# TC01802

**Appeal number TC/2011/00955**

***VATA 1994 ss 56, 57, 63 & 73 – fuel scale charges – misdeclaration penalty – underdeclaration of standard-rated outputs – unreceipted and unrecorded cash purchases - appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BENSON SUNDAY EYIN**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*value added tax*)** **Respondents**

**TRIBUNAL: Judge Malachy Cornwell-Kelly**
**Mrs Sheila Cheesman**

**Sitting in public at 45 Bedford Square London on 20 January 2012**

**The taxpayer in person**

**Mr Bruce Robinson of HMRC for the Crown**

## DECISION

*Introduction*

1 This appeal is against three decisions of the commissioners:-

(i) an amendment on 30 September 2010 to the appellant's value added tax return for the quarter ending 30 June 2010 made under section 73(1) of the Value Added Tax Act 1994 ('the Act') to show an underdeclaration of output tax of £124 representing fuel scale charges due on private use of vehicles;

(ii) an assessment on 6 October 2010 for the quarters ending 30 September 2006 to 31March 2010 made under section 73(1) and (2) of the Act for £31,703, being £30,174 underdeclared output tax and £1,529 for fuel scale charges due on the private use of vehicles;

(iii) misdeclaration penalties assessed on 11 November 2011 under section 63 of the Act of £330 for the quarter ending on 31 December 2007 and £313 for the quarter ending on 30 June 2008. (The penalties were at 15% of tax misdeclared, mitigated by 40% for cooperation by the appellant.)

2 We were assisted by oral evidence given by both the taxpayer and the assessing officer, Mr Robin Walker, as well as by the relevant documentary evidence.

*The legislation*

3 The Value Added Tax Act 1994 provides, so far as material-

*56 Fuel for private use*

(1)The provisions of this section apply where, in any prescribed accounting period, fuel which is or has previously been supplied to or imported or manufactured by a taxable person in the course of his business–

(a)is provided or to be provided by the taxable person to an individual for private use in his own vehicle or a vehicle allocated to him and is so provided by reason of that individual´s employment; or

(b)where the taxable person is an individual, is appropriated or to be appropriated by him for private use in his own vehicle; or

(c)where the taxable person is a partnership, is provided or to be provided to any of the individual partners for private use in his own vehicle.

(2)For the purposes of this section fuel shall not be regarded as provided to any person for his private use if it is supplied at a price which–

(a)in the case of fuel supplied to or imported by the taxable person, is not less than the price at which it was so supplied or imported; and

(b)in the case of fuel manufactured by the taxable person, is not less than the aggregate of the cost of the raw material and of manufacturing together with any excise duty thereon.

(3)For the purposes of this section and section 57–

(a)"fuel for private use" means fuel which, having been supplied to or imported or manufactured by a taxable person in the course of his business, is or is to be provided or appropriated for private use as mentioned in subsection (1) above;

(b)any reference to fuel supplied to a taxable person shall include a reference to fuel acquired by a taxable person from another member State and any reference to fuel imported by a taxable person shall be confined to a reference to fuel imported by that person from a place outside the member States;

(c)any reference to an individual´s own vehicle shall be construed as including any vehicle of which for the time being he has the use, other than a vehicle allocated to him;

(d)subject to subsection (9) below, a vehicle shall at any time be taken to be allocated to an individual if at that time it is made available (without any transfer of the property in it) either to the individual himself or to any other person, and is so made available by reason of the individual´s employment and for private use; and

(e)fuel provided by an employer to an employee and fuel provided to any person for private use in a vehicle which, by virtue of paragraph (d) above, is for the time being taken to be allocated to the employee shall be taken to be provided to the employee by reason of his employment.

(4)Where under section 43 any bodies corporate are treated as members of a group, any provision of fuel by a member of the group to an individual shall be treated for the purposes of this section as provision by the representative member.

(5)In relation to the taxable person, tax on the supply, acquisition or importation of fuel for private use shall be treated for the purposes of this Act as input tax, notwithstanding that the fuel is not used or to be used for the purposes of a business carried on by the taxable person (and, accordingly, no apportionment of VAT shall fall to be made under section 24(5) by reference to fuel for private use).

(6)At the time at which fuel for private use is put into the fuel tank of an individual´s own vehicle or of a vehicle allocated to him, the fuel shall be treated for the purposes of this Act as supplied to him by the taxable person in the course or furtherance of his business for a consideration determined in

accordance with subsection (7) below (and, accordingly, where the fuel is appropriated by the taxable person to his own private use, he shall be treated as supplying it to himself in his private capacity).

