[2020] UKUT 0051 (TCC)

Appeal number: UT/2019/0069

EXCISE DUTY – Section 13 of the Hydrocarbon Oils Duties Act 1979 – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

TERENCE STINSON T/A STINSON TRANSPORT	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE ANDREW SCOTT

Sitting in public at the Royal Courts of Justice, Chichester Street, Belfast on 28 January 2020

Danny McNamee of McNamee McDonnell Solicitors for the Appellant

Simon Charles, instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondent

DECISION

1. Mr Stinson appeals to this Tribunal against a decision (the "Decision") of the First-tier Tribunal (the "FTT") released on 15 April 2014. In the Decision, the FTT dismissed Mr Stinson's appeal against an assessment made under s13 of the Hydrocarbon Oils Duties Act 1979 ("HODA") in respect of rebated fuel that HMRC considered Mr Stinson had used in road vehicles he owned.

2. The reason for the significant delay since the release of the Decision lies in the appeal's uncertain procedural history. Following release of the Decision, Mr Stinson applied to the FTT for permission to appeal. The FTT refused permission in a decision notice released on 12 June 2014. After that, the position becomes less clear. In directions released on 28 January 2019, Upper Tribunal Judge Berner came to the view that Mr Stinson had renewed his application for permission to appeal to the Upper Tribunal, who had refused it on the papers. Although neither the parties nor the Tribunal was able to find that decision, its existence could be inferred from the fact that the Tribunal engaged (in 2014) in correspondence with the parties to fix a date for an oral renewal of the application. Judge Berner was unable to determine what happened next from the scanty documentation available to him and concluded that the fairest course was to list an oral hearing to determine Mr Stinson's application for permission to appeal. That oral hearing took place on 28 May 2019 and resulted in the Upper Tribunal giving Mr Stinson permission to appeal on three grounds.

The Decision and the grounds of appeal against it

3. In this decision, references in square brackets are to paragraphs of the Decision unless stated otherwise.

The Decision

4. At material times, Mr Stinson carried on a haulage business. In 2010, having analysed a sample of fuel taken from the running tank of a vehicle owned by Mr Stinson, HMRC came to the view that he might have been using rebated fuel in his entire fleet of lorries throughout the period 10 November 2007 to 23 May 2010. Under s13 of HODA, where oil is used, or taken into a road vehicle in contravention of s12(2) of HODA, HMRC may:

> … 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.

5. As we discuss in more detail below, an assessment under s13 could involve HMRC estimating the amount of rebated fuel that Mr Stinson used, or took into, his vehicles in the relevant period. A number of factors would be relevant to such an estimate. For example, the number of vehicles in the fleet, their fuel efficiency and the total distance travelled would be of obvious relevance. So too would Mr Stinson's purchases of

dutiable road fuel (referred to as "derv" in the hearing) since the more dutiable fuel he purchased, the less rebated fuel he would have used in his fleet.

6. With a view to making an assessment under s13, HMRC asked Mr Stinson detailed questions about his fleet of vehicles and their use of fuel in that period ([7] to [10]).

7. Mr Stinson gave some information, including details of five vehicles in his fleet identified by their vehicle registration at [11]. Having considered that information, HMRC were initially minded to make an assessment for £32,132 ([12]). Over time HMRC received further information and submissions which caused them to make successive reductions to that assessment. By 3 February 2012, HMRC had reduced the assessment to £21,665 and that was the amount in dispute before the FTT.

8. Mr Stinson's appeal to the FTT first came on for hearing on 21 May 2013. However, at that hearing, Mr Stinson applied for an adjournment on the basis that he had further documents in his position that would support his case. The FTT granted that application but, as the price of it, made directions. Those directions are set out in full at [4], but in essence required Mr Stinson to serve his further documentary evidence within 28 days. It also required him to confirm in writing, within 28 days, whether he considered the issues in dispute to be limited to:

> (a) the miles travelled by the Appellant's vehicles with reference to the numbers of drivers
>
> (b) fuel costs as shown in bank statements which have been disallowed
>
> (c) items set out in [the schedule of further information that Mr Stinson was required to serve].

