NCN: [2021] UKFTT 234 (TC)

TC08183

EXCISE DUTY—Hydrocarbon Oils Duties Act 1979 s 13—Appeal against assessment

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2011/05952

BETWEEN

TERENCE STINSON
T/A STINSON TRANSPORT **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
JANE SHILLAKER

The hearing took place on 7-8 June 2021. The form of the hearing was V (video). The remote platform was the Tribunal Video Platform. A face to face hearing was not held due to the Coronavirus (Covid-19) pandemic. The documents to which the Tribunal was referred are the hearing bundle (532 pages), the authorities bundle (25 pages) and the skeleton arguments of the parties.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Danny McNamee of McNamee McDonnell Solicitors for the Appellant

Simon Charles, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. The Appellant appeals against an assessment made under s 13(1A) of the Hydrocarbon Oils Duties Act 1979 in respect of the use of rebated diesel fuel in road vehicles he owned.

2. This appeal was determined by a differently constituted First-tier Tribunal in a decision dated 15 April 2014. The Appellant appealed successfully against that decision to the Upper Tribunal, which determined that there should be a complete rehearing of the appeal before a differently constituted First-tier Tribunal: *Stinson t/a Stinson Transport v Revenue and Customs* [2020] UKUT 0051 (TCC). This is the decision on the rehearing of the appeal.

3. The Appellant does not dispute the entitlement of HMRC to make an assessment, but disputes the amount of the assessment. In this decision, the Tribunal considers the approach it should take in order to give effect to the Upper Tribunal's decision (see especially paragraphs 49 to 62 below). It decides as follows.

4. The Tribunal should take the assessment under appeal as the starting point, and consider only those aspects of the assessment that are put in issue by the parties, and any additional aspects that the Tribunal of its own motion may decide to consider. Where a particular aspect of the assessment is considered by the Tribunal, it has a full appellate jurisdiction to determine whether that aspect of the assessment is correct, and to make any necessary corrections to it. However, this full appellate jurisdiction does not require the Tribunal to consider afresh every single aspect of the assessment, whether put in issue by the parties or not, as if the Tribunal itself were the assessing officer and as if no previous assessment had been made by HMRC.

5. The Tribunal also considers the approach to be taken in cases where HMRC contend that an error in the assessment in the Appellant's favour should be corrected by the Tribunal, and considers whether the Tribunal can of its own motion raise potential errors in an assessment that neither party has identified.

BACKGROUND

6. Diesel fuel which has been taxed for use in road vehicles is referred to as "DERV" ("Diesel Engine Road Vehicle") or "white diesel". Rebated diesel fuel, which is less expensive because it bears a lower level of tax, and which may lawfully be used for certain purposes specified by legislation, is known as "MGO" ("Marked Gas Oil") or "red diesel". Red diesel contains a chemical marker and dye that enable it to be identified as rebated fuel, in order to assist detection of any illegal usage of it.

7. At material times, the Appellant carried on a haulage business from premises in County Antrim at which his brother, trading as JS Couriers, carried on a similar business.

8. On 24 May 2010, officers of HMRC attended the premises of JS Couriers in order to carry out checks on fuel in vehicles and storage tanks at the premises. There were five vehicles in the yard at the time. Fuel samples drawn from the running tanks of all five vehicles tested positive for red diesel. Only one of these vehicles, with a registration number beginning with TKZ ("**vehicle TKZ**"), belonged to the Appellant, and no further reference is made in this decision to the other four vehicles. Vehicle TKZ was seized by HMRC pursuant to s 24 of the Hydrocarbon Oils Duties Act 1979 ("**HODA**") and ss 139 and 141 of the Customs and Excise Management Act 1979. The fuel sample taken from that vehicle was sent for testing by the Local Government Chemist, who reported on 17 June 2011 that the sample contained 9% marked UK rebated gasoil (red diesel).

9. In August 2010, HMRC Officer Dinsmore began conducting a post-detection audit. She requested the Appellant to provide details of all vehicles owned by him during the three years prior to 24 May 2010 (the date of detection), together with details of their fuel consumption and their average weekly mileage, as well as fuel purchase invoices. She also submitted a request to the Revenue Commissioners of the Republic of Ireland for details of "8th Directive" claims made by the Appellant in the Republic of Ireland in respect of fuel purchases made there (that is, claims made pursuant to EU rules for VAT refunds to taxable persons not established in the Member State of refund but established in another Member State).

10. On 9 November 2010, following receipt of certain material from the Appellant, Officer Dinsmore informed the Appellant of her intention to issue an assessment for £32,132 for the audit period 18 November 2007 to 23 May 2010. On 9 March 2011, Officer Dinsmore then issued an assessment in the lesser sum of £29,934 for the period 1 April 2008 to 30 September 2010. This assessment was based on a finding that the Appellant owned five vehicles during the audit period. In addition to vehicle TKZ, these were vehicles with registration numbers beginning with N6 ("**vehicle N6**"), OKZ ("**vehicle OKZ**"), RIA ("**vehicle RIA**") and N57 ("**vehicle N57**").

11. On 13 April 2011, Officer Dinsmore issued a replacement assessment in the reduced sum of £28,157. This was because HMRC now accepted, following receipt of further representations from the Appellant, that vehicle RIA should be removed from the assessment calculations.

