[2020] UKUT 133 (TCC)

Appeal number: UT/2019/0004

EXCISE DUTY – Whether evidence of the results of tests on fuel inadmissible under paragraph 5(2)(b) of Schedule 5 of the Hydrocarbon Oil Duties Act 1979 – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ITC (NE) LIMITED **Appellant**

-and-

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

TRIBUNAL **MR JUSTICE BIRSS**
JUDGE JONATHAN RICHARDS

Sitting in public at The Rolls Building, Fetter Lane, London on 3 March 2020

Matthew Crowe, instructed by ASW Legal Limited, solicitors, for the Appellant

Kelly Bond, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant appeals against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 6 September 2018. In the Decision, the FTT dismissed the Appellant's appeals against an assessment to excise duty in the sum of £36,875 and a related penalty of £19,539.

2. HMRC made the assessment under s13(1A) of the Hydrocarbon Oil Duties Act 1979 ("HODA") because they considered that the Appellant had been using rebated kerosene in road vehicles contrary to s12(2) of HODA. The penalty was imposed under paragraph 3 of Schedule 41 Finance Act 2008 ("Schedule 41") because HMRC considered that the Appellant had "done an act which enables HMRC to assess an amount as duty due" under s13(1A) of HODA.

3. Therefore, both the assessment and the penalty were imposed because HMRC considered that the Appellant was using rebated kerosene in road vehicles. The FTT heard evidence as to results of tests performed on fuel said to have been sampled from the running tanks of vehicles owned by the Appellant. In this appeal, the Appellant argues that, by virtue of paragraphs 1 and 2 of Schedule 5 of HODA, the FTT should not have admitted certain of that evidence.

Relevant statutory provisions

4. It was common ground that, if the Appellant had used rebated kerosene to fuel its road vehicles, it would have been in breach of s12(2) of HODA which provides as follows:

> **12 Rebate not allowed on fuel for road vehicles**
>
> …
>
> (2) No heavy oil on whose delivery for home use rebate has been allowed (whether under section 11 above or section 13ZA or 13AA(1) below) shall—
>
> (a) be used as fuel for a road vehicle; or
>
> (b) be taken into a road vehicle as fuel,
>
> unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.

5. It was also common ground that, if the Appellant was in breach of s12(2) of HODA, HMRC were entitled effectively to "claw back" the benefit of the rebate on the misused fuel by making an assessment under s13(1A) of HODA which provides as follows:

> **13 Penalties for contravention of section 12**
>
> …
>
> (1A) Where oil is used, or is taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may—

> (a) assess an amount equal to the rebate on like oil at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle, and
>
> (b) notify him or his representative accordingly.

6. The relevant penalty provisions are found in Schedule 41. Paragraph 3 of that Schedule provides as follows:

> **3 Putting product to use that attracts higher duty**
>
> (1) A penalty is payable by a person ("P") where P does an act which enables HMRC to assess an amount as duty due from P under any of the provisions in the Table below (a "relevant excise provision").

7. Section 13(1A) of HODA is specified in the accompanying table and so it follows that, where HMRC make an assessment under s13(1A) of HODA, they are also entitled to issue a penalty under paragraph 3 of Schedule 41.

8. The amount of penalty is specified in paragraph 6B of Schedule 41 by reference to a percentage that is applied to the "potential lost revenue" which, in the circumstances of this appeal, is the amount of excise duty that is the subject of the assessment under s13(1A) of HODA (see paragraph 9 of Schedule 41). The penalty percentage is determined by reference to a sliding scale of culpability: a penalty percentage of 100% applies in the case of "deliberate and concealed acts"; "deliberate but not concealed acts" attract a penalty percentage of 70% with other acts attracting a penalty percentage of 30%. Paragraph 12 of Schedule 41 provides for a penalty to be reduced where a taxpayer discloses relevant acts or failures to HMRC.

9. Thus, the statutory authority under which HMRC made the assessment at issue in this appeal is s13(1A) of HODA. The statutory authority under which they imposed the penalty was paragraph 3 of Schedule 41. However, the procedure under which the Appellant is entitled to challenge those decisions of HMRC is found in a different statute altogether, namely the Finance Act 1994 ("FA 1994"). Section 13A(2)(c) of FA 1994 treats an assessment under s13 of HODA as a "relevant decision". Section 16(1B) of FA 1994 provides a right of appeal to the FTT against such a "relevant decision" and s16 generally sets out the powers of the FTT in relation to such appeals. The right of appeal against the penalty is conferred by a more indirect route. Paragraph 17 of Schedule 41 provides a right of appeal to the FTT against any penalty imposed by Schedule 41. Paragraph 18 provides for that appeal to be treated in the same way as an appeal against an assessment to the tax concerned. Therefore, the powers of the FTT in relation to an appeal against a Schedule 41 penalty are similarly to be found in s16 of FA 1994.

