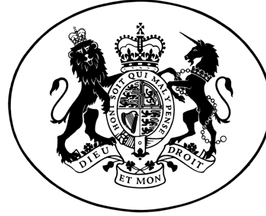

TC03841

Appeal number: TC/2013/06005

FIRST-TIER TRIBUNAL
TAX CHAMBER

Excise Duty – FA2008 Schedule 41, wrongdoing penalty based on lost revenue of a trading company in liquidation of which the appellant was a director – use of laundered fuel – appeal dismissed

THOMAS ARMSTRONG	**Appellant**
- and -	
THE COMMISSIOENRS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

TRIBUNAL: JUDGE IAN W. HUDDLESTON

Sitting in public at Bedford House, Bedford Street, Belfast on 17th June 2014

Jennifer Newstead Taylor BL appeared on behalf of the Respondent instructed by the Solicitors Office (VAT and Excise)

The Appellant appeared in person

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DECISION

Appeal

1. This is an Appeal against HMRC's decision to uphold, upon review, a wrong doing penalty ("the Penalty") issued to the Appellant under the provisions of Schedule 41 of the Finance Act 2008. The Appellant's alleged wrong doing is the using of laundered rebated fuel in road vehicles by a company (now defunct) of which he was a director. The penalty originally assessed was £127,000 but subsequent to a number of internal recalculations, additional evidence as to fuel purchases provided by the Appellant and the review decision itself was reduced to the current figure of £58,246. It is that figure which is under appeal.

The Law

2. Paragraph 3 of Schedule 41 of the Finance Act 2008 states:

"3 (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").

……………………………………………	…………………………………………..
HODA 1979 section 13(1A)	Rebated heavy oil
…………………………………………….	……………………………………………..

Paragraph 3 of Schedule 41 of the Finance Act 2008 states:

"22(1) Where a penalty under any of paragraphs 1, 2, 3(1) and 4 is payable by a company for a deliberate act or failure which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate [other than a limited liability partnership] "officer" means –
(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46))…

[(aa) a manager and]

(b) a secretary"

Facts

3. During the period between 6 September 2010 and 3 September 2011 the Appellant was a director of a company Sisson & French Limited ("the Company") which operated from a base at Lows Lane, Stanton by Dale, Ilkeston, Derbyshire DE7 4QU ("the Premises"). The Company subsequently went into liquidation.

4. On the 3 September 2011 officers from HMRC's Road Fuel Testing Unit visited the Premises and tested the fuel in a number of transport vehicles operated by the Company. Those fuel tests all indicated the presence of laundered rebated fuel and as a result the vehicles themselves were seized and removed. On subsequent analysis all samples were found to contain laundered UK rebated gas oil and two also contained kerosene.

5. The Appellant was interviewed by the Respondent's officers on two separate occasions - 5 September 2011 and 23 September 2011 - and the notes of those interviews were available to the Tribunal. Thereafter the Respondents conducted a road fuel audit.

6. On the 23 January 2011 HMRC wrote to the Appellant (at the address supplied by the Appellant at the interviews) requesting the Company's business records and explaining the circumstances in which a wrongdoing penalty may arise. There was no reply. On the 13 February 2012 HMRC again wrote to the Appellant in similar terms without response. The Appellant says that he had moved address - returning to Northern Ireland.

7. In the absence, therefore, of the Company's business records HMRC calculated a duty assessment based on the information which was available to them – having regard to the vehicles owned by the Company, the periods of their ownership, their average mileage, miles per gallon and relevant duty rates.

8. Subsequent to that a pre-assessment letter was sent to the Appellant on the 19 June 2012. Again there was no response and accordingly on the 16 July 2012 an assessment letter was issued in accordance with Section 13 (1A) Hydrocarbon Oils and Duties Act 1979 and Section 12A Finance Act 1994.

9. Subsequent to that initial assessment there were some amendments made to the initial assessment to take into account slight amendments both to the period of the fuel audit and indeed the period during which the Appellant was a director of the Company.