12. The Appellant's representative requested a statutory review of that assessment. In a statutory review decision dated 11 July 2011, HMRC further reduced the assessment to £24,302, having concluded that an amount of £3,855 relating to vehicle RIA had mistakenly been retained in the assessment despite the decision to remove that vehicle from the assessment. That letter also confirmed that the correct audit period was 14 April 2008 to 23 May 2010.

13. On 15 August 2011, HMRC received from the Revenue Commissioners of the Republic of Ireland copies of the Appellant's 8th Directive claim forms and supporting paperwork (the "**8th Directive material**"). This material consists of claims made by the Appellant in the Republic of Ireland for refunds of VAT on purchases there of DERV and on other expenditures including toll charges, repairs and truck washes. The parties agree that all these 8th Directive claims were paid in full by the Revenue Commissioners. HMRC also accept that it was entirely legitimate for the Appellant to fuel his vehicles in the Republic of Ireland and to submit 8th Directive claims in the Republic of Ireland in respect of those fuel purchases.

14. On 30 August 2011, Officer Dinsmore advised the Appellant that in light of the material received from the Republic of Ireland, the assessment had been further reduced to £23,628.

15. On 13 February 2012, Officer Dinsmore further reduced the amount to £21,655. This was due to the fuel consumption figure for vehicle N6 having been increased for purposes of the calculation of the assessment. This was the final assessment issued by HMRC.

16. The assessment was calculated by a methodology commonly used in s 13 HODA assessments. First, an "audit period" was established, in this case ultimately 14 April 2008 to 23 May 2010. The inference was then drawn that the Appellant, throughout the audit period, used red diesel not only in the vehicle in which red diesel was detected (vehicle TKZ), but in every vehicle that he owned and used. A determination was made of what vehicles the Appellant owned and drove during which parts of the audit period. A determination was made of the fuel consumption of each of these vehicles, and of the average number of miles per week that each vehicle was driven. From this, a calculation was made of the number of litres of diesel that each vehicle used during the audit period, and from that a calculation was made of the total number of litres of diesel used by the Appellant during the audit period. A

determination was then made of the number of litres of DERV that the Appellant could establish by evidence that he had purchased during the audit period. A calculation was then made of the "shortfall" between the total number of litres of diesel used by the Appellant, and the total number of litres of DERV that he could establish that he had purchased. The inference was drawn that this shortfall represented the amount of red diesel used by the Appellant during the audit period. The Appellant was assessed on the shortfall to the difference between the rate of duty on MGO and the rate of duty on DERV. These rates of duty changed several times during the audit period, and calculation of the duty on the shortfall therefore had to be made separately for different sub-periods of the audit period. In this case, there were five such sub-periods.

17. By a notice of appeal dated 28 April 2011, the Appellant appealed to the First-tier Tribunal against the assessment. That was the beginning of the present Tribunal appeal.

18. Following hearings on 21 May 2013 and 18 March 2014 before a differently constituted First-tier Tribunal (the "**earlier FTT proceedings**"), that Tribunal issued a decision on 15 April 2014 (the "**earlier FTT decision**") dismissing the appeal. That Tribunal found that the assessment appealed against was based on all of the evidence before the HMRC officer, that no material matter was disregarded, that the assessment was based on a genuine attempt to calculate as accurately as possible the amount of duty due, and that the methodology was reasonable.

19. As noted in paragraph 2 above, in a decision dated 20 February 2020 (the "**UT Decision**"), the Upper Tribunal allowed an appeal against the earlier FTT decision and remitted the case to a differently constituted First-tier Tribunal for reconsideration. The Upper Tribunal found that the earlier FTT decision had applied the wrong approach to determining the appeal, in that it had not appreciated that it had a full appellate jurisdiction, and had instead apparently dealt with the matter as if it was an appeal against a "best judgment" assessment of HMRC.

20. The appeal now comes before this Tribunal for determination (the "**present FTT proceedings**").

APPLICABLE LEGISLATION

21. Section 12 of HODA provides:

> (1) If, on the delivery of heavy oil for home use, it is intended to use the oil as fuel for a road vehicle, a declaration shall be made to that effect in the entry for home use and thereupon no rebate under section 11 above shall be allowed in respect of that oil.
>
> (2) No heavy oil on whose delivery for home use rebate has been allowed (whether under section 11 above or section 13ZA or 13AA(1) below) shall—
>
> (a) be used as fuel for a road vehicle; or
>
> (b) be taken into a road vehicle as fuel,
>
> unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.

22. Section 13 HODA relevantly provides:

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

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

(b) notify him or his representative accordingly.

23. Section 16 of the Finance Act 1994 ("**FA 1994**") provides a right of appeal against decisions to issue assessments under ss 12 and 13 HODA.

24. An assessment under s 13 HODA is not an ancillary decision for the purposes of s 16(8) FA 1994. Accordingly, the Tribunal has full appellate jurisdiction in relation to an appeal against such an assessment (s 16(4) and (5) FA 1994).

25. The burden of proof in such an appeal is dealt with in s 16(6) FA 1994.

APPLICABLE LEGAL PRINCIPLES

26. In making an assessment under s 13 HODA, in circumstances where HMRC have no evidence as to how much rebated diesel a person has actually used, HMRC have the power to estimate the amount of rebated fuel that the person used or took into his or her vehicles in the relevant period. Even though HMRC may find rebated diesel in the running tank of only one of a person's vehicles, they have the power to make assessments based on an inference that the person has been using rebated diesel in his or her fleet more generally. Factors relevant to such an estimate would include the number of vehicles in the person's fleet, their fuel efficiency, the total distances travelled, and purchases by the person of dutiable road fuel, since the more dutiable fuel a person purchases, the less rebated fuel he or she would have used in his or her fleet (UT Decision at [5] and [28(1)]).