9. The FTT's directions provided that if Mr Stinson wished to raise issues other than those the FTT had identified, he had to provide further and better particulars within 28 days.

10. Mr Stinson did not comply with the FTT's directions. Mr McNamee, who represented Mr Stinson, explained to us that he had prepared draft documentation to comply with them but that, by oversight, that draft was never formally served either on HMRC or the FTT.

11. The resumed hearing took place on 18 March 2014, nearly 10 months later. Despite not having complied with the FTT's previous directions, Mr Stinson sought to make arguments which he had not previously trailed with HMRC. The FTT recorded, at [5], that it would not hear any new evidence from Mr Stinson without an application for permission to rely on it. In the event Mr McNamee made no application for permission to rely on further evidence. However, the FTT evidently allowed Mr Stinson some latitude to make new arguments, based on the existing evidence served by the parties, saying at [6]:

> 6… [A] number of new issues were raised during the hearing in respect of which no formal application was made. Despite our indication at the start of the hearing that we may disregard any such issues where no

> formal application had been made, in the interests of justice and fairness to the Appellant we did consider the matters raised which ultimately did not assist the Appellant.

12. At [20] to [22], the FTT referred to what it clearly regarded as a dispute between the parties as to the approach it should take to the appeal. The FTT recorded (at [20]) that HMRC relied on *Thomas Corneill v HMRC* [2007] EWHC 715 (Ch) but that Mr Stinson relied on an extract from *Gora & Ors* v HMRC [2003] EWCA Civ 525 to the effect that:

> [The Tribunal] satisfies itself that the primary facts upon which the Commissioners have based their decision are correct. The rules of the tribunal and procedures are designed to enable it to make a comprehensive fact-finding exercise in all appeals.

13. It is not clear to us what dispute the FTT considered that it was addressing at [20] to [22]. Both Mr Charles (counsel for HMRC) and Mr McNamee (Mr Stinson's solicitor) had appeared below and gave different explanations. Mr Charles submitted that the FTT was dealing with a submission by Mr McNamee that, unless HMRC could prove that red diesel had been found in the running tanks of all vehicles in Mr Stinson's fleet, it was not open to them to make assessments based on an inference that he was using red diesel throughout his fleet rather than in just the single lorry that HMRC had tested. Mr McNamee said that he made no such submission and had accepted that the assessments were made to "best judgement" (although this phrase did not appear in s13 of HODA, the provision under which HMRC made their assessment). We are simply not able to resolve the difference between the recollections of Mr Charles and Mr McNamee. No official recording of the hearing before the FTT has been produced (no doubt because the hearing was not recorded) and neither party referred to, or produced, copies of any skeleton arguments that were before the FTT. Prior to the hearing before us, HMRC applied for copies of the judge's, and Tribunal member's, notes of the hearing, but were informed by the FTT that these could not be located.

14. At [22], the FTT concluded that Mr Stinson's "reliance on *Gora* was misplaced" since Gora was a "restoration case" that was "wholly different in both fact and law to the present appeal". By contrast, *Corneill* "related to an excise duty assessment" and the FTT "found it useful in determining our approach to this case".

15. This Tribunal, therefore, is in the unfortunate position of not fully understanding what approach the FTT thought it should take when determining the appeal. We do know, however, that the FTT considered it was accepting submissions, based on the extracts from *Corneill* that were quoted at [20]. By contrast it was rejecting the submissions it understood to be based on *Gora,* and the quote from that decision set out at [21]. Having considered the two quotes from the cases that the FTT gave, we have inferred that the FTT was adopting the following approach:

> (1) It realised that HMRC were entitled to assess Mr Stinson on the basis of an inference that he was using red diesel throughout his fleet even though they only had test results establishing that red diesel was being used in a single vehicle (paragraphs [30] and [32] of *Corneill* which the FTT quoted).

(2) Since HMRC had made that inference, the FTT realised that HMRC were entitled to base assessments on estimates as to, for example, the extent to which red diesel based on estimated mileage of the vehicles involved (paragraph [33] of *Corneill* from which the FTT quoted).