(7)In any prescribed accounting period of the taxable person in which, by virtue of subsection (6) above, he is treated as supplying fuel for private use to an individual, the consideration for all the supplies made to that individual in that period in respect of any one vehicle shall be that which, by virtue of section 57, is appropriate to a vehicle of that description, and that consideration shall be taken to be inclusive of VAT.

(8)In any case where–

(a)in any prescribed accounting period, fuel for private use is, by virtue of subsection (6) above, treated as supplied to an individual in respect of one vehicle for a part of the period and in respect of another vehicle for another part of the period; and

(b)at the end of that period one of those vehicles neither belongs to him nor is allocated to him,

subsection (7) above shall have effect as if the supplies made to the individual during those parts of the period were in respect of only one vehicle.

(9)In any prescribed accounting period a vehicle shall not be regarded as allocated to an individual by reason of his employment if–

(a)in that period it was made available to, and actually used by, more than one of the employees of one or more employers and, in the case of each of them, it was made available to him by reason of his employment but was not in that period ordinarily used by any one of them to the exclusion of the others; and

(b)in the case of each of the employees, any private use of the vehicle made by him in that period was merely incidental to his other use of it in that period; and

(c)it was in that period not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the vehicle available to them.

(10)In this section and section 57–

"employment" includes any office; and related expressions shall be construed accordingly;

"vehicle" means a mechanically propelled road vehicle other than–

(a)a motor cycle as defined in section 185(1) of the Road Traffic Act 1988 or, for Northern Ireland, in Article 37(1)(f) of the Road Traffic (Northern Ireland) Order 1981, or

(b)an invalid carriage as defined in that section or, for Northern Ireland, in Article 37(1)(g) of that Order.

*63Penalty for misdeclaration or neglect resulting in VAT loss for one accounting period equalling or exceeding certain amounts*

(1)In any case where, for a prescribed accounting period–

(a)a return is made which understates a person´s liability to VAT or overstates his entitlement to a VAT credit, or

(b)an assessment is made which understates a person´s liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners,

and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent. of the VAT which would have been lost if the inaccuracy had not been discovered.

(2)The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent. of the relevant amount for that period.

(3)Any reference in this section to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the understatement of liability or, as the case may be, overstatement of entitlement referred to, in relation to that period, in subsection (1) above.

(4)In this section "the relevant amount", in relation to a prescribed accounting period, means–

(a)for the purposes of a case falling within subsection (1)(a) above, the gross amount of VAT for that period; and

(b)for the purposes of a case falling within subsection (1)(b) above, the true amount of VAT for that period.

(5)In this section" the gross amount of tax", in relation to a prescribed accounting period, means the aggregate of the following amounts, that is to say–

(a)the amount of credit for input tax which (subject to subsection (8) below) should have been stated on the return for that period, and

(b)the amount of output tax which (subject to that subsection) should have been so stated.

(6)In relation to any return which, in accordance with prescribed requirements, includes a single amount as the aggregate for the prescribed accounting period to which the return relates of–

(a)the amount representing credit for input tax, and

(b)any other amounts representing refunds or repayments of VAT to which there is an entitlement,

references in this section to the amount of credit for input tax shall have effect (so far as they would not so have effect by virtue of subsection (9) below) as references to the amount of that aggregate.

(7)In this section "the true amount of VAT", in relation to a prescribed accounting period, means the amount of VAT which was due from the person concerned for that period or, as the case may be, the amount of the VAT credit (if any) to which he was entitled for that period.

(8)Where–

(a)a return for any prescribed accounting period overstates or understates to any extent a person´s liability to VAT or his entitlement to a VAT credit, and

(b)that return is corrected, in such circumstances and in accordance with such conditions as may be prescribed, by a return for a later such period which understates or overstates, to the corresponding extent, that liability or entitlement,

it shall be assumed for the purposes of this section that the statements made by each of those returns (so far as they are not inaccurate in any other respect) are correct statements for the accounting period to which it relates.

(9)This section shall have effect in relation to a body which is registered and to which section 33 applies as if–

(a)any reference to a VAT credit included a reference to a refund under that section, and

(b)any reference to credit for input tax included a reference to VAT chargeable on supplies, acquisitions or importations which were not for the purposes of any business carried on by the body.

(10)Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if–

(a)the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or

(b)at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the Commissioners full information with respect to the inaccuracy concerned.

