[2015] UKFTT 0427 (TC)

TC04604

Appeal number: TC/2014/03917

EXCISE DUTIES – application by motor fuel retailer for approval for duty deferment – retailer required duty deferment account number to be able to negotiate duty deferment supply agreement with suppliers - application refused by HMRC as retailer did not own fuel in a tax warehouse nor were there arrangements for it to purchase such fuel – refusal upheld on review - was refusal of application reasonable – no – further review ordered - regulations 4 and 9 of the Excise Duties (Deferred Payment) Regulations 1992 (SI 1992/3152)

FIRST-TIER TRIBUNAL
TAX CHAMBER

BROBOT PETROLEUM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER
SANDI O'NEILL

Sitting in public at Fox Court. London WC1 on 1 May 2015

A Powell, of Allan Powell Associates, Chartered Tax Advisor, for the Appellants

W Hays, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Brobot Petroleum Limited ("Brobot") against a decision of HMRC to refuse Brobot's application for a Hydrocarbon Oils Ex-warehouse Duty Deferment Account. The decision was made by Officer Greener in a letter to Brobot dated 2 May 2014. His decision was upheld on review.

2. At the hearing, Mr Powell represented Brobot and Mr Hays represented HMRC. We heard oral evidence at the hearing from Edmund Bright, a director of Brobot, Brian Madderson, chairman of the Petrol Retailers Association, and from Derek Greener, the HMRC officer who made the decision to refuse Brobot's application. A bundle of documents was also produced in evidence.

3. In addition, a witness statement from Sharon Marshall was submitted on behalf of HMRC at the hearing. Officer Marshall was the review officer who upheld Officer Greener's decision. Her statement had been served on the Appellant on the day before the hearing. The Directions issued by the Tribunal required that witness statements be served by 19 December 2014 (subsequently extended to 16 January 2015). The Directions also required that witnesses attend the hearing and be available for cross-examination unless advance notification is given by the other party that the witness's evidence is not in dispute. However, as Mr Powell did not object to the late service of the witness statement, and did not dispute her evidence, we consented to the late service of the statement and its admission in evidence.

The Appeal

4. Hydrocarbon oil may only be removed from a tax warehouse in the UK on payment of excise duty, unless the person to whom the oil is delivered has been authorised to defer payment under regulations 4 and 9 of the Excise Duties (Deferred Payment) Regulations 1992 (SI 1992/3152) ("the Regulations"). The Regulations are made under s127A, Customs and Excise Management Act 1979.

5. Regulations 4 and 9 are as follows:

> **Approved Persons**
>
> 4(1) A person who wishes to be granted excise duty deferment under these Regulations shall apply to be approved for excise duty deferment purposes.
>
> (2) When approving a person under this regulation, the Commissioners may specify the maximum amount of excise duty which may be deferred by that person at any time under that approval.

(3) When approving a person under this regulation the Commissioners may limit the approval to deferment in respect of goods which are at specified places.

(4) A person may be approved separately under this regulation in respect of different places.

(5) The Commissioners may, for reasonable cause, at any time vary or revoke any approval granted under this regulation.

[…]

Conditions

9 The Commissioners may make any approval of a person or any grant of deferment of duty subject to any condition or requirement and conditions or requirements may be added to or varied at any time by the Commissioners.

6. HMRC has issued guidance as to the basis on which it is prepared to approve excise duty deferment. Notice 101 deals with duty deferment generally, and Notice 179 deals with motor and heating fuels. Paragraph 6.1 of Notice 101 states the following:

6.1 Who can apply for deferment approval?

You can apply if you are:

- an importer
- an owner of goods in warehouse or free zone
- an agent (including warehousekeepers) who enter goods for importers or owners
- you do not have to be VAT registered to apply for approval

7. Paragraph 10.4 of Notice 179 is in similar terms:

10.4 Who can defer payment?

You can defer payment if you are:

- an importer
- an owner of goods in warehouse or free zone
- an agent (including warehousekeepers) who enters goods for importers or owners, and are
- approved and hold a Deferment Approval Number (DAN) which identifies your duty deferment account

For further information on deferment please see Notice 101: deferring duty, VAT and other charges. Copies of the notice are available from our Helpline on 0300 200 3700.