(3) The FTT understood that taxpayers who think that HMRC have "got the primary facts or the inference wrong" can air such arguments in an appeal to the FTT (paragraph [33] of *Corneill*).

(4) However, in some way, which the FTT did not explain precisely, although Mr Stinson was entitled to argue in the appeal that HMRC had got "the primary facts or the inference wrong", the FTT believed that it was not required to "make a comprehensive fact-finding exercise". (This is the only sense we can make of the FTT's rejection of what it understood to be Mr Stinson's case based on the extract from *Gora*).

16. Having set out its conclusions from *Corneill* and *Gora*, at [23] to [29], the FTT summarised aspects of the evidence before it.

17. At [26] to [29], the FTT summarised the evidence of Officer Dinsmore (who had made the assessment on behalf of HMRC) in relation to the appellants' purchases of derv in the Republic of Ireland. It seems reasonably clear (though the FTT did not say so expressly) that Mr Stinson argued, in the course of discussions with HMRC, that the assessments, or proposed assessments, were too high since he fuelled his fleet with derv he purchased in the Republic of Ireland and so, to the extent of those purchases of derv, was not using red diesel. We infer that Mr Stinson had himself provided HMRC with evidence supporting that assertion (perhaps in the form of bank statements since the FTT referred to such bank statements in directions it made following adjournment of the first hearing listed for 21 May 2013). Officer Dinsmore explained that she had contacted the tax authorities in the Republic of Ireland asking for copies of the forms that Mr Stinson had submitted to them reclaiming VAT he had incurred in connection with such purchases. It seems reasonable to conclude that Officer Dinsmore's purpose was to ascertain the extent to which Mr Stinson's claims to have spent money purchasing derv in the Republic of Ireland was corroborated by the VAT reclaim forms.

18. Officer Dinsmore's evidence, summarised at [26] to [29], was that she only accepted that Mr Stinson had purchased derv in the Republic of Ireland where she was provided with a receipt from a filling station clearly showing an identifiable amount spent specifically on derv. As will be seen in our discussion below, Mr Stinson considered this approach to be unfair since, in most cases relevant to this appeal, the information Officer Dinsmore obtained from the Republic of Ireland tax authorities consisted simply of a "cover sheet", consisting of Mr Stinson's original claim for repayment of VAT incurred on the purchase of derv but without copies of the receipts from filling stations which he had submitted in connection with that claim.

19. Mr McNamee put it to Officer Dinsmore in cross-examination that records from the DVLA which HMRC had put into evidence suggested that one of Mr Stinson's vehicles (which we will identify by reference to its registration number as "Vehicle OKZ") was scrapped on 11 April 2006. Therefore, Mr McNamee suggested, HMRC's assessment, which assumed that Mr Stinson was using red diesel in that vehicle between November

2007 and May 2010, must be too high. At [28], the FTT summarised Officer Dinsmore's response to this challenge. She evidently acknowledged the possibility that the vehicle had been scrapped but said that she was not sure whether it had been since the same DVLA document[1] referred to a "licence" in relation to the vehicle being issued on 1 January 2007, and expiring on 30 April 2007, which she said called into question whether it had ever been scrapped at all. She also expressed the view that, Mr Stinson could be expected to know his own fleet and, if Vehicle OKZ had been scrapped, he would have told her much earlier in the process particularly given that she had already shown that she was willing to listen to his representations, having already accepted that another vehicle ("Vehicle RIA") was not in use during the period relevant to HMRC and so could be assumed not to be using red diesel in that period.