10. Section 24 of HODA permits HMRC to make regulations connected with, among other matters, the addition of chemical "markers" to rebated fuel so that it can be distinguished from dutiable fuel. Section 24(3) of HODA makes the following provision connected with statutory markers:

(3) For the purposes of the Customs and Excise Acts 1979, the presence in any hydrocarbon oil, biodiesel or bioblend of a marker which, in regulations made under this section, is prescribed in relation to—

(a) oil delivered without payment of duty under section 9 above; or

(b) rebated heavy oil, rebated light oil, rebated biodiesel or rebated bioblend,

shall be conclusive evidence that that oil has been so delivered or, as the case may be, that the rebate in question has been allowed.

11. In order to determine whether statutory markers are present in fuel, and so whether the presence of those markers is "conclusive evidence" of particular facts for the purposes of s24(3), Schedule 5 of HODA ("Schedule 5") contains provisions dealing with the sampling of fuel, and the admissibility of evidence as to the analysis of fuel samples. The provisions relevant to this appeal are as follows:

SCHEDULE 5 Sampling

1 The person taking a sample—

(a) if he takes it from a motor vehicle, shall if practicable do so in the presence of a person appearing to him to be the owner or person for the time being in charge of the vehicle;

(b) if he takes the sample on any premises but not from a motor vehicle, shall if practicable take it in the presence of a person appearing to him to be the occupier of the premises or for the time being in charge of the part of the premises from which it is taken.

2 (1) The result of an analysis of a sample shall not be admissible—

(a) in criminal proceedings under the Customs and Excise Acts 1979; or

(b) on behalf of the Commissioners in any civil proceedings under those Acts,

unless the analysis was made by an authorised analyst and the requirements of paragraph 1 above (where applicable) and of the following provisions of this paragraph have been complied with.

(2) The person taking a sample must at the time have divided it into three parts (including the part to be analysed), marked and sealed or fastened up each part, and—

(a) delivered one part to the person in whose presence the sample was taken in accordance with paragraph 1 above, if he requires it; and

(b) retained one part for future comparison.

(3) Where it was not practicable to comply with the relevant requirements of paragraph 1 above, the person taking the sample must have served notice on the owner or person in charge of the vehicle or, as

> the case may be, the occupier of the premises informing him that the sample has been taken and that one part of it is available for delivery to him, if he requires it, at such time and place as may be specified in the notice.

12. Paragraph 2(1) of Schedule 5 regulates the admissibility of evidence in proceedings under the "Customs and Excise Acts 1979". It was common ground that this term is defined in s 1 of the Customs and Excise Management Act 1979 ("CEMA") as follows:

> "the Customs and Excise Acts 1979" means –
>
> this Act,
>
> the Customs and Excise Duties (General Reliefs) Act 1979
>
> the Alcoholic Liquor Duties Act 1979
>
> the Hydrocarbon Oil Duties Act 1979 and
>
> the Tobacco Products Duty Act 1979

The Decision

13. The FTT was faced with a substantial disagreement between the parties on many matters of primary fact. In this section, we will set out a summary of the key findings of fact that the FTT made, and its core reasoning, only insofar as relevant for the purposes of this appeal. References in this section to numbers in square brackets are to paragraphs of the Decision unless stated otherwise.

Findings as to the presence of rebated kerosene in the Appellant's vehicles

14. On 15 July 2014, Mrs Julie Ramsay, an officer of HMRC, stopped a vehicle owned by the Appellant (which we will identify, by reference to its registration number, as "Vehicle VO59"). At the time, she was accompanied by another HMRC officer (Mr Harwood) and a trainee (Mr Udberg). A sample of the fuel was taken at the roadside from that vehicle. Before us, the Appellant does not seek to argue that there was any breach of Schedule 5 in connection with the roadside test of the fuel in Vehicle VO59 and therefore we will not describe the circumstances surrounding the taking of that sample in any detail.