8. Brobot had been authorised under the Excise Payment Security System, which allowed Brobot to defer or make payments of excise duty without having to provide a bank guarantee.

9. Although Brobot had an EPSS authorisation, this is separate from authorisation to defer payment of duty. To defer payment of excise duty they needed additional approval under Regulation 4. Brobot applied for such authorisation, which was refused by HMRC. HMRC's decision was communicated to Brobot by a letter from Officer Greener dated 2 May 2014, and that decision was subsequently upheld by Officer Marshall on review.

10. Brobot now appeal against HMRC's decision.

Which decision?

11. An initial issue was to identify the decision being appealed. Was it the original decision of Officer Greener, or the decision of Officer Marshall on review? Mr Hays sought to persuade us that for the purposes of the legislation governing appeals in this case, there was only one "decision" (being the decision of Officer Greener), and it was that decision that was being appealed.

12. We were referred by Mr Hays to s13A(2)(j) Finance Act 1994 ("FA 1994") and the definition of "relevant decision" as being the decision made under Schedule 5 (in other words, the original decision made by Officer Greener). Mr Hays then referred us to s15F(5), and the reference in the sub-section to the relevant decision being upheld, varied or cancelled on review. Mr Hays submitted that because the statute referred to the original decision being varied (rather than being quoshed or replaced), the original decision still stood as being the "decision", rather than there being a fresh decision being made by the review officer. Finally, Mr Hays referred us to s16(1B) which provided that it was the "relevant decision" against which the appeal was made.

13. The difficulty with Mr Hays' argument is that s16(1B) applies where there has been no review, and in those circumstances the appeal must be against the original "relevant decision". But where there had been a review, the appeal is made under s16(1C), which does not refer to the "relevant decision".

14. We therefore hold that in this case it is the review decision of Officer Marshall that is the decision against which the appeal is made.

15. In the light of our holding as to the decision under appeal, and on the basis of Officer Marshall's witness statement, HMRC acknowledged and adopted Officer Greener's reasons for originally refusing Brobot's application as the reasons given on the review. We noted that Brobot did not object to Officer Marshall's witness statement and did not require her to attend for cross-examination. Taking account of the overriding objective in the Tribunal Rules and the interests of justice, we decided, with the

agreement of both Brobot and HMRC, to proceed with the hearing of the substantive issues before us.

Our powers

16. Decisions by HMRC "as to whether or not any person or place is to be, or to continue to be, approved for any purpose connected with the deferment of duty or as to the conditions subject to which any person or place is so approved" are an "ancillary matter" for the purposes of s16 (see s16(8) and Schedule 5, paragraph 2(4)(a), FA 1994).

17. Our powers in relation to appeals on ancillary matters are set out in s16(4) FA 1994:

> (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –
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> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
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> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

Background facts

18. The background facts are not in dispute and we find them to be as follows.

Brobot's reasons for wanting to be able to defer duty

19. The market for petrol filling stations in the UK can be divided into three categories, independently owned filling stations, supermarket filling stations, and filling stations owned and operated by the major oil companies. Brobot are an independent filling station owner, with some 23 filling stations in the East Midlands, selling fuel under the Jet and BP brands.

20. Excise duty is a very substantial part of the cost of fuel – at the time of the hearing, it was nearly 58p per litre. Excise duty on refined oil is accounted for at the "duty point".

In the case of imported refined fuel, we were informed that the fuel is typically held in bond in storage tanks at or near the dockside (which is a "warehouse" for the purposes of the relevant regulations). The duty point will be the point where the fuel is discharged into road tankers for delivery to the filling stations. Apparently HMRC do not permit fuel to be transferred in bond to inland storage depots.