10. On the 1 May 2013 the Appellant wrote requesting a review stating that the Appellant had proof of purchase of duty paid diesel. Those records were requested but were not supplied.

11. Upon review, the reviewing officer, by way of his review letter of the 25 June 2013 notified by the Appellant of a reduction in the Penalty to a figure of £91,215.

12. On the 5 August 2013 HMRC received an email detailing proof of purchase of duty paid diesel from a company called Northern Oil Limited. Those supplies were verified and consequently as a result the Penalty was further reduced to its current level of £58,246.

HMRC's Case

13. HMRC's case can be relatively shortly summarised. HMRC assert that at all material times the Appellant was a director of the Company and therefore had control over the fuelling of the vehicles. It is their case that the Company had bulk storage facilities at the Premises from which the vehicles were fuelled - except only for a limited period when fuel was purchased directly from petrol filling stations – a fact which they say they have already taken into account in terms of the reduced penalty. HMRC also assert that the Appellant has a history of purchasing red diesel and kerosene and to substantiate their case on this point referred the Tribunal to the following:-

- to an admission by the Appellant during the course of his interviews of buying red diesel and kerosene for a friend called "Ola" to be used in connection with his business;

- to an allegation – again put to the Appellant during his interviews that on the 3 September 2011 – that a company called "Transpeed" - delivered red diesel to a person called "Tom" at the Premises. That information was revealed as the vehicle was subsequently stopped after leaving the Premises and the driver interviewed but as to which the Appellant now asserts arose from a simple mistake;

- that during the inspection all the Company's vehicles were each found to have red diesel and/or kerosene in their running tanks;

- that the Appellant does not admit to knowing that the Company was using illicit fuel but yet relies on bogus invoices from a company, JRA Trading, to support his contention that the fuel was legitimate notwithstanding the fact that those invoices have been established to be fake – both in terms of the address and other details included on them;

- that the Appellant failed to undertake even basic due diligence in relation to JRA Trading despite the presence of points of concern such as the marked reduction in the price of diesel as compared to the market norm.

14. As to the question of the quality of the Appellant's disclosure HMRC say that the Appellant failed to comply in any meaningful way with the Respondent and that therefore the quality of the Appellant's disclosure has been "limited". In particular HMRC refers to:-

(1) HMRC's assertion that the Appellant's answers at interview appear to be aimed at concealing the wrong doing;

(2) the fact that the Appellant has not provided the Respondent with the Company's business records;

(3) the fact that the Appellant did not keep the Respondent up to date with an accurate correspondence address.

15. As to the question of the Penalty, therefore, the Respondent's position is that they have considered all evidence supplied by the Appellant and his conduct and have reduced the Penalty accordingly.

16. Specifically, however, in relation to the two vehicles which the Appellant indicated were "off road" at the relevant time and should be discounted from the calculation HMRC's position is that the Appellant has failed to produce any credible evidence that the two vehicles in question (registration numbers FJ03HHL and KU52JKV) were in fact off road and, if they were, for what period so they have not made any amendment for that assertion.

17. In short, therefore, HMRC assert that there are no new circumstances which would require any reassessment of the Appellant's conduct such as would justify his appeal and therefore request that the Appeal be dismissed.

The Appellant's Case

18. The Appellant appeared in person and gave evidence to the Tribunal. Both from that evidence and his earlier written correspondence his case can be summarised as follows:-

(1) that HMRC's assertion that the Appellant had dealt before in "red diesel" was explicable:-

(a) firstly, in the case of the facts surrounding "Ola" the evidence which the Appellant gave was that Ola had asked him to purchase red diesel using his credit card, that Ola then purchased the fuel from the Appellant (for cash) simply because Ola did not have access to credit card/banking facilities and that the red diesel in question was then used to run generators at public access events such as fairs etc;

(b) that as far as the Transpeed delivery to which HMRC made reference was concerned that it was entirely a mistake and that the "Tom" to whom the delivery man referred when stopped by HMRC was not the Appellant but to another Tom in an entirely different company;

(2) that the Appellant himself had no knowledge of the laundered fuel and that in the main most of the supplies had been paid for and organised by a third party company Boston Commercial Finance (BCF) whose directors had a very strong connection with the Company as it had originally been run by the same directors/shareholders as those that owned BCF. The Appellant's case is that he simply made contact with JRA Trading (by mobile) and that he always spoke to the same person, Steven Kane, who then arranged for the deliveries were made and for which the Appellant

then paid in cash or funded through BCF who in effect "bank rolled" and provided all of the administration function for the Company.