15. Having considered the results of the Government Chemist's analysis of fuel taken from Vehicle VO59 at the roadside, the FTT found 32% of the fuel in the running tank of Vehicle VO59 tested positive for statutory markers associated with rebated kerosene ([78]). It was not clear whether HMRC seized vehicle VO59 immediately following the roadside test ([44]) but little turns on this since Vehicle VO59 was seized later on the same day as discussed at paragraph [22] below.

16. Since the roadside test on Vehicle VO59 indicated the presence of rebated kerosene, HMRC decided that they would visit the Appellant's business premises with a view to checking whether it was using rebated kerosene more generally. Accordingly, Mrs Ramsay and the team of HMRC officers made their way to those premises, arriving at around 13.40 on 15 July 2014 ([43]).

17. On arrival at the Appellant's premises, Mrs Ramsay identified herself as an HMRC officer and explained that she wished to conduct tests on fuel in the running tanks of the Appellant's vehicles. Mr Welsh, the sole director of the Appellant, gave her a list of the Appellant's vehicles and a box of vehicle keys ([49] and [50]).

18. The HMRC team proceeded to test the fuel of the Appellant's vehicles. Significantly for the issues arising in this appeal, neither Mr Welsh nor any representative of the Appellant was present while those tests took place. We set out the FTT's findings of fact in this regard in full:

> 51. Mr Welsh claims that he did not know that the fuel tanks of the appellant's vehicles were being sampled and tested. He had given the box of keys to Mrs Ramsay. It is simply not credible that Mr Welsh was not aware that a large number of the appellant's vehicles in the vicinity of the Premises were being sampled and tested. Having heard and seen Mr Welsh give evidence it does not strike me that he would simply have given an unidentified officer a box of keys and let her get on with whatever it was she wanted to do.
>
> 52. I find that Mr Welsh was aware of the purpose of Mrs Ramsay's visit and that her officers were taking samples and testing the fuel. He could clearly have insisted on being present when the samples were drawn. The statutory provisions go further. Paragraph 1 Schedule 5 HODA 1979 provides that the sample "shall if practicable" be taken in the presence of the owner or the person in charge of the vehicle. Mrs Ramsay did not suggest that it was impracticable for Mr Welsh to be present, or that Mr Welsh refused to observe. This point was not pursued by either party but it seems to me that Mrs Ramsay could and should have ensured that Mr Welsh or another representative of the appellant was present or should have noted the position if he refused for any reason to be present. The fact that Mr Welsh was not present when samples were taken meant that he had no opportunity at that time to raise any issues in connection with the taking of samples.

19. At [52], the FTT referred to the question of admissibility of the results of the fuel tests that is at the heart of the appeal to this Tribunal. Ms Bond, who appeared in the proceedings before the FTT, confirmed to us that the FTT did not raise the admissibility issue during the hearing itself and therefore we infer that the FTT identified that issue after the hearing, while preparing its decision.

20. It appears that, although Mrs Ramsay may have observed the first few tests (see her evidence summarised at [22(9)]), most of the actual testing was undertaken by Mr Harwood and Mr Udberg. While those tests were being conducted, Mrs Ramsay was in the Appellant's office having a discussion with Mr Welsh. Mr Harwood and Mr Udberg contacted Mrs Ramsay by radio as their tests proceeded and Mrs Welsh kept a list recording the vehicles that had been tested and which vehicles had tested positive for statutory markers associated with rebated kerosene. The FTT set out the list that Mrs Ramsay kept at Annex 1 of the Decision.

21. Mrs Ramsay's list was inaccurate in material respects. Specifically, some of the vehicles that were listed as having been tested were not actually at the Appellant's premises that day. The FTT observed:

> 60. Whatever the circumstances which contributed to these errors, it is very troubling that the procedures adopted did not eliminate the risk of the errors occurring. I cannot help but think that if Mr Welsh had been present whilst the samples being drawn and Mrs Ramsay had been present rather than relying on radio contact then the errors would not have occurred.

22. Mrs Ramsay concluded that six of the Appellant's vehicles (including Vehicle V059 which had been tested earlier in the day) had rebated kerosene in their running tank. However, she considered that four of those tests were more conclusive than the other two. After discussion with a colleague (Mr Allinson), Mrs Ramsay decided that she would exercise her power as an HMRC officer to seize just four vehicles, one of which was Vehicle V059. However, having seized those vehicles, she immediately exercised HMRC's power under s152(b) of CEMA to restore them for a fee of £2,000. Mr Welsh paid that fee by card and the Appellant did not make any challenge to the lawfulness of any seizure ([72]).