21. Duty must be paid to HMRC before fuel is removed from bond, unless there is a duty deferment arrangement with HMRC in place. A duty deferment arrangement allows a supplier approved by HMRC to defer paying the excise duty for an average of four weeks. At the end of the deferment period, the supplier must pay the duty to HMRC.

22. There is no bad debt relief for excise duties charged on fuel. The supplier will need to account to HMRC for excise duty on fuel, even if the retailer to whom he sells the fuel defaults on payment.

23. The combination of the high rate of excise duty, the limited duty deferment period and the absence of any bad debt relief means that fuel suppliers limit the credit that they are prepared to offer their retailer customers. In many cases, suppliers give as little as one day's credit. In the case of Brobot, because of the length of time they have traded, the credit terms with their suppliers are 10 and 21 days (depending upon the supplier). However the suppliers limit their exposure to default by taking a first charge against some of Brobot's properties.

24. The fact that suppliers take a charge over Brobot's properties has limited Brobot's access to capital, and made expansion of the business difficult. There have been times when Brobot have operated on low stocks because credit limits were reached, preventing them from stocking to capacity.

25. In addition to the issue with credit terms, Brobot also suffer stock losses on delivery of fuel from suppliers. Under environmental regulations, suppliers operate "vapour recovery" systems at supply terminals, which limit the escape of fuel vapour into the atmosphere. At the terminal, as part of the process of loading fuel onto a road tanker, heavily saturated fuel vapour is created which is captured by the terminal's vapour recovery installation. After processing, the captured fuel is returned to the terminal's storage tanks and is available for resale. The vapour recovery operates after the fuel has been metered out into the road tanker, and so will have been included in the calculation of fuel sold to Brobot. Brobot therefore will have paid for fuel that has been recovered by the supplier and returned to the supplier's storage tanks. The sales brochures for vapour recovery systems advertise their efficiency at 0.18%. Brobot purchases approximately 136 million litres of fuel each year, of which 46 million litres is unleaded petrol; Mr Bright calculates that for the 46 million litres of unleaded petrol, 82,000 litres will have been recovered, for which Brobot receive no allowance.

26. But to compound the problem, the supplier will have accounted for excise duty on this recovered fuel (as it will have passed the duty point). To avoid a double charge to

duty arising on such recovered fuel, HMRC refund the duty levied on recovered vapour to the supplier under an extra-statutory concession. The evidence before us was that the suppliers do not make good the refund of this duty to their retailer customers – notwithstanding the fact that it is normally HMRC's practice to refuse to give refunds if there is any element of "unjust enrichment" to the person receiving the refund (we note that since the hearing date, HMRC have announced a consultation into the "vapour recovery scheme" extra-statutory concession on recovered fuel).

27. In addition to the losses due to vapour recovery, Mr Bright mentioned other reasons why stock losses occur when fuel is loaded onto tankers. These include the expansion of and contraction of fuel depending upon temperature. Fuel volume should be measured at a standard temperature of 15°C. However fuel may be loaded onto tankers "hot" (particularly when loaded from a refinery), and will then contract as it cools whilst being delivered to the filling station, so that the volume of fuel delivered at 15°C is less than the volume of fuel metered into the tanker. Another concern is that the meters used at the supply terminals are not subject to external controls, and there is a concern that they may be set to a negative tolerance.

28. Mr Bright informed us that retailers had no means of checking on the volume of fuel discharged from a tanker when it delivered at a filling station – due to environmental regulations the tankers are sealed, and there is no means of "dipping" the tanker to verify the volume of fuel it contained.

29. Mr Bright estimated that the stock losses suffered by Brobot as a result of these issues are more than £120,000 per annum.