20. The next section in the Decision (paragraphs [30] to [40]) summarised the parties' submissions.

21. As regards Vehicle OKZ, Mr Charles for HMRC referred the FTT to evidence in the form of an invoice from Diesel Card Ireland Ltd to Mr Stinson which appeared to suggest that Vehicle OKZ had been refuelled on a few occasions after it had been scrapped. He suggested, therefore, that the DVLA record referring to scrappage of the vehicle was unreliable ([32]). Mr McNamee invited the FTT to conclude that the fuel invoice just suggested that a fuel card associated with Vehicle OKZ had been used (to pay for fuel used in another vehicle) and that Vehicle OKZ had, as indicated in the DVLA records, been scrapped. Perhaps significantly, the FTT summarised its understanding of Mr Charles's submissions as follows:

> Mr Charles submitted that [because of the fuel card evidence] doubt was cast on the reliability of the DVLA document which, taken together with the Appellant's failure to mention to the officer that the vehicle had been scrapped (particularly when he had provided such information in relation to a different vehicle) **did not displace the officer's assessment as being to best judgment**. [emphasis added]

22. At [38] the FTT summarised Mr Stinson's argument that he was the only person insured to drive two vehicles ("Vehicle TKZ" and "Vehicle N6" respectively) and that, since HMRC's assessment assumed that those two vehicles were driven simultaneously it was necessarily defective. HMRC's counter-submission (recorded at [33]) was that Mr Stinson's assertion that he was the only person in the business insured to drive the vehicles had not been raised previously and was unsupported by any documentary evidence. Accordingly, the FTT recorded HMRC as submitting that it should reject Mr Stinson's evidence in this regard as he had not "discharged his burden of proof".

23. As regards the disputed purchases of derv, the FTT recorded HMRC's submission (at [34]) that:

> …where there was no supporting invoice to specify the items purchased, the officer had used best judgment in disallowing the amounts. The fact

[1] The FTT in its decision mistakenly thought that Officer Dinsmore was referring to a different document

> that the officer had obtained the documents confirmed that she had acted reasonably and in the Appellant's best interests in order to apply best judgment.

The FTT also recorded Mr Stinson (at [40]) as basing some submissions in relation to the derv purchases on the concept of "best judgment":

> 40. There is no basis in law to determine the appeal on the basis of whether the officer had used their best judgment at the time of making the assessment. The Appellant provided HMRC with information prior to appointing representation and it remains unknown what information he gave the officer.

24. The final relevant section of the Decision ([42] to [46]) contains the FTT's "Discussion and Conclusion". So far as material for the purposes of this appeal, the FTT reached the following conclusions:

(1) It concluded that Mr Stinson's evidence was "vague and unconvincing" and that there was a notable of absence of documentary evidence supporting his case. By contrast, it found HMRC's Officer Dinsmore to be a "reasonable and credible witness whose evidence was cogent and compelling".

(2) It rejected Mr Stinson's case that Vehicle OKZ was scrapped concluding (at [43]):

> … [N]o documentary evidence was produced by the Appellant to support this assertion and the Appellant failed to make any mention of it from the time the officer issued a Notice of Intention to assess until this appeal hearing. For those reasons, the Appellant has failed to satisfy us that the vehicle was scrapped prior to the period of assessment.

(3) At [44], the FTT rejected Mr Stinson's argument in respect of Vehicle TKZ and Vehicle N6 concluding that HMRC's assessment did not assume concurrent use. Moreover, it concluded that Mr Stinson had not provided documentary evidence of who was insured to drive the two vehicles.

(4) The FTT rejected Mr Stinson's arguments that HMRC's assessment under-estimated his use of derv, purchased in the Republic of Ireland, to fuel his fleet saying:

> 45. The Appellant contended in oral evidence that payments shown on bank statements and amounts set out on VAT repayment claim forms from the Republic of Ireland were derv purchases. It was submitted by Mr McNamee that the Tribunal should accept this unchallenged evidence. We do not agree. It has always been the case for HMRC that the Appellant's assertions, reiterated in his oral evidence, were insufficient for the purpose of the assessment where unsupported by documentary evidence. Indeed, where such evidence existed to support the Appellant's contention the officer had made allowances and reduced the assessment to reflect the amounts accordingly.
>
> 46. The Appellant is VAT registered and obliged to keep adequate records, yet no evidence in the form of invoices or receipts were

> produced by him and there was no evidence of any efforts having been made by him to obtain confirmation from, for example, garages where purchases were made… For those reasons we were not satisfied that the purchases which the Appellant seeks to have removed from the assessment related to the purchase of derv and in the absence of any documentary evidence to support his assertions, we found that HMRC acted reasonably and to best judgment in raising the assessment. We are satisfied that the assessment was based on all of the evidence before the officer and that no material matter was disregarded. We accepted that the assessment was based on a genuine attempt to calculate as accurately as possible the amount of duty due and the Appellant was given ample opportunity to substantiate his assertions. Where he failed to do so, we find HMRC's calculations were based on reasonable methodology and that the officer was justified in raising the assessment to best judgment in the sum of £21,665.
>
> 47. The appeal is dismissed.