23. At [26], the FTT recorded HMRC's evidence that the results of tests on fuel sampled from the six vehicles with positive results showed the presence of rebated kerosene in proportions ranging from 32% in the case of Vehicle VO59 and 30% in the case of another vehicle with lesser concentrations (between 2% and 7%) being present in the fuel sampled from the other four vehicles.

24. Part of the Appellant's case before the FTT was that, despite the apparent results of the tests on fuel, there was no rebated kerosene in the running tanks of <u>any</u> of its vehicles. At [74] to [79], the FTT concluded that, on the basis of the decision of the Court of Appeal in *Revenue and Customs Commissioners v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*"), given that the Appellant had not challenged the lawfulness of the seizure of the four vehicles, it was bound to accept, as a "deemed fact" that there was at least a trace of rebated kerosene in the running tank of those four vehicles. The Appellant was, however, entitled to argue that there was nothing more than a trace of kerosene in these four vehicles. The FTT concluded that the Appellant was entitled to argue that there was no kerosene whatsoever in the running tank of any other vehicle. Ultimately, however, the FTT found as a fact that rebated kerosene was present in all six vehicles in the concentrations reflected by HMRC's test results. In doing so, the FTT specifically rejected the Appellant's argument that the test results were unreliable.

The FTT's findings in relation to the assessment

25. At [80] to [86], the FTT explained how HMRC calculated the assessment. Very broadly, that assessment was in respect of the period 1 June 2011 to 14 July 2014. During that period, HMRC determined that the Appellant owned 25 vehicles. They sought to determine the total miles travelled during the period by those vehicles and the amount of fuel that, based on the fuel efficiency of those vehicles, would be used in travelling those miles.

26. Having determined the total amount of fuel that they considered the Appellant's vehicles would have needed, HMRC determined how much "legitimate" fuel the Appellant had purchased (by reference to fuel receipts that the Appellant supplied). The shortfall between the amount of fuel needed, and the legitimate fuel that the Appellant could demonstrate was purchased was assumed to represent the use of rebated fuel. The FTT summarised HMRC's conclusions in a table at [86]:

Total Litres Required	254,226
Total Litres Purchased	190,593
Shortfall	63,333
Duty on the Shortfall	£36,875

27. At [87], the FTT considered, and dismissed, a challenge to the methodology HMRC employed to make their assessment based on the alleged defects in their fuel testing procedure in the following terms:

> 87. The appellant says that Mr Gilmartin failed to take into account the errors in the sampling and testing procedure referred to above. As a result it is unreasonable to attribute the calculated shortfall to the use of rebated fuel. I have found that the 6 vehicles tested all contained kerosene as indicated above. It was not clear to what extent Mr Gilmartin took the test results into account, but for present purposes it is clear that I should do so.

28. In a similar vein, at [109] and [110], the FTT rejected the Appellant's argument that the shortfall that HMRC had identified could not be attributable to the use of rebated kerosene as its fuel receipts were independently checked by FedEx and it had been in business for 15 years without any detections of rebated fuel in its vehicles.

29. Paragraphs [88] to [109] were concerned with specific challenges to points of detail in HMRC's assessment. Since the FTT's conclusions in these paragraphs are not under appeal, we will just give a flavour of a few of them:

> (1) At [88], the FTT rejected the Appellant's case that Vehicle VO59 could not operate using kerosene as fuel.
>
> (2) At [89] to [98], the FTT rejected the Appellant's arguments that at least some of its vehicles were more fuel-efficient than HMRC had estimated with the result that the total fuel needed to power those vehicles was less, and so the "shortfall" was lower, than HMRC had estimated. At [99], the FTT observed that, even if it had accepted the Appellant's case as to the fuel-efficiency of its vehicles, it would still have concluded that there was significant use of rebated kerosene in the Appellant's fleet as, although the shortfall on which HMRC had based their assessment would be reduced, it would still be significant at 53,446 litres.
>
> (3) At [101] to [108], the FTT considered and rejected the Appellant's case that some of its vehicles were "subcontracted" to third parties on terms that those third parties would be responsible for fuelling them.

30. The FTT's overall conclusion in relation to the Assessment was set out at [111] as follows:

> 111. The appellant has not satisfied me that there is any innocent explanation for the significant shortfall in fuel purchases identified by Mr Gilmartin. Even if there had been only 4 vehicles which had tested positive for traces of kerosene there would still be no explanation. Taking all the evidence into account I am not satisfied that the Assessment is excessive.