27. In an appeal to the Tribunal against an assessment under s 13 HODA, the Appellant is entitled (in addition to any legal arguments that he or she may wish to raise) to challenge the factual basis underpinning HMRC's assessment. The Tribunal has full power to decide on the correct amount of the assessment, and is not limited to a determination of the reasonableness or otherwise of HMRC's estimates or inferences. If HMRC's factual assumptions are reasonable, but wrong, the Tribunal is entitled to adjust the assessment (UT Decision at [28(3) and (4)]). The Tribunal thus has a full appellate jurisdiction, rather than a "judicial review" or "best of judgment" appeal jurisdiction.

28. To the extent that the appellant challenges the factual basis underpinning HMRC's assessment, he or she bears the burden of proving the necessary facts (UT Decision at [28(5)]).

THE PRESENT FTT PROCEEDINGS

Pre-hearing

29. After this appeal was remitted by the Upper Tribunal to the First-tier Tribunal, directions were issued for the Appellant to deliver a notice setting out the specific grounds on which he seeks to challenge the decision under appeal. On 29 May 2020, the Appellant filed restated grounds of appeal which state as follows:

1. HMRC had not taken into consideration that Vehicle OKZ… was scrapped and therefore the Appellant should not have been assessed for a vehicle that was no longer on the road.

2. HMRC had failed to conclude that the Appellant had made significant legitimate purchases of derv as evidenced by the VAT repayment in the Republic of Ireland.

3. The Appellant was the sole insured driver of vehicles TKZ … and N6 …, and therefore could not be liable for the Respondent's double counting in relation to both of these vehicles during the same period.

30. In October 2020, a witness statement of the Appellant was served on HMRC for the present FTT proceedings. This did no more than restate the Appellant's grounds of appeal set out in the previous paragraph.

31. In November 2020, HMRC served on the Appellant witness statements of three HMRC officers with exhibits for use in the present FTT proceedings. Two of these witness statements, dated 19 July 2012 and 24 July 2012, made by officers involved in the 24 May 2010 visit to the premises of JS Couriers, were presumably originally prepared for the earlier FTT proceedings. The third witness statement, dated 9 November 2020, is made by HMRC Officer Gavin. Officer Gavin says in her witness statement that Officer Dinsmore who made the assessments no longer works at HMRC, and that she, Officer Gavin, was asked "to review the case". The final paragraph of this witness statement reads as follows:

> I have reviewed Officer Dinsmore's witness statements and the assessment paperwork. I conclude that I vehicle OKZ … should be removed from the audit calculations. The mpg for vehicle N6 … should be increased to 29.7. Finally, I would include a further 620 litres of diesel in the audit fuel purchases. This would result in the assessment … issued on 13th April 2011 last amended 13th February 2012 been reduced to £16,157. I advise that I only accepted evidence of Mr Stinson's diesel fuel purchases when I was provided with an invoice / receipt from a filling station clearly showing an identifiable amount spent specifically on diesel and enabling me to allocate it to the correct audit duty period. In all other respects, I agree with Officer Dinsmore's calculations.

32. The hearing bundle for the present FTT proceedings also includes a witness statement of Officer Dinsmore dated 2 August 2012 that was evidence in the earlier FTT proceedings, and a further witness statement of Officer Dinsmore dated 17 December 2019 which was prepared for the proceedings before the Upper Tribunal, but was ultimately not admitted by the Upper Tribunal on the ground that it was not relevant to the issues before it. There is also a witness statement of the Appellant dated 28 September 2012 from the earlier FTT proceedings.

33. At the hearing, counsel for HMRC also produced two Excel spreadsheets setting out the basis of the calculation of the figure of £16,157 given in the witness statement of Officer Gavin. The first was a spreadsheet dealing with the evidence of fuel purchases, and the second was a corrected version of the calculation underlying the figure of £16,157 in Officer Gavin's witness statement, which also applies the methodology described in paragraph 16 above.

The hearing

34. At the hearing, it appeared to the Tribunal that both parties relied on the documentary evidence in the hearing bundle relevant to the application of the assessment methodology (such as documentary evidence relevant to DERV purchases), and that neither party was relying on claimed facts that needed to be established by witness evidence. The Tribunal therefore asked early in the hearing whether it was necessary for witnesses to be cross-examined, and whether the Tribunal could simply rely on the documentary evidence.

35. The representatives of both parties agreed as follows. The correct amount of the assessment did not depend on facts to be established through witness evidence. The correct amount of the assessment could be determined through a consideration of the documentary

evidence alone. The authenticity of all of the relevant documents in the hearing bundle was undisputed.

36. Following this discussion, there was no cross-examination of witnesses. The Appellant adopted his witness statement. The Appellant's representative agreed on the above basis to the witness statements of the three HMRC officers being admitted into evidence without their contents being contested.

37. In the course of the hearing, there was a discussion as to which of two possible approaches the Tribunal should take to determining the appeal. On one approach (referred to at the hearing as a "bottom up" or "clean sheet" approach), the Tribunal would make its own independent *de novo* determination of the correct amount of the assessment from scratch. On the other approach (referred to at the hearing as a "top down" approach), the Tribunal would take the HMRC assessment as the starting point, and treat it as correct except to the extent that specific aspects of it are put in issue in the appeal.