The grounds of appeal against the Decision

25. On 3 June 2019, the Upper Tribunal gave Mr Stinson permission to appeal against the Decision on the following grounds:

> (1) The FTT erred in law by considering only the "reasonableness" or otherwise of HMRC's decisions, rather than exercising a full appellate jurisdiction and determining the actual amount (if any) of duty to which Mr Stinson was liable.
>
> (2) The FTT's factual conclusion, that Vehicle OKZ was not scrapped before 14 April 2008, was not available to it applying the principle set out in *Edwards v Bairstow*.
>
> (3) The FTT erred in law in failing to conclude that Mr Stinson had made significant legitimate purchases of derv by either (i) ignoring unchallenged evidence of such purchases that was available to it and/or (ii) by making findings that were not available to it applying the principle set out in *Edwards v Bairstow*.

26. At the hearing, we gave Mr Stinson permission to extend his grounds of appeal so as to argue as Ground 4 that the FTT erred in law in failing to recognise that HMRC's assessment assumed that Vehicle TKZ and Vehicle N6 were in use simultaneously (which was impossible given that Mr Stinson was the sole person insured to drive both vehicles). HMRC did not object to the extension to the grounds of appeal that Mr Stinson requested.

HMRC's application for permission to rely on further evidence

27. Prior to the hearing, HMRC requested permission to rely on additional evidence (not served below) consisting of a witness statement of Officer Dinsmore. As well as giving much more detail on the process that she had followed when making the assessment than was evident from the Decision, Officer Dinsmore sought to give evidence as to her recollection of the hearing before the FTT. We dismissed HMRC's

application. In our judgment, the purpose of the hearing before us is twofold: first we must decide whether the Decision contains an error of law; second, if it does, we should consider whether we should set it aside and remake it. We did not consider that Officer Dinsmore's evidence would be of material assistance in deciding whether the Decision contains an error of law: that question has to be determined primarily from the Decision itself. Officer Dinsmore's additional evidence might be of assistance at the second stage as, if we identified an error of law, that evidence might help us to remake the Decision. However, Officer Dinsmore did not attend the hearing for cross-examination and we agreed with Mr McNamee's submission that it would be unfair for us to remake the Decision on the basis of new evidence that he could not challenge.

Ground 1 – Analysis

28. By the time of the hearing before us, the parties seemed agreed on the following propositions of law which we would also endorse:

> (1) Even though HMRC had only found red diesel in the running tank of one of Mr Stinson's vehicles, they had the power to make assessments based on an inference that he was using red diesel in his fleet more generally. Similarly, they had the power to make assessments that estimated his use of red diesel in circumstances where they had no evidence as to how much red diesel he had actually used.
>
> (2) There is no statutory requirement that an assessment under s13 of HODA has to be made to HMRC's "best judgment".
>
> (3) It does not follow from the fact that HMRC have power to make an assessment on the basis set out at [(1)] that such an assessment is necessarily correct. In his appeal to the FTT, Mr Stinson was entitled (in addition to any legal arguments within the FTT's jurisdiction that he wished to raise) to challenge the factual basis underpinning HMRC's assessment. He could argue, for example, that HMRC were wrong to infer that he used red diesel throughout his fleet. He could argue that HMRC's assessments over-estimated his use of red diesel because his fleet had travelled fewer miles than HMRC had estimated or that he used more derv purchased in the Republic of Ireland (and so less red diesel) than HMRC had estimated.
>
> (4) On an appeal to the FTT against an assessment under s13 of HODA, the FTT has full power to decide on the correct amount of the assessment. It is not limited to a determination of the reasonableness or otherwise of HMRC's estimates or inferences. So, for example, where HMRC have based an assessment on assumptions as to a vehicle's fuel efficiency, the FTT can reduce the assessment if it is satisfied that HMRC's assumptions are wrong. It does not matter whether the assumptions are reasonable or involve an exercise of what can colloquially be referred to as "best judgment" (recognising that no such statutory concept applies to assessments under s13 of HODA). If HMRC's factual assumptions are reasonable, but wrong, the FTT is entitled to adjust the assessment.