The FTT's decision in relation to the penalty

31. The FTT decided that the Appellant's use of rebated kerosene in its fleet was deliberate, but not concealed. Its essential reasoning was contained in the following paragraphs:

> 118. There is no suggestion that the appellant's vehicles were run exclusively on kerosene. What is said is that kerosene has been mixed with legitimate road fuel to avoid excise duty. The large shortfall in purchases of legitimate diesel and the absence of any innocent explanation for that shortfall point strongly to deliberate use of kerosene by the appellant. I also take into account the high level of kerosene in two vehicles with smaller, but still significant levels in four other vehicles.
>
> 119. On the balance of probabilities I am satisfied that the explanation for the shortfall in fuel purchases over the period of the Assessment is deliberate use of kerosene as a road fuel by the appellant. Even if the evidence was limited to trace levels of kerosene in four vehicles, that would still have been consistent with mixing of kerosene and legitimate road fuel. I would still have found that there had been deliberate use of kerosene mixed with legitimate fuel in the period of the Assessment.

32. The FTT then considered the extent to which the penalty should be reduced by reference to the Appellant's disclosure of relevant acts and failures to HMRC. There was some doubt as to whether the Appellant had properly raised this issue in its appeal against the penalty, but the FTT concluded that it was in the interests of justice to consider the issue. At [126], the FTT upheld HMRC's determination that the Appellant should be given 50% of the maximum possible reduction to the penalty. That meant that the applicable penalty percentage was 52.5% of the unpaid duty (see [121]) and so the applicable penalty was £19,359 as HMRC had determined.

The grounds of appeal against the Decision and overview of the parties' positions

33. The Appellant has permission to appeal on the following two grounds:

> (1) Ground 1 – The FTT erred in law in concluding that the results of HMRC's testing of fuel could be admitted in evidence in circumstances where HMRC had not advanced evidence, or sufficient evidence, that the conditions set out in paragraphs 1 and 2 of Schedule 5 were satisfied.

(2) Ground 2 – The FTT erred in law in failing to conclude from the facts that it found (including, in particular, any findings of fact at [52] of the Decision) that the results of HMRC's testing of fuel should not be admitted as evidence.

34. In advancing these grounds of appeal, the Appellant acknowledges that it made no challenge to the admissibility of the fuel testing evidence at any point during the proceedings. It also accepts that the FTT did not raise the question of admissibility during the hearing, although it did allude to it in the Decision. The essence of the Appellant's Ground 1, therefore, is that whether the Appellant or the FTT raised the question of admissibility or not, in order to be allowed to rely on the fuel test results, HMRC had to advance evidence to the effect that the requirements of paragraphs 1 and 2 of Schedule 5 were satisfied. Since HMRC had not done so, the results of the fuel test results were necessarily not admissible as evidence[1].

35. The Appellant's Ground 2 approaches matters slightly differently. In that ground, the Appellant argues that, at [52] of the Decision, the FTT made a finding of fact to the effect that it was practicable for Mr Welsh to observe the fuel tests that were conducted at its business premises. Having made that finding, it argues that the FTT was obliged to conclude that the requirements of Schedule 5 were not met in relation to those tests and so the evidence of the results of those tests was not admissible[2].

36. HMRC make the following arguments in response:

(1) Schedule 5 is not engaged since it applies only in the context of "proceedings under the Customs and Excise Acts 1979". The appeal to the FTT was not such a proceeding.

(2) The Appellant should not be permitted to raise Ground 1 for the first time on appeal. In any event, Schedule 5 could not have required HMRC to lead evidence to the effect that the requirements of that Schedule were met in circumstances where the Appellant was not raising any challenge to the admissibility of the fuel test results.

(3) Ground 2 should fail because either (i) the FTT made no finding (at [52] of the Decision or elsewhere) to the effect that HMRC officers failed to

[1] As we understood the Appellant's case, this point is not advanced in relation to the results of the tests on Vehicle VO59's fuel. As noted at [14] above, Vehicle VO59 was tested by the roadside before other vehicles were tested at the Appellant's business premises. While the Appellant argues that there was a breach of Schedule 5 during the tests at its business premises (as no-one observed those tests on its behalf), it makes no criticism of the roadside test of Vehicle VO59 and appeared to accept that HMRC's evidence before the FTT demonstrated that the roadside test satisfied the requirements of Schedule 5.