30. Mr Bright considered that Brobot could mitigate these losses if they were approved by HMRC to defer duty. They would then be able to purchase fuel in bond at the storage terminal, prior to the fuel passing the duty point on being loaded onto road tankers. This would mean in particular that:

> (a) Brobot would become the person liable to account to HMRC for excise duty on the fuel (rather than the original supplier). The supplier would no longer have the risk of having to pay the duty notwithstanding a default by its retailer customer. As a result, Brobot would no longer have to provide a charge over their properties to suppliers, and they may be able to negotiate longer credit terms; and
>
> (b) Any refund of duty on fuel recovered under vapour recovery systems would be refunded to Brobot.

31. In his evidence, Mr Bright told the Tribunal that contracts for the supply of fuel were normally for a period of between one and five years. Approximately one year prior to a contract expiring, he would start negotiations for a new contract. A number of contracts came up for renewal recently, and duty deferment was part of the negotiations. However the suppliers refused to contemplate supply of fuel whilst in bond unless and

until Brobot had been approved to acquire fuel in bond by HMRC (and had been issued with a Deferment Account Number ("DAN")). In the circumstances, Brobot had rolled-over the contracts for one year, with the intention that once HMRC had issued Brobot with a DAN, he would re-open negotiations with the suppliers. But, said Mr Bright, until Brobot had a DAN, suppliers would not negotiate with him to supply fuel in bond.

Brobot's application

32. The primary requirements imposed by HMRC for duty deferment are that the applicant must (a) have sufficient funds to pay the duty, and (b) provide financial security (typically a bank bond) for (effectively) twice the sum deferred in each calendar month. But since 2007 HMRC has operated a scheme (the Excise Payment and Securities System ("EPSS") to permit deferment of excise duty without a requirement to provide financial security. To be eligible for EPSS, the applicant must have a clean three year VAT record, and must have sufficient assets to cover any deferment liability. Under the arrangements then in existence, a taxpayer who wanted to use EPSS would first apply to HMRC's EPSS unit for approval to use EPSS. Once that approval had been given, the taxpayer would apply for a DAN in respect of the particular duty to be deferred (eg tobacco, alcohol or hydrocarbon oil).

33. Brobot applied for approval under EPSS, and was approved by HMRC's EPSS unit by letter dated 19 December 2013. Brobot then applied for a DAN to HMRC's Central Deferment Office at Southend-on-Sea. This application was made on 3 January 2014.

34. On 17 January 2014, the DAN application was referred to Officer Greener. On 3 February 2014, Officer Greener contacted HMRC's Oils Unit of Expertise to seek advice in relation to the application, and asking whether Phillips 66 (one of Brobot's suppliers) were encouraging their customers to apply for deferment accounts.

35. Officer Greener was informed by the Unit of Expertise that (having made enquiries of Phillips 66), that Phillips 66 were not encouraging customers to apply for deferment accounts. He was also advised that Brobot may not meet the requirements in paragraph 10.4 of Notice 179, and will not qualify for a deferment account.

36. Officer Greener e-mailed Brobot on 14 February 2014 in the following terms:

> I've discussed your case with our Oils Unit of Expertise. From what I can gather, our policy team are taking a fairly robust line on the qualifications for an oils deferment. Notice 179 para 10.4 states that to be approved you must be an importer, an owner of goods in warehouse or free zone or an agent (including warehousekeeper) who enters goods for importer or owners (and are approved and hold a Deferment Account Number which identifies your account).
>
> […] once I get a response from policy about whether they will accept your application then I will be in touch.

37. Mr Bright responded the same day stating that Brobot had not yet decided upon a supplier. Mr Bright referred in his e-mail to a statement from HM Treasury about EPSS approved traders and the Regulations.

38. Following advice received from the Unit of Expertise, Officer Greener wrote to Mr Bright on 18 February 2014 with a series of questions, to which Mr Bright replied by e-mail on 21 February 2014. One of the pieces of information Mr Greener required was "evidence in the form of any agreements/proposals that may have taken place between your company and a supplier(s)". In his reply, Mr Bright confirmed that Brobot had not, at this stage, decided on a supplier or the warehouse from which the supply would be made.