(5) To the extent Mr Stinson challenged the factual basis underpinning HMRC's assessment, he bore the burden of proving the necessary facts.

29. In his Ground 1, Mr Stinson essentially argues that the FTT did not fully appreciate that its powers were as set out at paragraph [28] above. Instead of engaging with its power to consider for itself whether his factual challenges to the basis underpinning HMRC's assessment were correct, he submits that the FTT was unduly influenced by a consideration of whether those assumptions were "reasonable" or whether the assessment was made to "best judgment". To succeed in that ground of appeal, Mr Stinson does not need to show that every passage of the Decision demonstrates such a misunderstanding. The ground of appeal will be made out if decisions on material issues were based on a misunderstanding of the FTT's powers.

30. For the reasons below, we are satisfied that the FTT followed the wrong approach when considering Mr Stinson's case on the disputed purchases of derv in the Republic of Ireland. That error was material to the Decision since Mr Stinson was claiming (i) that he used derv purchased in the Republic of Ireland to a more significant extent than HMRC had estimated and (ii) as a result HMRC had materially over-estimated his use of red diesel.

31. Most significantly, in giving its reasons for rejecting Mr Stinson's factual case at [46], the FTT stated expressly that HMRC "acted reasonably and to best judgment", that HMRC based their assessment "on all material before the officer", that "no material matter was disregarded", that HMRC "made a genuine attempt to calculate [the assessment] as accurately as possible". The final sentence of paragraph [46] is particularly emphatic: the FTT concludes that since HMRC's calculations were based on "reasonable methodology … the officer was justified in raising the assessment to 'best judgment' in the sum of £21,665". The FTT's apparent conclusion from that paragraph is that the "reasonable methodology" justifies the entire amount of HMRC's assessment and immediately following that conclusion, in paragraph [47], the FTT dismisses the entirety of Mr Stinson's appeal.

32. We do not accept HMRC's submission that, in paragraph [46], the FTT was simply saying that it had independently reached a conclusion on the facts relating to the derv purchases that coincided with the view reached by HMRC. Paragraph [46], therefore, suggests on its face that the FTT misunderstood its powers. However, as Mr Charles correctly submitted, it would be wrong to read paragraph [46] in isolation from the rest of the judgment. Nor should we read it in an unduly literal fashion. Judgments may often contain inaccurate expressions which, when the judgment is read as a whole, betray no error of law. Mr Charles placed particular emphasis on his submission that, by adopting a structure that involved the FTT summarising the competing evidence and submissions of the parties before reaching conclusions, the FTT demonstrated that it had well in mind its full appellate jurisdiction and power to find facts afresh.

33. We accept Mr Charles' submission that there are aspects of the Decision that suggest that the FTT had the correct test in mind. As he notes, the approach of summarising competing evidence and submissions does tend to suggest that the FTT realised (correctly) that it needed to make its own findings of fact rather than merely evaluating whether HMRC's view of the facts was reasonable or not. The FTT's

conclusion at [43] in relation to Vehicle OKZ was that the "Appellant has failed to satisfy us that the vehicle was scrapped…", which suggests that the FTT realised that it was not limited to considering whether it was reasonable for HMRC to form the view that Vehicle OKZ had not been scrapped. In paragraph [44], the FTT set about determining whether, on the basis of the evidence it had seen, it was satisfied that Mr Stinson was the only person insured to drive Vehicle TKZ and Vehicle N6 (not whether it was reasonable for HMRC to conclude he was not the only such person).