(3) On the Appellant's own evidence the fuel was often delivered in clear tanks in transit vans and appeared to be clear fuel which was then transferred from those tanks into the bulk storage facilities on the Premises.

(4) As regards the records which HMRC sought, the Appellant indicated that he had done his best to obtain those but that as BCF, in essence, provided the banking and administration facilities to the Company that he did not have physical access to them and his repeated requests to BCF were met with straightforward denial. Subsequently BCF went into administration and the administrator confirmed that there were no records to which he could have access for the purposes of explaining the trading which the Company had been conducting during the period through which he was a director.

(5) The Appellant's final assertion was that other fuel (ie. that other than which had been supplied by JRA Trading) had been purchased legitimately – in the main from Northern Oil Limited (for which invoices were available and HMRC had made the appropriate adjustment to the assessment) and/or from ordinary garages. In relation to those garage transactions the Appellant's evidence was that he had purchased those fuel supplies in cash simply because he had not been able to open up a company bank account but that in terms of providing corroborative evidence he was unable to confirm either the garages in question or evidence of the particular transactions.

19. Overall the Appellant's case is that he was not being deliberate in any form of concealment, that he had purchased fuel in good faith and that he could not be responsible for the conduct of third parties such as BCF whom he did not actually control. Based on those assertions he contends that the Appeal should be allowed.

Decision

20. Having heard the evidence and reviewed all the papers we make the following findings:-

(1) Period of directorship

During the course of the Hearing the Appellant had adduced information that he had a co-director, a Mr Joseph E. Crane. The Tribunal Judge asked for confirmation of the company records which were, in turn, produced during the course of the Hearing and which did confirm that Mr Crane had in fact been a co-director with the Appellant during the period from the 26 July 2010 to the 21 February 2011. This confirmed the Appellant's evidence on this point.

As a point of law, however, it does not make any difference because under Schedule 41 a culpable "officer" is any director of the Company and there is no provision for liability to be shared simply because there is more than

one director (which is in essence what the Appellant suggested). On the facts, therefore, even though there were two directors during the relevant period, pursuant to the provisions of Schedule 41 Mr Armstrong is and was an officer throughout the relevant period and therefore the Penalty can be correctly levied against him. We find that he was, in fact, the only director who was in post throughout the entirety of the relevant period.

(2) The Assessment

As indicated above the Company went into liquidation and has been struck off. As such Mr Armstrong, therefore, has no locus standi by which to appeal against the original assessment.

In terms of the calculation of Potential Lost Revenue on which the Penalty is based, however, he asserts, in effect, three different suppliers. I take those in turn. Firstly he asserts that legitimate fuel was purchased, in cash, from various garages. He has not, however, been able to produce any evidence of that fact either to HMRC or this Tribunal. As in these proceedings the onus of proof is upon him to do so then regrettably in the absence of that proof we can do nothing but concur with HMRC that his argument that the current calculation of Penalty on the basis of legitimate purchases from garages be further reduced be dismissed.

The second period to which the Appellant made reference was the period of supply by Northern Oil. In relation to this we find that HMRC have already taken that factor into account and have reduced the assessment accordingly. No further reduction is sought for or applicable;

The final period of supply, therefore, relates to JRA Trading and as to which the Appellant asserts his belief that he was acquiring proper "legitimate" fuel. We have highlighted the detail of that above. On the facts and evidence before us we conclude that there are sufficient circumstances around the supply of the fuel to put an ordinary businessman at the very least upon notice that the supply itself was "off market". In the first place the method of supply was by way of tanks within transit vans which is not, we would suggest, a customary way in which fuel is normally supplied. In the second place there was a substantial discount to market price (approximately 10 pence per litre) which again we would consider sufficient to put an ordinary businessman on notice of the fact that he should be enquiring as to the source of supply.