(11)Where, by reason of conduct falling within subsection (1) above–

(a)a person is convicted of an offence (whether under this Act or otherwise), or

(b)a person is assessed to a penalty under section 60,

that conduct shall not also give rise to liability to a penalty under this section.

*73Failure to make returns etc*

(1)Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(2)In any case where, for any prescribed accounting period, there has been paid or credited to any person–

(a)as being a repayment or refund of VAT, or

(b)as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they

later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

(3)An amount–

(a)which has been paid to any person as being due to him as a VAT credit, and

(b)which, by reason of the cancellation of that person´s registration under paragraph 13(2) to (6) of Schedule 1, paragraph 6(2) of Schedule 2 or paragraph 6(2) or (3) of Schedule 3 or paragraph 6(1) or (2) of Schedule 3A ought not to have been so paid,

may be assessed under subsection (2) above notwithstanding that cancellation.

(4)Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment.

(5)Where the person failing to make a return, or making a return which appears to the Commissioners to be incomplete or incorrect, was required to make the return as a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another person, subsection (1) above shall apply as if the reference to VAT due from him included a reference to VAT due from that other person.

(6)An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following–

(a)2 years after the end of the prescribed accounting period; or

(b)one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

(6A)In the case of an assessment under subsection (2), the prescribed accounting period referred to in subsection (6)(a) and in section 77(1)(a) is the prescribed accounting period in which the repayment or refund of VAT, or the VAT credit, was paid or credited.

(7)Where a taxable person–

(a)has in the course or furtherance of a business carried on by him, been supplied with any goods, acquired any goods from another member State or otherwise obtained possession or control of any goods, or

(b)has, in the course or furtherance of such a business, imported any goods from a place outside the member States,

the Commissioners may require him from time to time to account for the goods; and if he fails to prove that the goods have been or are available to be supplied by him or have been exported or otherwise removed from the United Kingdom without being exported or so removed by way of supply or

have been lost or destroyed, they may assess to the best of their judgment and notify to him the amount of VAT that would have been chargeable in respect of the supply of the goods if they had been supplied by him.

(8)In any case where–

(a)as a result of a person´s failure to make a return for a prescribed accounting period, the Commissioners have made an assessment under subsection (1) above for that period,

(b)the VAT assessed has been paid but no proper return has been made for the period to which the assessment related, and

(c)as a result of a failure to make a return for a later prescribed accounting period, being a failure by a person referred to in paragraph (a) above or a person acting in a representative capacity in relation to him, as mentioned in subsection (5) above, the Commissioners find it necessary to make another assessment under subsection (1) above,

then, if the Commissioners think fit, having regard to the failure referred to in paragraph (a) above, they may specify in the assessment referred to in paragraph (c) above an amount of VAT greater than that which they would otherwise have considered to be appropriate.

(9)Where an amount has been assessed and notified to any person under subsection (1), (2), (3) or (7) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

(10)For the purposes of this section notification to a personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting as aforesaid shall be treated as notification to the person in relation to whom he so acts.

*The Facts*

4 We find the following facts established by the evidence.

5 The appellant was registered for VAT on 12 January 2004 at 39 High Street, Penge, carrying on business as 'Robust Pound and Confectionery', classified as a non-specialist retail store without alcohol. The locus of the business was changed a number of times and is now the appellant's private address. On 26 April 2004, the officer making a control visit, a Mr Keith Hurrell, recorded that no output tax was being declared, although all the sales were in fact standard-rated, and an assessment was therefore made for the missing tax and it was duly paid; there was no appeal.

6 A further control visit was made on 12 August 2010 to verify a repayment claim and the officer, Mr Robin Walker, projected a large underdeclaration of output tax on the sales actually recorded. The appellant's explanation of this was that "I have a chap who supplies me with zero-rated goods from warehouse clearance – mainly children's books but also children's clothes. He does not provide me with a receipt, and only accepts cash payments". The appellant claimed that this was an acceptable form of supply "at least from my meeting with Keith Hurrell, HMRC officer, during his visit in 2004". At the appellant's request, the report by Mr Hurrell in 2004 was produced, but provided no support for this statement.

7 The appellant also claimed that as a result of a leaking flat roof, the pilfering of goods by staff, shoplifting and accidental damage, he had sustained losses which had to be taken into account. There was however no evidence to support these claims, save some correspondence with the appellant's landlord in 2007 which did not mention any damage to his goods caused by the leak. The calculation of the underlying the assessments allowed a generous 100% mark-up for recorded zero-rated purchases and proceeded on the basis that all other recorded sales were standard-rated.