38. For the Appellant, Mr McNamee ultimately insisted as follows. The starting point has to be the 13 February 2012 assessment in the sum of £21,655. That is the last assessment made by HMRC, and it is against that assessment that the Appellant is appealing. Officer Gavin's witness statement is not an assessment, nor a statutory review decision, and cannot change the 13 February 2012 assessment.

39. The practical significance of this for the Appellant, in relation to his first ground of appeal, is said to be as follows.

40. The 13 February 2012 assessment was made on the basis that the Appellant owned and used four vehicles during the audit period (vehicle TKZ, vehicle N6, vehicle OKZ, and vehicle N57: see paragraph 10 above). However, HMRC now concede, as confirmed in the witness statement of Officer Gavin, that vehicle OKZ should be removed from the audit calculations (paragraph 31 above). The £16,157 figure in Officer Gavin's witness statement is thus based on the usage of only three vehicles, excluding vehicle OKZ.

41. The calculation sheet at page 421 of the hearing bundle shows the amounts of red diesel that HMRC determined were used by vehicle OKZ during the audit period. (This page of the hearing bundle is part of the calculation of the earlier 11 July 2011 assessment in the sum of £24,302, but the same figures were used in the final assessment under appeal.). If the relevant rates of duty are applied to that volume of fuel, it can be determined that the 13 February 2012 assessment attributed £8,563.90 of the total amount of the assessment to the usage of vehicle OKZ. Thus, if vehicle OKZ is now to be excluded from the assessment, £8,563.90 should be deducted from the £21,655 total, leaving an assessment of £13,091.10.

42. In relation to the three vehicles remaining in the audit, Officer Gavin's total figure of £16,157 is therefore in fact an *increase* in the order of some £3,000 over and above the amount of the 13 February 2012 assessment.

43. The Appellant therefore argues that the 13 February 2012 assessment must be the starting point, and that a reduction should be made to it in accordance with paragraph 41 above.

44. The argument for HMRC, as presented by Mr Charles, included the following two strands.

45. First, Mr Charles emphasised that the Tribunal has a full power, and indeed a *duty*, to determine independently what is the *correct* amount of the assessment. In order to arrive at the correct amount, the Tribunal is requested on behalf of HMRC to apply a "bottom up" approach in this case. The calculations that HMRC ask the Tribunal to make when making the

new assessment are those set out in the witness statement of Office Gavin and the Excel spreadsheets produced at the hearing.

46. Secondly, Mr Charles submitted that the burden of proof rests with the Appellant to establish the necessary facts for challenging the factual basis underpinning HMRC's assessment, and that the onus is on the Appellant to articulate clearly in his grounds of appeal what aspects of the assessment are challenged on appeal. He argued that the Tribunal should not draw inferences from the evidence that are different to those drawn by HMRC unless the Appellant specifically puts these inferences in issue and presents positive evidence in relation to them.

47. The Tribunal questions whether the second of these strands is consistent with the first. In any event, the second strand seems to describe a "top down" approach. At the end of the hearing, the Tribunal therefore invited submissions from Mr Charles on whether the Tribunal could make a "top down" determination in this case. His submission was as follows. The Tribunal needs to arrive at a determination of the *correct* amount of the assessment, and has a full appellate power to do this through either a "bottom up" or a "top down" approach. However, the Tribunal would struggle to get to a *correct* amount by means of a "top down" approach in the present case. This is because the figure of £21,655 is known to be wrong. It is wrong apart from anything else because it includes vehicle OKZ in the calculation, because of the other errors identified in Officer Gavin's witness statement (paragraph 31 above), and also because of the error referred to in paragraph 103 below. To take as the starting point a figure that is known at the outset to be wrong cannot be expected to lead to a final figure that is correct.

48. Mr Charles was asked if he needed time to prepare further submissions on the issue of which approach the Tribunal should adopt, given that a "bottom up" approach had been in contemplation during much of the hearing, and given that the Tribunal only indicated at the end of the hearing that it was minded to apply a "top down" approach. Mr Charles confirmed that he did not require further time.

THE TRIBUNAL'S FINDINGS

The approach to be adopted—findings of general principles

49. In an appeal against an assessment under s 13 HODA, the Tribunal has a full appellate jurisdiction. Where any aspect of the assessment is in issue, the Tribunal must therefore itself determine whether that aspect of the assessment is correct. For instance, if an appellant contends that the fuel consumption figure used in the assessment for one of the vehicles is wrong, the Tribunal will need to determine, based on the evidence presented, what is the correct fuel consumption figure for that vehicle. The Tribunal does not apply a "judicial review" standard of review, or treat the fuel consumption figure in the assessment as a "best of judgment" determination of HMRC. The Tribunal must itself find as a fact what *is* the correct figure, rather than treat the HMRC figure as correct unless the Appellant, for instance, establishes that the HMRC figure was unreasonable. (Compare UT Decision at [28(3) and (4)].)

50. However, this full appellate jurisdiction does not require the Tribunal to consider afresh every single aspect of the assessment, whether put in issue by the parties or not, as if the Tribunal itself were the assessing officer and as if no previous assessment had been made by HMRC.