Thirdly, the method of dealing ie. by which Mr Armstrong made a telephone call to a mobile number triggering an ultimate supply for which he paid in cash or arranged payment through BCF is again, we find, something which would raise suspicion in a normal businessman. As it transpired the invoices which were raised were, in fact, bogus. Firstly the address given was a domestic address. Secondly, not only was it a domestic address but the address itself was wrongly quoted. Thirdly the

form of invoice was itself somewhat suspect in that it failed to have adequate other details identifying the supplier etc.

5 In those circumstances we find that the Appellant must at least be imputed with knowledge that the fuel supplied was not from a legitimate source - or at the very least that he ought to have made further and adequate enquiries. We do not find the Appellant's assertion that he was unaware of the suspect nature of the fuel convincing. There may be some additional complexity around the relationship between the Company, BCF
10 and JRA Trading but no specific allegations were made or evidence adduced around that relationship or its impact on the Appeal.

(3) Fuel Usage

15 The fuel which the Company bought (as described above) was then used to fuel the Company's seven vehicles – a fact which was established through the inspection visit carried out by HMRC.

In relation to that the Appellant says that two of the seven vehicles were in fact off road and being used for parts. Specifically on that point it was a
20 matter of evidence before us that those vehicles were the subject of a hire purchase agreements with a third party financier. The appellant, however, has not produced any evidence that they were not taxed or for example that he had previously declared to the Vehicle Licensing Authority that they were "off road" or were otherwise rendered unable to travel to avoid
25 paying Road Duty Tax. In those circumstances we find it quite hard to accept that the two vehicles were not in operational use. In reality, therefore, and in the absence of further evidence we find that the seven vehicles were properly included in the original assessment and, therefore, penalty calculation is correct in the absence of cogent corroborative
30 evidence to confirm the Appellant's assertion that they were in fact off road at the relevant time.

(4) Co-operation

21. The next matter which we turn to is the level of co-operation and assistance
35 which was provided by the Appellant. In this regard we have had reference to the Review Officer's letter of the 25 June 2013. In that letter the Review Officer took a slightly different view from the original inspecting officer and, as a consequence, did provide a reduction based on the assistance which the Appellant had provided. As a result she allowed a discount of 25% which resulted in an overall penalty calculated at
40 87.5% of the Potential Lost Revenue. In relation to this the Appellant says that he tried but was unable to get further and additional business records from BCF. In his evidence to the Tribunal the Appellant explained that BCF was in fact almost a factoring agent and supplier of finance to the Company. Whilst we accept that the inter relation between the Company and BCF was probably more significant than the
45 papers suggest we find it difficult to accept that the Appellant could not either by reference to third party information or by attempts to compel the previous directors of

BCF to provide access to the Company's information that he could not adduce corroborative evidence in support of his case.

22. We turn then to some of the inconsistencies which were provided in the sworn interviews that were put to the Appellant during the course of the hearing. To give an example it was put to the Appellant that one of his former employees had indicated that laundered fuel had in fact been used in connection with the fuelling of the vehicles - a point which the Appellant denied both at interview and in the Hearing. There is clearly a conflict of evidence in relation to the point but on balance having reviewed both that and other aspects of the interview notes we find that there are a number of unexplained inconsistencies between the Appellant's version of events as given in evidence and that contained in the sworn testimony both of himself and others carried out at the time of the inspection and the subsequent fuel audit. Having considered all of the information we do, therefore, find that HMRC have taken adequately into account the level of co-operation which the Appellant has provided in relation to the Penalty.

23. Taking all of the above into account we therefore conclude that the Appeal be dismissed.

24. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN HUDDLESTON
TRIBUNAL JUDGE

RELEASE DATE: 24 July 2014