[2] Again, in Ground 2, the Appellant does not challenge the admissibility of the roadside test on Vehicle VO59's fuel.

comply with the requirements of Schedule 5 or (ii) if the FTT made such findings they were unsupported by evidence and so not available to it.

(4) Even if Ground 1 or Ground 2 were established, the FTT had still found that HMRC had correctly determined a shortfall between the Appellant's need for fuel and its purchases of legitimate fuel. The amount of that shortfall on its own justified the assessment that HMRC had made, whatever the results of the fuel tests that were performed on 15 July 2014. Similarly, the extent of that shortfall itself justified the FTT's conclusion that the Appellant's use of rebated kerosene was deliberate. In short, even if Ground 1 or Ground 2 were established, the FTT's conclusion as to the assessment and penalty would have been the same.

Discussion

Whether paragraph 2(1)(b) of Schedule 5 is engaged

37. Both of the Appellant's Ground 1 and Ground 2 rely on the proposition that its appeals against both the assessment and the penalty were "civil proceedings under the Customs and Excise Acts 1979" with the result that the provisions of paragraph 2(1)(b) of Schedule 5 were engaged.

38. It is clear to us that, when the FTT determined the Appellant's appeal against both the assessment and the penalty, it was determining "civil proceedings". However, in paragraph 2(1)(b) of Schedule 5, Parliament has not set out restrictions on the admissibility of evidence that apply in <u>all</u> "civil proceedings". Rather, the restrictions apply only in the case of "civil proceedings under the Customs and Excise Acts 1979". Therefore, the key question is whether the Appellant's appeals against the assessment and penalty were "under the Customs and Excise Acts 1979". As we have noted at [12] above, the statutory definition of the term "Customs and Excise Acts 1979" consists simply of a list of statutes, one of which is HODA.

39. The difficulty for the Appellant's argument is that HODA does not itself confer any right of appeal against either the assessment or the penalty. Nor are the provisions that govern such appeals (such as the powers of the FTT to disturb the assessment or penalty) to be found in HODA. Rather, as we observe at [9] above, the right of appeal against the assessment is to be found in s16 of FA 1994, the right of appeal against the penalty is to be found in paragraph 17 of Schedule 41 and the powers of the FTT on an appeal against either an assessment or a penalty are to be found in s16 of FA 1994. Neither FA 1994, nor Finance Act 2008 (which contains Schedule 41) are on the list of statutes set out in the definition of the "Customs and Excise Acts 1979".

40. Of course the assessment under appeal was made "under" HODA. Even though the penalty is imposed by Schedule 41, HMRC are only empowered to issue that penalty where a taxpayer engages in conduct that would enable them to make an assessment under s13(1A) of HODA and so there is a clear link between the assessment and the penalty. However, paragraph 2(1)(b) of Schedule 5 does not direct attention at the statutory basis for decisions of HMRC. Rather, it sets out a rule of evidence that is to apply in "proceedings" and so directs attention at the statutes "under" which the

proceedings are brought. A literal reading of paragraph 2(1)(b) of Schedule 5 therefore leads to the conclusion that the relevant "proceedings" were the Appellant's appeals against the assessment and the penalty and those proceedings were "under" a combination of FA 1994 and Schedule 41 of Finance Act 2008 rather than any of the statutes set out in the definition of "Customs and Excise Acts 1979". On that interpretation, paragraph 2(1)(b) of Schedule 5 is not engaged.

41. In his oral submissions, Mr Crowe acknowledged that literal interpretation, but argued that we should not adopt it. Rather, he argued that, in the proceedings before the FTT, the whole basis of the Appellant's challenge was that HMRC were wrong to make the assessment under s13(1A) of HODA, and so wrong to issue a penalty based on the making of that assessment. Applying a purposive reading of the legislation, the Appellant was, he submitted, engaged in "proceedings under" HODA.

42. There was force in Mr Crowe's submission. However, it seems to us that, if Parliament had intended the result for which he argues, it might have been expected to refer in paragraph 2(1)(b) of Schedule 5, not to the set list of statutory provisions comprising the "Customs and Excise Acts 1979", but rather to another, much broader definition, also contained in the same s1 of CEMA alongside the defined term "Customs and Excise Acts 1979". It is:

> "the customs and excise acts" means the Customs and Excise Acts 1979 and any other enactment for the time being in force relating to customs or excise.