51. It would be wasteful of judicial resources to require the Tribunal to undertake its own independent determination of every single aspect of an assessment, regardless of whether or not there is any dispute between the parties in relation to that aspect. Furthermore, the nature

of the judicial function is to determine matters in dispute between the parties. It is not generally the role of the Tribunal to stand in the shoes of an assessing officer. The Tribunal should not be required to check for potential errors in an assessment that neither party has identified, or to undertake a 100% audit of the assessment that HMRC has made.

52. There may be cases where the entire assessment has to be made afresh, for instance, where the appellant succeeds in persuading the Tribunal that the entire methodology adopted in the assessment was wrong. However, even in such a case the Tribunal will not necessarily be required to stand in the shoes of the assessing officer and make its own "clean sheet" assessment. The Tribunal might instead give a decision in principle on the correct methodology to be adopted, and then leave it to the parties to seek to agree on the application of that methodology to the circumstances of the case. In the event that there are subsequently specific points of disagreement between the parties on the application of the methodology, the parties could be given leave to bring those disputed aspects of the assessment back before the Tribunal.

53. The Tribunal therefore finds that it should generally take the assessment under appeal as the starting point, and consider only those aspects of the assessment that are put in issue by the parties, and any additional aspects that the Tribunal may of its own motion decide to consider.

54. In the generality of cases, the Tribunal will confine itself to considering claimed errors identified by the appellant. The appellant will be expected to identify and particularise these claimed errors in accordance with the Tribunal's Rules. The claimed errors should in principle be pleaded in the grounds of appeal in the appellant's notice of appeal, and the permission of the Tribunal will be required if new grounds of appeal are sought to be raised at a later stage.

55. It is also possible that HMRC might detect an error in the assessment that has been made in the appellant's favour. A question arises as to whether, and to what extent, it is possible for HMRC to request the Tribunal to correct such an error. There are three possibilities. One is that HMRC is precluded from requesting the Tribunal to correct errors in an assessment at all where the error is in the appellant's favour, on the basis that HMRC cannot appeal against its own assessment, and that HMRC can only withdraw the assessment and make a new one if it is within time to do so. The second possibility is that the Tribunal is able to correct such an error, provided that the overall amount of the assessment is not increased as a result. This would mean that where an appellant succeeds in having an assessment reduced on appeal, errors in the assessment in the appellant's favour could be corrected to offset the amount of that reduction. The third possibility would be that the Tribunal has an unlimited power to correct such errors, even if this would result in an overall increase in the assessment.

56. Whichever of these is the correct position, the Tribunal considers that any request by HMRC for the Tribunal to correct an error that has been made in the assessment in the appellant's favour would need to be properly pleaded by HMRC in accordance with the Tribunal's Rules. Normally, HMRC is expected to plead its case in the HMRC statement of case. Should HMRC decide at a later stage to request the Tribunal to correct an error in the assessment in the appellant's favour, they would need to make an application to the Tribunal requesting permission to raise that contention at a late stage, and the appellant would need to be given an adequate opportunity to address that contention.

57. Although the Tribunal is not required to consider aspects of an assessment that have not been put in issue by either party, and is not under any duty to detect errors in the assessment that have escaped the attention of the parties, it should be open to the Tribunal of its own motion to raise and consider potential errors in the assessment that neither party has identified. Whether the Tribunal should exercise its discretion to do so will depend on the circumstances of the particular case. The parties would need to be afforded an adequate opportunity to make submissions on such matters, and it may be inappropriate for the Tribunal to consider an issue

raised on its own motion if this would cause delay or an increase in the parties' costs of the proceedings. On the other hand, it may be appropriate for the Tribunal to do so if, for instance, the parties indicate that they can address the matter raised by the Tribunal of its own motion spontaneously at the hearing.

58. Where one party concedes a fact that is to the advantage of the other party's case, the Tribunal can find that fact to be established, even if no evidence in support of that fact has been presented to the Tribunal.

The approach to be adopted—the present case

59. The Appellant does not dispute the entitlement of HMRC to make an assessment, nor the methodology adopted by HMRC for making the assessment, nor many of the individual components of that assessment. The Tribunal considers it appropriate to take the approach in paragraph 53 above.

60. The argument of HMRC presented at the hearing, as the Tribunal has understood it, is as follows. The Tribunal should make its own "bottom up" calculation of the assessment. In doing so it should take as the starting point the calculation in Officer Gavin's witness statement, as corrected by the Excel spreadsheets produced by HMRC at the hearing. The Tribunal should consider only such claimed errors in that calculation as may be specifically identified by the Appellant. (See paragraphs 44 to 46 above.)

61. The Tribunal does not accept this. It agrees with the submissions of the Appellant at paragraph 38 above. The witness statement of Officer Gavin and the Excel spreadsheets came into existence over nine years after the Appellant filed his notice of appeal, over 6 years after the appeal had already been determined in the earlier FTT proceedings, after the earlier FTT decision had been overturned by the UT Decision, after the Appellant had filed his restated grounds of appeal, and after HMRC had filed its 28 July 2020 statement of case. The witness statement of Officer Gavin and the Excel spreadsheets may be of assistance in confirming the correctness of, or in demonstrating errors in, the assessment under appeal. However, there is no basis for treating these documents as the *starting point*.

62. The assessment under appeal is the last assessment made by HMRC on 13 February 2012, and the Tribunal takes that assessment as the starting point.