39. On 10 March 2014 Officer Greener e-mailed Mr Bright saying that he was still not in a position to approve the application for a DAN as he had not provided evidence that Brobot had entered into negotiations with a supplier or a warehouse. Officer Greener advised Mr Bright that he required evidence in the form of an e-mail or letter from a prospective supplier stating that they were willing to supply Brobot once a DAN had been granted.

40. On 14 April 2014, Mr Bright e-mailed Officer Greener providing a copy of his prior e-mail of 14 February 2014.

41. On 2 May 2014, Officer Greener wrote to Mr Bright to advise that HMRC were unable to proceed with the application for the DAN, as Brobot had not demonstrated that there was a commercial agreement in place with a supplier or warehouse where hydrocarbon oil would be transferred in an excise warehouse.

42. In the course of his evidence at the hearing, Officer Greener explained that, on the basis of advice received from HMRC's unit of expertise, he was not able to issue a DAN unless there was documentary evidence that a supplier was willing to supply fuel to Brobot from a warehouse. The policy of HMRC, as stated in Notice 179, was that a DAN would not be issued unless the applicant owned fuel in a tax warehouse. However, following discussion with the Unit of Expertise, Officer Greener was prepared to relax the policy if Brobot could show that they would be supplied goods in warehouse. Officer Greener wanted to see some form of agreement showing that a supplier was willing to sell fuel to Brobot on this basis.

43. In his evidence, Mr Bright told us that Brobot's prospective suppliers were not willing to give up their duty deferment arrangements unless and until Brobot had their own DAN. At the time that Brobot applied for the DAN, they were in discussions with suppliers about a new supply agreement, but the suppliers were not prepared to enter into meaningful negotiations without Brobot having a DAN. Mr Bright told us that he had met suppliers and discussed supply on a duty deferred basis face-to-face, but that he had not made a formal written proposal to suppliers. From his correspondence and discussions with Officer Greener, Mr Bright was under the impression that HMRC required sight of

formal terms of supply – but Mr Bright considered that the reality was that he would not be able to obtain a formal proposal of supply without having first been issued a DAN. He needed a DAN in order to be able to negotiate.

Submissions

44. Mr Powell submitted on behalf of Brobot that HMRC's decision not to issue a DAN was unreasonable. There was little risk to HMRC in issuing a DAN. Brobot had already been authorised under EPSS, and so HMRC had already reached a decision that Brobot were a compliant trader who did not present an unacceptable risk of default.

45. Mr Powell noted that in cases where a person applied for approval as a warehouse keeper, HMRC regularly gave approval for an initial period of 12 months, which was then renewed subject to HMRC being satisfied with the warehouse keeper's compliance.

46. Mr Powell submitted that Brobot's application was not speculative or made in abstract. HMRC could readily impose conditions and limits to ensure that any approval given to Brobot was not abused.

47. Mr Hays, on behalf of HMRC, submitted that HMRC's policy as set out in paragraph 10.4 of Notice 179 was reasonable. It was reasonable that HMRC only issue a person with a DAN if they have use for one. It was reasonable for HMRC not to have to maintain duty deferral arrangements for traders which were not used.

48. Mr Hays submitted that there was a degree of flexibility in the application of the policy, and it was not just blindly followed. In particular, in the case of Brobot's application, Officer Greener would have been prepared to issue a DAN if there was evidence before him that Brobot would have made use of it, even if it did not yet own fuel in a tax warehouse.

49. Mr Hays submitted that Mr Bright's evidence that suppliers were not willing to supply Brobot, without Brobot having been issued a DAN, was weak, and was based on informal discussions. In particular, why had Brobot not made any formal written request to suppliers?

50. Mr Hays submitted that if HMRC had issued a DAN to Brobot, there was a risk that they would have issued a DAN that was not needed. Mr Hays submitted that it was reasonable for HMRC not to issue a DAN for an initial limited period. He could foresee difficulties with such an approach, in particular the risk that a DAN would be granted to someone who did not need it. Mr Hays also submitted that there would be difficulties in fixing an appropriate initial period. It was, he submitted, better for there to be a clear line in the sand.