43. Moreover, while there is a definite logic to Mr Crowe's submission in relation to the assessment, as Ms Bond pointed out, there is less logic to it in relation to the penalty. While the assessment was imposed pursuant to a provision of HODA, the penalty was imposed "under" Schedule 41 and not "under" HODA. The only link between the penalty and HODA is the fact that HMRC are entitled to issue the penalty under Schedule 41 only if a taxpayer engages in conduct that would enable them to make an assessment under s13(1A) of HODA. In those circumstances, even if we were minded to adopt Mr Crowe's broad interpretation, we would not conclude that an appeal against a penalty imposed under paragraph 3 of Schedule 41 amounts to civil proceedings "under" HODA. It follows that, on Mr Crowe's argument, if a taxpayer appeals against both an assessment under s13(1A) of HODA and a penalty under paragraph 3 of Schedule 41 and, as is usual, both appeals are dealt with at the same hearing, there would be restrictions on the admissibility of fuel test evidence in the parts of that hearing relating to the assessment, but not in the parts relating to the penalty. We doubt that Parliament intended that result. Rather, we consider that, having referred to the narrow definition of the "Customs and Excise Acts 1979", rather than the broader definition of the "customs and excise acts", Parliament intended to draw a bright line between those proceedings to which evidential restrictions applied and those that did not.

44. We asked the parties if they could provide us with an example of civil proceedings that are brought under HODA specifically. Neither party was able to do so. However, HODA is by no means the only statute within the definition of "Customs and Excise Acts 1979". CEMA is also within that definition and Schedule 3 of CEMA contains

detailed provisions dealing with condemnation proceedings in the magistrates' court concerning challenges to the lawfulness of HMRC's seizure of goods. Such condemnation proceedings can become relevant if HMRC exercise their power in s13(6) of HODA to seize rebated fuel that they consider has wrongly been taken into a road vehicle, or their power under s141 of CEMA to seize road vehicles running on rebated fuel. Therefore, the interpretation of paragraph 2(1)(b) of Schedule 5 which we favour does not deprive that provision of any practical effect. If HMRC consider that rebated fuel has been taken into a road vehicle and, as a consequence seize the fuel and/or the vehicle in which it was found, paragraph 2(1)(b) of Schedule 5 would impose restrictions on the use of fuel testing evidence in condemnation proceedings brought to challenge the lawfulness of that seizure. In addition, while we have not been shown examples of civil proceedings taken under HODA specifically, HODA does provide for certain criminal sanctions to apply to the misuse of rebated fuel (see for example s13(4) of HODA). Paragraph 2(1)(a) of Schedule 5 would clearly apply in the case of such criminal proceedings.

45. Therefore, for the reasons that we have given, we do not consider that the Appellant's appeals against the assessment and penalty were "civil proceedings under the Customs and Excise Acts 1979" for the purposes of paragraph 2(1)(b) of Schedule 5. While that was not our initial impression of the matter, we are satisfied that this interpretation is consistent with the overall purpose of the statutory provision and, importantly, does not deprive that provision (or paragraph 2(1) of Schedule 5 generally) of practical effect. That conclusion is sufficient to dispose of the Appellant's appeal. However, recognising that the question of interpretation is not straightforward, in the section that follows, we consider whether, even if we are wrong in our approach to that question of interpretation, and even if evidence of the test results had been excluded, the outcome of the Appellant's appeal to the FTT would have been different.

Whether the outcome would have been different even if fuel test evidence was excluded

46. The first point to note is that the Appellant challenges only the admissibility of evidence relating to vehicles tested at its business premises on 15 July 2014. There is no challenge to the admissibility of the evidence of the roadside test on Vehicle VO59, and no challenge to the FTT's finding of fact at [78] that 32% of the fuel in the running tank of that vehicle consisted of rebated kerosene.

47. Second, HMRC seized three other vehicles at the Appellant's business premises. The Appellant did not challenge the lawfulness of those seizures in condemnation proceedings before the magistrates' court. It would be inconsistent with those vehicles having been lawfully seized for the Appellant to argue that there was no kerosene in their running tanks. Accordingly, applying the decision of the Court of Appeal in *Jones*, in addition to the 32% kerosene in the running tank of Vehicle VO59, as the FTT correctly noted, it was a "deemed fact" before the FTT that there was at least some kerosene in the running tanks of the other three vehicles seized.