The Appellant's first ground of appeal

63. The Appellant's first ground of appeal is that vehicle OKZ should be removed from the assessment calculation.

64. HMRC concede that vehicle OKZ should be removed. This concession is made in the witness statement of Officer Gavin (paragraph 31 above), and at the hearing this concession was confirmed by HMRC.

65. The Tribunal therefore allows the Appellant's first ground of appeal, and finds that vehicle OKZ should be removed from the assessment calculation.

66. At the hearing, Mr Charles expressly agreed that the 13 February 2012 HMRC assessment attributes £8,563.90 of the total amount of the assessment to the usage of vehicle OKZ (see paragraph 41 above).

67. The Tribunal therefore finds that (in addition to any other amendments that need to be made to the assessment in the light of further findings below) the assessment falls to be reduced by the amount of £8,563.90.

The Appellant's second ground of appeal

Introduction

68. In his second ground of appeal, the Appellant contends that the assessment should give him credit for all of the purchases of DERV during the audit period that are evidenced in the 8th Directive material provided to HMRC by the Republic of Ireland Revenue Commissioners (see paragraphs 9 and 13 above).

69. The 8th Directive material consists of claim forms itemizing purchases in the Republic of Ireland in respect of which the Appellant was claiming repayment of VAT, as well as individual invoices and receipts that were submitted with the claim forms in support thereof.

70. The position of HMRC is that the Appellant *has* in fact been given credit in the 13 February 2012 assessment for all claimed purchases of DERV itemized in the 8th Directive claim forms, other than five specific items.

71. The five specific items are dealt with in paragraphs 94 to 100 below. The remainder of the claimed DERV purchases in the 8th Directive claim forms are dealt with in paragraphs 72 to 93 below.

Items for which, according to HMRC, the Appellant has already been given credit

72. The Appellant contends as follows. He has not been given credit in the assessment for all of the purchases of DERV itemised in the 8th Directive claim forms. He should be given credit for every such purchase, even where there is no specific receipt or invoice in support. The fact that all claims in the claim forms were paid by the authorities in the Republic of Ireland indicates that those authorities were satisfied that all of the purchases had indeed been made by the Appellant. There may have been additional receipts or invoices attached to the claim forms that were not provided by the Revenue Commissioners to HMRC.

73. HMRC contend as follows. The 8th Directive material was received by HMRC only in August 2011. By this time, HMRC had already received other documentary evidence from the Appellant, on the basis of which HMRC had already given the Appellant credit for various purchases of DERV in its assessment. When the 8th Directive material was received, HMRC discovered that the most of the DERV purchases referred to in it were purchases for which the Appellant had already been given credit on the basis of other documents received earlier. Several DERV purchases for which the Appellant had not already been given credit were found in the 8th Directive claim forms, and he was given additional credit for these if they were supported by an invoice or receipt in the 8th Directive material. As a result of this, a revised assessment was made on 30 August 2011, which reduced the previous assessment by some £674. The only claimed purchases of DERV in the 8th Directive claim forms for which the Appellant has ultimately not been given credit in the 13 February 2012 assessment are the five items dealt with in paragraphs 94 to 100 below.

74. The Tribunal finds as follows.

75. To the extent that the Appellant challenges the factual basis underpinning HMRC's assessment, he bears the burden of proving the necessary facts. If the Appellant contends that he purchased a greater quantity of DERV during the audit period than the amount for which he was given credit in the assessment, he bears the burden of proving that he purchased that additional quantity.

76. There are two principal methods by which the Appellant could prove this.

77. First, the Appellant could produce to the Tribunal evidence of all of the purchases of DERV that he claims to have made during the audit period. On the basis of this evidence, the Tribunal could make its own finding of the total amount of DERV purchased by the Appellant during the audit period. If this figure differed from the amount for which he was given credit in the assessment, the Tribunal could then adjust the assessment accordingly.

78. Alternatively, given that the Tribunal is taking the assessment as the starting point, the Appellant could produce evidence of certain particular purchases of DERV during the audit period, together with evidence that he has not been given credit for these particular purchases in the assessment. If, on the basis of this evidence, the Tribunal were to find that he had purchased a quantity of DERV for which he has not been given credit in the assessment, the assessment could be amended accordingly. In other words, under this method, the burden of proof would be on the Appellant not only to prove the purchases of the DERV, but also to prove that these purchases of DERV are not already included in the HMRC assessment.

79. The Appellant has not sought to adopt the first of these methods. As to the second of these methods, the Appellant has not produced evidence to show that the purchases of DERV claimed in the 8th Directive claim forms are *additional* to the purchases for which he has already been given credit in the assessment.

80. The Tribunal takes into account that the hearing bundle does not include all of the documentary evidence of fuel purchases that he had provided to HMRC before they received the 8th Directive material. According to paragraph 15 of the 17 December 2019 witness statement of Officer Dinsmore (prepared for but not admitted in the Upper Tribunal proceedings), HMRC no longer hold copies of the earlier documents provided by the Appellant. It should certainly not count against the Appellant that HMRC no longer hold copies of documents that he provided. On the other hand, there is also no reason why this should count in the Appellant's favour. The burden of proof is on the Appellant to establish the amount of DERV that he purchased, and the Tribunal is not prepared to draw inferences in his favour from the mere fact that HMRC have not retained documents that he provided to them. He could himself have retained copies of these documents.

