to [108] above;

(5) The new review of the Revocation Decision must take into account the conclusions of this tribunal at [110] above; and

(6) The new reviews must make clear the principal factors taken into account when deciding the issue of proportionality, setting out those factors which tend to support a decision in favour of the Company and those factors which tend to support a contrary decision, giving full reasons for the reviewing officer's conclusions on the proportionality issue. In particular, the reviewing officer should pay particular regard to the fact that the 2009 seizures followed a "self-referral", that circumstances justifying prosecution of the Company for the misuse of controlled oil are not present in this case and that the relevant published policy of HMRC both in relation to the Revocation Decision and the Restoration Decision does not deal comprehensively with the position where the misuse of controlled oil on which the decisions were based did not involve deliberate behaviour on the part of the Company; and

(7) The new reviews shall be undertaken within 56 days of the receipt of the evidence referred to at (3) above or, if such evidence is not received within the period prescribed at (3) above, within 56 days of the expiry of such period.

Disposition

112. The appeal is allowed.

JUDGE ROGER BERNER **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 8 August 2017