48. The facts we have outlined at [47] were sufficient to demonstrate that the Appellant had taken rebated kerosene into its road vehicles in contravention of s12(2) of HODA. Accordingly, since HMRC do not need to demonstrate the presence of rebated fuel in

every vehicle in the Appellant's fleet in order to make an assessment under s13(1A) of HODA (see *Thomas Corneill & Co Ltd v Revenue & Customs Commissioners* [2007] EWHC 715), even in the absence of the test results whose admissibility was disputed, HMRC had demonstrated that the requirements necessary to make an assessment were met. That in turn was sufficient to demonstrate that HMRC were entitled to charge some penalty. The question, therefore, is simply whether the disputed test results had any bearing on the amount of the assessment or penalty.

49. Mr Crowe submitted that we should be cautious before concluding that the disputed results were of no relevance in the FTT's conclusions on the amount of the assessment or penalty. Mr Welsh had maintained in his evidence that there was no rebated kerosene in the running tank of any of the Appellant's vehicles. Therefore, Mr Crowe submitted, the FTT must have formed an adverse impression as to his credibility when finding, on the basis of the disputed test results, that material quantities of kerosene were in fact present. That adverse impression, he argued, may well have disposed the FTT to reject his evidence on matters relevant to the assessment, such as the points of detail referred to at [29] above, and the question whether the Appellant's use of rebated kerosene was "deliberate" for the purposes of determining the amount of any penalty[3].

50. We do not accept Mr Crowe's submission. The FTT did indeed, in a number of passages, express concerns about Mr Welsh's credibility. For example, at [41] the FTT explained why it was unimpressed by Mr Welsh's evidence as to the time that Mrs Ramsay arrived at the Appellant's premises. At [48], the FTT commented adversely on Mr Welsh's suggestion that Mrs Ramsay was seeking to conceal the fact that HMRC were making a "targeted enquiry" into his business. At [49], the FTT concluded that Mr Welsh went "well beyond fair criticism" of HMRC in aspects of his evidence. At [51], the FTT rejected as "simply not credible" Mr Welsh's claim that he gave a box containing keys to all of his vehicles to Mrs Ramsay without knowing why she wanted them. At [63], the FTT rejected his claim that Mrs Ramsay had falsified her notebook. However, nowhere does the FTT state, or even suggest, that its concerns about Mr Welsh's credibility were brought about because of the fuel testing evidence.

51. In any event, the FTT was well aware that the Appellant was challenging the reliability of HMRC's tests on its fuel (even though it was not, before the FTT, challenging the admissibility of the test results as evidence). In those circumstances, at [111] of the Decision, the FTT concluded that even if the evidence of those test results was that there was only a trace of kerosene in the running tanks of just four vehicles (the bare minimum "deemed facts" that followed as a result of *Jones*), it would still

[3] In his oral submissions, Mr Crowe submitted that, absent the prejudicial effect of the fuel testing evidence, the FTT might have "accepted" Mr Welsh's evidence that employees of the Appellant with gambling problems were responsible for the misuse of rebated fuel and that this was not, therefore, "deliberate" conduct of the Appellant. As we read [28(4)] and [63] of the Decision, Mr Welsh denied mentioning any such employees with gambling problems. However, the points we make below apply even if, contrary to our understanding, Mr Welsh was advancing such a case in his evidence.

have concluded that HMRC's assessment was correct. At [119], the FTT expressed a similar conclusion in relation to the penalty.

52. We are satisfied, therefore, that even if (contrary to our conclusion at [45]) the Appellant could establish that paragraph 2(1)(b) of Schedule 5 precluded the FTT from admitting the evidence whose admissibility is challenged, the outcome, based on the FTT's findings of fact, would inevitably have been the same. Accordingly, even if the Appellant could establish that either Ground 1 or Ground 2 is made out, we would have regarded any such error as immaterial to the decision and would not have exercised our power in s12(2) of the Tribunals, Courts and Enforcement Act 2007, to set aside the Decision.

Disposition

53. Both of the Appellant's grounds of appeal fail given our conclusion at [45]. Even if we are wrong in that conclusion, and even if the Appellant could establish that either of its grounds of appeal were made out, any resulting errors of law would have been immaterial to the Decision and would not have caused us to set the Decision aside. Those reasons, which make it unnecessary for us to consider the points of detail raised in Ground 1 and Ground 2, mean that the appeal is dismissed.

MR JUSTICE BIRSS

JUDGE JONATHAN RICHARDS

RELEASE DATE: 23 April 2020