81. Indeed, there is reason to presume that he would have retained copies both of the material that he provided directly to HMRC, as well as of the receipts and invoices that he submitted to the Revenue Commissioners in the Republic of Ireland. This is because he would have required these documents also for other purposes, including income tax and other business purposes. The Appellant has not positively asserted that he did not retain copies of these documents.

82. It was to the Appellant's advantage to provide HMRC with evidence of purchases of DERV. If the Appellant had records of such purchases, there is therefore reason to presume that he would have provided this material himself directly to HMRC, even before HMRC received the 8th Directive material from the Republic of Ireland. It would therefore not be surprising to discover that the Appellant had already provided to HMRC evidence of the purchases of DERV itemized in the 8th Directive material.

83. The numbers of litres of DERV purchases for which the Appellant was given credit in the assessment are set out at pages 423-424 of the hearing bundle (9,386.80 in period 1; 5,033.74 in period 2; 6,629.36 in period 3; 6,519.19 in period 4; and 230.07 in period 5). These pages of the hearing bundle are part of the calculation of the earlier 11 July 2011 assessment in the sum of £24,302, but the same figures for DERV purchases were used in the final assessment under appeal. Subject to the corrections referred to in this decision below, the Tribunal finds as a fact that the Appellant made purchases of DERV during the audit period in these amounts for which he was given credit in the assessment. The Tribunal so finds on the basis that the assessment is the starting point in this appeal, and on the basis that the assessment

amounts to a concession of fact on the part of HMRC that the Appellant purchased this quantity of DERV (paragraph 58 above).

84. It is not disputed that the total amount of DERV purchases for which the Appellant was given credit in the assessment is greater than the total amount of the DERV purchases itemized the 8th Directive material. It is therefore possible for the whole of the latter to be included in the former.

85. The Appellant has not produced any positive evidence that the DERV purchases evidenced by the 8th Directive material were additional to the purchases for which he has already been given credit in the assessment. Nor has the Appellant presented any persuasive arguments as to why the Tribunal should draw an inference that this is the case.

86. In particular, the Appellant has not identified specific purchases of DERV in the 8th Directive claim forms for which he claims that credit was not given in the assessment. Rather, he has simply challenged generically the HMRC decision not to give credit for purchases of DERV itemized in the 8th Directive claim forms where there is no invoice or receipt in support.

87. However, HMRC contend that the only purchases of DERV in the 8th Directive claim forms for which there is no invoice or receipt, and for which no credit was therefore given in the assessment, are the five items dealt with in paragraphs 94 to 100 below. The Appellant has advanced nothing specific to contradict this HMRC contention.

88. The Tribunal therefore finds that, apart from the items dealt with in paragraphs 94 to 100 below, the Appellant has not established that he made any purchases of DERV in addition to the amounts for which he has already been given credit in the assessment.

89. The Tribunal makes this finding for the reasons above, without relying on the witness statement of Officer Gavin. However, for completeness, the Tribunal also notes the following.

90. According to paragraph 40 of the witness statement of Officer Gavin, exhibit IG28 to that witness statement is a spreadsheet of fuel purchases and invoices prepared by Officer Dinsmore. This spreadsheet includes purchases of DERV in places in the Republic of Ireland, indicating that the DERV purchases for which the Appellant was given credit in the assessment included purchases in the Republic of Ireland.

91. Exhibit IG32 to the witness statement of Officer Gavin contains her calculations of what she considers to be the correct amount of the assessment. This includes a statement of the amounts of DERV purchases for which she considers the Appellant should be given credit (page 400 of the hearing bundle), which are exactly the same amounts as in the assessment under appeal, with the separately identified addition of the amounts referred to in paragraphs 109-112 below.

92. According to HMRC, apart from the five items dealt with in paragraphs 94 to 100 below, the calculation of Officer Gavin includes all of the purchase of DERV itemized in the 8th Directive claim forms. This is said to be demonstrated by the table at pages 401 to 403 of the hearing bundle, and the Excel spreadsheets produced by HMRC at the hearing. The Appellant did not seek to contradict this HMRC contention. The fact that Officer Gavin's figure for DERV purchases, which includes the purchases in the 8th Directive material, is identical to the figure for DERV purchases in the assessment under appeal (but for the addition of the amounts referred to in paragraphs 109-112 below), supports the conclusion that the assessment under appeal also included all of those purchases.

93. Thus, apart from the five items dealt with in paragraphs 94 to 100 below, the Tribunal dismisses the Appellant's second ground of appeal.

Items for which the Appellant has not been given credit

94. HMRC accept that there are five itemized purchases in the 8th Directive claim forms for which the Appellant was not given credit.

95. One of these items, for the period 04/08 to 07/08, in the sum of €51.39, is said by HMRC not to be a purchase of DERV, but rather toll charges. The Tribunal finds that this sum does indeed relate to toll charges and as such does not impact the calculations for the purposes of this appeal.

96. The other four items were itemized in the 8th Directive claim forms with the names of filling stations in the Republic of Ireland. Amounts were claimed for the periods shown as follows:

CLAIM PERIOD	AMOUNT
03/09–06/09	€26.54 and €20.89
04/08-07/08	€69.72
05/09-09/09	€23 (specifically dated 5 August 2009)

These add up to €140.15 in total.

97. These are claimed purchases of DERV. HMRC contend that the Appellant should not be given credit for these as there are no invoices or receipts in support of these purchases.