51. Mr Hays submitted that the evidence we had heard about stock loss and vapour recovery was not relevant to our decision. In particular, there was no evidence that the vapour recovery scheme was unlawful.

Conclusions

52. We find that Brobot are a substantial trader, with an established independent filling station business.

53. We find that Brobot's application for deferment approval was not speculative. We find that they had good reasons for wanting to be able to purchase fuel on a duty deferred basis. In this regard we find that the evidence as to the stock losses that they suffered, the credit terms of their suppliers (including the security that suppliers required over their assets) are all relevant.

54. We also find that HMRC's policy not to issue DANs unless they are needed is reasonable. However we find that Brobot had a legitimate reason for needing a DAN. Mr Bright is the managing director of a substantial petrol retailer, and has had many years' experience of negotiating with suppliers of fuel. Notwithstanding Mr Hays' submissions, we believe Mr Bright when he says that suppliers were not prepared to engage in detailed or substantive negotiations for supply on a duty deferred basis unless and until Brobot had been issued with a DAN.

55. Brobot were therefore faced with a chicken-and-egg situation. They were not able to enter into meaningful negotiations with fuel suppliers for a supply agreement on a duty deferred basis without having been issued with a DAN – and on the other hand, HMRC would not issue them with a DAN until they had such an agreement (or at least such an agreement in principle).

56. We find that it was unreasonable (in a "Wednesbury" sense) for HMRC to place Brobot in such a position by refusing to issue Brobot with a DAN.

57. Nor are we persuaded that HMRC would face difficulties if it issued a DAN in this case initially on a time limited basis. If it turned out that Brobot were unsuccessful in concluding an agreement for the supply of fuel on a duty deferred basis, then the DAN would expire automatically with the effluxion of time. There would not be a risk to HMRC of unneeded DANs being in issue.

58. We note Mr Bright's evidence that he normally commenced negotiation for the renewal of a supply agreement around one year before the agreement expired. Therefore HMRC could issue a DAN limited initially to a period of one year. The continuation of the DAN after one year would be dependent upon either Brobot having concluded an agreement for the supply of fuel on a duty deferred basis. If Brobot's negotiations were proving difficult and had not concluded at this point, the DAN could be continued for a further limited period.

59. We therefore find that HMRC could not reasonably have arrived at a decision to refuse to authorise Brobot under Regulation 4 in the circumstances of this case.

60. We direct that HMRC's decision not to authorise Brobot under Regulation 4 shall cease to have effect from the date on which this decision is released.

61. We require HMRC to conduct a further review of their original decision in accordance with the following directions:

(1) that the review be carried out by an officer not previously involved in the processing of the underlying applications or in any stage of the decision making process;

(2) that the official carrying out the further review should take account of the terms of our decision, in particular that:

(a) it is unreasonable for HMRC to refuse to issue a DAN to an established petrol retailer in circumstances where it can demonstrate a bone fide intention to enter into negotiations to purchase fuel on a duty deferred basis from a supplier; and

(b) it would be reasonable for HMRC to make the issue of a DAN in such circumstances subject to conditions, including a condition that the DAN would lapse if no supply agreement has been concluded (or substantive negotiations are not in progress) within a specified time – such time to be determined by reference to the time the applicant has previously taken to negotiate supply agreements.

62. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 25 AUGUST 2015

List of cases cited but not referred to in this decision:
TDG (UK) Ltd v HMRC [2002] V&DR 323
Forth Wines Ltd v HMRC [2012] UKFTT 74 (TC)

R (oao HT & Co (Drinks) Ltd and another) v HMRC [2015] EWHC 659 (Admin)
Eastenders Cash and Carry plc v HMRC [2011] UKFTT 25 (TC)
R (oao Wilkinson) v HMRC [2005] UKHL 30
Noor v Revenue & Customs Commissioners [2013] UKUT 71 (TCC)