34. However, even in the passage dealing with Vehicle OKZ, the FTT's engagement with the evidence was relatively cursory, which perhaps suggests that the FTT did not think it necessary to engage in a "comprehensive fact-finding exercise". The FTT based its conclusion on (i) its perception that there was an absence of documentary evidence produced by Mr Stinson (even though there was documentary evidence, albeit formally put into evidence by HMRC, in the form of the DVLA material) and (ii) the lateness of Mr Stinson's claim that the vehicle was scrapped. If the FTT had clearly in mind that its task was to find whether the vehicle had actually been scrapped, it might have been expected to engage more fully with the apparent conundrum arising from the use of the fuel card and Mr Stinson's explanation of that conundrum. In addition, the FTT expressed no conclusion on the apparent inconsistency in the DVLA material which might have been expected if it had appreciated the full-extent of its fact-finding powers.

35. We do not accept Mr Charles' argument that, by summarising the evidence of Officer Dinsmore at [26] to [29], the FTT demonstrated that it was considering the "substance of the evidence" rather than the reasonableness or otherwise of HMRC's stated position. It seems to us that summarising Officer Dinsmore's evidence is just as consistent with the FTT's intention to evaluate the reasonableness or otherwise of HMRC's position as it is with an intention to decide whether the facts were as stated by Officer Dinsmore.

36. Nor do we accept Mr Charles' submission that, having cited *Corneill* and quoted passages from it, the FTT must have had the correct test in mind. As we have observed at [15] above, we are unable to discern what precise conclusions the FTT drew from *Corneill*. If the FTT appreciated that its powers were as summarised at paragraph [28] above, we would have expected that conclusion to follow more clearly from the FTT's discussion of the authorities. Moreover, the fact that the FTT evidently thought it was rejecting the Appellant's submission (which it understood to be based on *Gora*) that it should conduct a "comprehensive fact-finding exercise" tends to support the conclusion that it did not have the correct approach firmly in mind.

37. There are other indications in the Decision that the FTT was not applying the correct approach. At [32], the FTT recorded HMRC as submitting, in connection with the purely factual question of whether Vehicle OKZ had been scrapped, that the Appellant's evidence "did not displace the officer's assessment as being best judgment". If the FTT clearly had in mind that it had to resolve disputed questions of fact itself, it might not have summarised the submissions in those terms. In a similar vein, the FTT clearly thought, in its summary of HMRC's submissions at [35], that there was significance in the question whether Officer Dinsmore had "acted reasonably".

38. Overall, while recognising the force of Mr Charles' submission that there are aspects of the Decision that point to a different conclusion, we have reached the view that in material parts of the Decision, and particularly when dealing with the disputed purchases of derv, the FTT misunderstood the true extent of its powers.

39. There may have been understandable reasons for the FTT's error. Even in the hearing before us, both parties referred to "best judgment" aspects of HMRC's assessment even though that phrase has no statutory significance. We can accept that the parties' submissions to the FTT on the scope of its powers may have been confusing. The FTT also had to deal with the fact that, having not complied with directions requiring him to articulate his case more clearly, Mr Stinson appeared to be raising lines of argument for the first time in the course of cross-examination of Officer Dinsmore. The FTT clearly had to be on its guard, during the hearing, against the possibility of HMRC being "ambushed" and this may have made it more difficult for it to focus on the parties' submissions as to the nature of the investigation the FTT should conduct. However, while acknowledging these points, having identified an error of approach, Mr Stinson's appeal on Ground 1 has to succeed.

Approach to the Decision in the light of our conclusion on Ground 1

40. Ground 1 discloses an error of law in the Decision which was an error of approach. The consequences of the error are particularly clear in the way the FTT approached the disputed derv purchases. However, since the FTT followed the wrong approach in connection with the disputed derv purchases, it is quite possible that it followed the wrong approach more generally. As we have observed, there are certainly indications that, when it was deciding whether Vehicle OKZ was scrapped, the FTT realised it had to determine these matters for itself rather than merely determining the reasonableness or otherwise of HMRC's view. However, against that, the fact that the FTT did not engage in detail with the evidence on this issue suggests that it might have followed the wrong approach.