98. The Tribunal finds as follows. Each of the 8th Directive claim forms includes boxes in which the claimant is required to state the number of invoices and receipts submitted with each claim. It would appear from the numbers entered on these forms that the Appellant submitted with the claim forms more supporting documents than were provided to HMRC by the Republic of Ireland. Furthermore, these four items are for relatively small amounts. The Revenue Commissioners in the Republic of Ireland were satisfied that these purchases were made. In all the circumstances, the Tribunal considers it more likely than not that they were made.

99. At the hearing, HMRC accepted that it would be open to the Tribunal on the evidence to find that the Appellant made these purchases of DERV, although the HMRC position was that the Tribunal should not do so.

100. The Tribunal finds as a fact that the Appellant did make the additional purchases of DERV in paragraph 96 above.

The Appellant's third ground of appeal

101. At the beginning of the hearing, Mr McNamee expressly stated that he no longer pursues the third ground of appeal.

102. The Tribunal therefore decides to dismiss this ground of appeal.

Other issues

Potential errors in the Appellant's favour

103. At the hearing, the Tribunal invited an explanation from HMRC of why the proposed assessment of Officer Gavin was some £3,000 higher than would be expected following the removal of vehicle OKZ from the calculation (see paragraphs 38-43 and 63-67 above). HMRC

were unable fully to explain this difference, although Mr Charles did identify what he said was an error in the 13 February 2012 assessment that might provide at least part of the explanation.

104. This appeared to suggest that according to the current HMRC position, the assessment might contain one or more errors in the Appellant's favour. However, no such errors have been identified or pleaded by HMRC in their statement of case or skeleton argument, and no such errors have been clearly identified even now. At this late stage, the Tribunal will not consider whether there are any such errors in the assessment (see paragraphs 55-57 above).

Fuel consumption of vehicle N6

105. In a letter to the Appellant dated 13 February 2012, Officer Dinsmore advised the Appellant that the fuel consumption figure for vehicle N6 was to be increased to 29.7 miles per gallon such that the final assessment was being reduced to £21,665 (see page 300 of the hearing bundle).

106. However, the 13 February 2012 assessment itself then uses a fuel consumption figure for vehicle N6 of only 23.5 miles per gallon (see page 302 of the hearing bundle).

107. The HMRC statement of case at paragraph 52 acknowledges that the assessment under appeal erroneously used a miles per gallon figure of 23.5 rather than 29.7, and concedes that this error should be corrected. In her witness statement, Officer Gavin also confirms that the assessment should be amended by increasing the fuel consumption figure for vehicle N6 to 29.7 miles per gallon (see paragraph 31 above), and this was again confirmed by HMRC at the hearing.

108. Although the Appellant did not include a ground of appeal contending that the wrong fuel consumption figure was used for vehicle N6, it is clear from the 13 February 2012 letter that the assessment under appeal was intended to use a miles per gallon figure of 29.7. The use of any different figure was therefore a mere clerical error in the assessment, rather than a substantive error. In the light of the clear concession made by HMRC, the Tribunal considers that the assessment should be amended to increase the fuel consumption figure for vehicle N6 to 29.7 miles per gallon.

Additional fuel purchases by the Appellant

109. The witness statement of Officer Gavin states at paragraph 46 that following her review of the fuel purchase invoices, she found evidence of further purchases of DERV which had not been included in the calculation of the 13 February 2012 assessment. These additional amounts were 1,546.13 litres in period 1, and 102.15 litres in period 3, and 620 litres in period 4 (these figures appear again in exhibit IG32 to that witness statement, at page 400 of the hearing bundle).

110. These additional fuel purchases total 2,268.28 litres, not 640 litres (as stated in paragraph 46 of the witness statement) or 620 litres (as stated at paragraph 51 of the witness statement).

111. The Tribunal has given very careful consideration to whether it should find that the Appellant made additional purchases of DERV in the amounts indicated in paragraph 46 of the witness statement of Officer Gavin, and in exhibit IG32. The Tribunal has in particular considered whether it would be inconsistent with the approach set out above to allow the Appellant to have the benefit of an error identified in a witness statement of an HMRC witness, when the Appellant has not himself raised that error in a ground of appeal (see paragraph 54 above), and the parties have agreed that their cases do not rely on facts to be established by witness evidence (see paragraphs 34-36 above).

112. However, the Tribunal concludes that paragraph 46 and exhibit IG32 to the witness statement of Officer Gavin contain a concession of fact by HMRC in favour of the Appellant (see paragraph 58 above). The Tribunal finds that the DERV purchase figures used in calculating the assessment should be increased by those amounts.

CONCLUSION

113. The appeal is allowed in part as follows:

(a) the assessment under appeal in the sum of £21,665 is reduced by £8,563.90 as a result of the exclusion from the audit of vehicle OKZ;

(b) thereafter, the amount of the assessment is to be adjusted:

(i) to give the Appellant credit for the purchases of DERV referred to in paragraph 96 above;

(ii) to use a fuel consumption figure for vehicle N6 of 29.7 miles per gallon; and

(iii) to give the Appellant credit for the purchases of DERV referred to in paragraph 109 above.

114. The appeal is otherwise dismissed.

115. If the parties are unable to agree on the amendments to the assessment under appeal required to give effect to this decision, either party is at liberty to request the Tribunal within 90 days of the date of release of this decision to determine the matter remaining in dispute.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

116. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 24 June 2021