8 As a result, total output tax of £42,547 was reached as against £12,383 declared, meaning that there had been an underdeclaration of £30,174. No evidence had been, or was at the hearing, produced to support the appellant's claim that £145,000 worth of standard-rated goods had been stolen or damaged. The officer found little or no remaining stock at the business and the appellant's figures indicated that some £200,000 worth of standard-rated goods must have been purchased over the periods 09/06 to 06/10, but only sold for £80,000: such a pattern was not seen as credible, and Mr Walker concluded that if this quantity of stock had indeed been acquired it must have been disposed of in off-record sales. In the event though, Mr Eyin was given the benefit of the doubt and the calculations accepted the total sales as declared.

9 With regard to the use of vehicles giving rise to the fuel scale charges, the appellant told Mr Walker that one of the vehicles in question belonged to his wife and that he used it occasionally, and he sought at least an averaging of the charge over the two cars, his and his wife's, to reflect the fact that one car only was in effect normally used in the business. We saw the petrol purchase records for 03/09, 06/09 and 09/09 but they did not identify which car the purchases were made for; Mr Walker told us that he had seen the underlying invoices but, again, they did not identify for which of the two cars the petrol had been purchased.

10 10 The appellant claimed that he had been advised by HMRC enquiry centres that he should be liable to the fuel scale charge on one of these cars only. Records of telephone enquiries were produced and they showed the following: (i) on 23 July 2010 at 1249, the appellant telephoned the centre, but there is no record either of his question or the reply; (ii) on 13 October 2010 at 1205, the appellant sought information about fuel scale charges and was referred to public notice 700/64 on the subject; (iii) the same day, at 1235, the appellant telephoned again and was directed to "Budget Note 44 2010 that 482.00 gross so 482 x 7/47".

*Conclusions*

11 11 The case law drawn to our attention consisted of the familiar decisions of Woolf J (as he then was) in *Van Boeckel v CEC* [1981] STC 290, and the decision of Dr Brice in *McCourtie v CEC* LON/92/191. In *Van Boeckel*, referring to the requirement that assessments must be made by the commissioners "to the best of their judgment", the learned judge said:

> In my view, the use of the words 'best of their judgment' does not envisage the burden being placed upon the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can

> reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.

12 In *McCourtie*, Dr Brice added:

> In addition to the conclusions drawn by Woolf J in *Van Boeckel*, earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first, that the facts should objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias.

13 We are fully satisfied that these criteria have been met by the assessments made in this case. It must be noted that the assessment for underdeclared output tax accepts that the total sales recorded were correctly stated, but not that the zero-rating of them was as claimed by the appellant; that is already a significant concession in the appellant's favour, since there is evidence to suggest that the total sales may themselves have been underdeclared

14 From Mr Eyin's correspondence in the file, and from his manner in the witness box, we judged him to be an articulate and educated man who was well able to understand that large unrecorded purchases of goods for cash with no receipt did not provide any basis on which a claim for zero-rating of his sales could be sustained. There is no evidence to support the appellant's claim as to the purchases of zero-rated goods and we do not accept the claim.

15 In regard to the fuel scale charges, there is no doubt that the appellant, as he has admitted, did claim input tax credits for fuel purchase for both his and his wife's car, and it is clear that the legislation does not provide for averaging of the kind that the appellant seeks. We have cited the telephone records of the three calls Mr Eyin made to the enquiry centre, but whatever the replies were understood to mean – and the second one on 13 October 2010 is particularly obscure – they did not precede the expenditure in

question and cannot therefore be said to have caused Mr Eyin to have acted to his detriment. Nor can they, of course, have the effect otherwise of altering the correct interpretation of the law.

16 In regard to the misdeclaration penalty, we asked Mr Walker on what basis he had mitigated the full effect of it by 40%, and his reply was that while Mr Eyin had been fully cooperative in his enquiries he had not volunteered information about the misdeclarations and that Mr Walker judged the taxpayer's conduct to have been "somewhere between negligent and deliberate". From our review of the documentation and our impression of the witness evidence, we endorse that assessment of the matter and confirm the mitigation of 40% as fair and reasonable.

17 The appeals must therefore be dismissed.

18 In this appeal, there was some reluctance on the part of the respondents to accede to Mr Eyin's perfectly proper request for Mr Walker's handwritten notes of his control visit to the business to be put in evidence. Happily, that reluctance was overcome, and we trust that similar requests will not be met with the same hesitation.

*Appeal rights*

19 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal no later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**Malachy Cornwell-Kelly**
**Tribunal Judge**

**RELEASE DATE: 8 February 2012**