41. The FTT's conclusion at [44], with regard to Vehicle TKZ and Vehicle N6, appears more secure. However, even in this passage, the FTT could have underpinned its conclusion with more comprehensive findings of fact. A key pillar of the FTT's analysis was that HMRC's assessments were not based on assumptions as to the times at which those vehicles were used, but rather on the total miles actually travelled by those vehicles. Therefore, the FTT concluded that HMRC's assessments were not based on an assumption that the two vehicles were ever used at the same time. That reasoning is clearly logical, but suffers from the defect that the FTT does not, in the Decision, make findings as to how HMRC actually calculated the assessment. HMRC were evidently aware of this shortcoming since, as we have noted, they applied for permission to adduce further evidence from Officer Dinsmore explaining how she had calculated the assessment. Even at the hearing before us, the parties remained apart on the question of how the assessment was calculated, with HMRC maintaining that it was based on estimated actual use of the vehicles in Mr Stinson's fleet, and Mr Stinson arguing that it was based on figures as to average general use of vehicles of the kind he owned that HMRC had obtained "from the internet".

42. That therefore gives rise to the question of how this Tribunal should exercise its powers in circumstances where we have identified an error of law in the Decision but cannot be sure of the precise effect of that error beyond knowing that it affected the FTT's conclusion on the derv purchases.

43. Our powers under s12 of the Tribunals, Courts and Enforcement Act 2007 are as follows:

> **12 Proceedings on appeal to Upper Tribunal**
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> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.

44. We have decided that the Decision must be set aside as the error of law affected the FTT's determination of a material issue namely the extent of Mr Stinson's purchases of derv in the Republic of Ireland and the effect, if any, on the assessment (the "derv issue").

45. We will not remake the Decision. We were not provided even with a full set of documents that were in evidence before the FTT and are in no position to decide how much derv Mr Stinson actually purchased in the Republic of Ireland or how, if at all, those purchases should alter the amount of HMRC's assessment. The appeal will, therefore, have to be remitted to the FTT. That conclusion makes it unnecessary for us to consider Ground 3 since the FTT will, in the remitted appeal, be in a position to consider the entire derv issue afresh.

46. We considered proceeding with an analysis of Grounds 2 and 4 which would mean that, unless Mr Stinson is able to overcome the high hurdle set out in *Edwards v Bairstow* for challenging the FTT's factual findings related to Vehicles OKZ, TKZ and N6, the re-hearing before the FTT would focus exclusively on the derv issue.

47. However, that approach would give rise to a clear risk of unfairness. If we considered that the high *Edwards v Bairstow* threshold was not met then we could not disturb the FTT's factual conclusions on the subject matter of Grounds 2 and 4 (Vehicles OKZ, TKZ and N6) and, despite a clear risk that the FTT had applied the wrong approach, Mr Stinson would nevertheless be saddled with findings of fact based on such an approach. Moreover, even if we considered that the *Edwards v Bairstow* threshold was met, we might find it difficult to remake the FTT's decision on Grounds 2 and 4 given the relative paucity of documentary evidence with which we were provided.

48. On balance, therefore, we have decided that since there is a real possibility that the FTT's error of approach affected its conclusions on matters other than the derv issue, there should be a complete rehearing of the appeal. It follows that we do not need to deal with Mr Stinson's Grounds 2 or 4 either and we will not do so.

49. The next logical question is whether we should direct that the re-hearing should be limited to considering evidence that the parties served in the original FTT proceedings. We are not unconcerned that, by directing a complete rehearing of the appeal, we would be giving Mr Stinson an opportunity to escape responsibility for his patchy compliance with FTT directions by improving on the evidence and case he put to the FTT. However, we see no realistic alternative. The FTT hearing took place a long time ago. At the hearing before us, the parties were not always agreed on what evidence had been served in the FTT proceedings. We would risk creating uncertainty and potentially still further delay if we sought to restrict the re-hearing to a consideration of evidence already served.

Disposition

50. Mr Stinson's appeal is allowed. The appeal is remitted to a differently constituted FTT for reconsideration.

JUDGE JONATHAN RICHARDS
JUDGE ANDREW SCOTT

RELEASE DATE: 20 February 2020