[2021] UKUT 0051 (TCC)

Appeal number: UT/2020/0006 (V)

EXCISE DUTY – registered dealer in controlled oils – scope of First-tier Tribunal's fact-finding jurisdiction – application to admit new evidence – whether First-tier Tribunal's factual conclusions available to it – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

PROSPECT ORIGIN LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE JONATHAN RICHARDS**
JUDGE GUY BRANNAN

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 2 March 2021

Marc Glover, Counsel, instructed by Portner Law Limited for the Appellant

Natasha Barnes, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs for the Respondents

DECISION

1. The appellant company (the "Company") carried on a business of selling fuel, including red diesel and was a Registered Dealer in Controlled Oils ("RDCO"). By a letter dated 24 July 2018, HMRC revoked the Company's status as an RDCO. The Company appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against that revocation. In a decision released on 30 December 2019 (the "Decision"), the FTT dismissed the Company's appeal and the Company now appeals, with the permission of the Upper Tribunal, against the Decision.

2. As part of its appeal, the Company also applies to rely on fresh evidence in this Tribunal that was not before the FTT.

The Decision

3. The Decision is careful and detailed. It contains numerous factual findings, many of which are not under challenge and which we need not therefore summarise or repeat. Accordingly, in this section, we simply summarise aspects of the Decision under various thematic headings sufficient to enable us to put the Company's appeal into context. References to numbers in square brackets are to paragraphs of the Decision unless we state otherwise.

Background

4. The Company had been approved as an RDCO since 1 March 2017. Its sole director and shareholder was Mr Stephen Pepper. It operated from two premises. At Unit 1, The Old Ironworks, Bowling Back Lane, Bradford (the "BBL Premises") it sold fuel, including red diesel[1] and took in waste cooking oil for recycling. It had other premises at Cleckheaton which were only involved in the recycling of waste cooking oil.

5. Mr Pepper made infrequent visits to the BBL Premises ([63] and [167(5)]). When he was not there, the business at the BBL Premises was managed by Javid Khan, the site manager.

[1] The FTT provided an outline on the restrictions on the use of rebated fuels, such as red diesel, in road vehicles at [3]. The FTT referred to the decision of the Upper Tribunal in *Behzad Fuels Limited v HMRC* [2017] UKUT 0321 (TCC) in which it was explained that:

> "4. ..."white diesel" is the diesel that is used in road vehicles and is subject to full excise duty. "Red diesel" is in all material respects an identical product to white diesel, but because it may only be used in agricultural and similar vehicles which are not driven on the road is subject to a much lower rate of excise duty. In order to enable red diesel and white diesel to be distinguished, chemical "markers" and a red dye are added to red diesel; the chemical markers can be detected by chemical analysis."

HMRC's decision to revoke RDCO status

6. On 10 October 2017, Officer Gilmartin of HMRC wrote a warning letter to the Company saying that the driver of a road vehicle found with red diesel in the running tank on 1 October 2017 had, during an interview under caution, said that he fuelled his vehicle directly from the Company's pump at the BBL Premises. Accordingly, HMRC expressed concern that the Company was not doing enough to ensure that its customers had an eligible use for red diesel, or to ensure that they did not put such fuel directly into a road vehicle.

7. The letter of 10 October 2017 was a warning only, but HMRC's concerns persisted. On 2 July 2018, Officer Elliott of HMRC wrote to the Company saying that HMRC were minded to revoke the Company's RDCO approval and, in a decision letter dated 24 July 2018 (the "Revocation Decision"), Officer Elliott wrote to say that the RDCO approval had been revoked. In that letter, Officer Elliott pointed to problems surrounding the use of rebated fuel supplied by the Company in road vehicles saying:

> "On 01/10/2017 the Road Fuel Testing Unit (RFTU) detected a vehicle running on rebated fuel purchased from your site. A warning letter was issued to you on 07/11/2017 [sic]. Despite this warning further detections of vehicles using rebated fuel purchased from your premises were made by RFTU on 01/12/2017 (2 vehicles), 21/12/2017 (8 vehicles), and 10/01/2018 (5 vehicles).
>
> In light of the above, we no longer consider you to be fit and proper to hold an RDCO licence. Your activity continued even after you were issued a warning letter setting out the consequences of such activities continuing from your premises. These facts lead us to believe that you have neglected or ignored your obligations as an RDCO."

8. It was common ground that, in making the Revocation Decision, HMRC were making a decision on an "ancillary matter" for the purposes of s16(8) and s16(9) of the Finance Act 1994. Accordingly, while the Company had the right of appeal to the FTT against that revocation, the FTT's powers on that appeal were limited as set out in s16(4) as follows:

> (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.

The FTT's findings of fact

9. At the heart of HMRC's decision to revoke the Company's RDCO status was the proposition that red diesel supplied from the BBL Premises was being used in road vehicles. Much of the evidence before the FTT was concerned with the 16[2] instances that Officer Elliott had mentioned in the Revocation Decision with HMRC officers providing evidence to the FTT to the effect that (i) red diesel was found in the running tank of a particular road vehicle and (ii) that red diesel was considered to have originated from the Company's premises.

10. Where fuel of a vehicle had been tested or inspected, there was little dispute between the parties as to whether it contained red diesel or not. More contentious were the separate questions (i) whether any such red diesel found in road vehicles had emanated from the Company's premises and (ii) whether, even if it had, the Company was at fault.

11. Evidence as to the source of the red diesel referred to in the 16 instances specified in the Revocation Decision tended to come from reports of interviews between HMRC officers and the drivers of the vehicles that had been found with rebated fuel in their running tank. HMRC officers would ask the drivers of the vehicle where they had purchased the red diesel. Some drivers identified the Company's premises with a reasonable degree of specificity by, for example, referring to the Company by name or producing receipts for their fuel indicating that it had been supplied by the Company. However, other drivers used much vaguer expressions (for example referring to "a garage on Bowling Back Lane"). In the latter cases, the Company submitted that it had not been identified specifically, not least since "Bowling Back Lane" could be understood as referring to an area of Bradford (and not just a street) and so drivers could have been identifying other businesses, including temporary "pop-up" businesses, in the vicinity.

12. Where red diesel was identified as coming from the Company's premises, the FTT considered whether this was as a result of a "direct fill" of the vehicle concerned at those premises (i.e. the red diesel being put directly into the vehicle's running tank, rather than being placed into a container in the first instance and subsequently being introduced into the running tank when the vehicle had left the Company's premises). The reason for the distinction is obvious: the Company could clearly expect much greater criticism if it stood by and let a customer fill a vehicle with rebated fuel than it would if it sold such fuel to an ostensibly honest customer who placed it into a container, unaware that the customer intended subsequently to use it in a road vehicle.

[2] We include the instance on 1 October 2017 which led to HMRC's warning letter since it was also mentioned in the Revocation Decision.

13. The FTT reached the following conclusions in relation to the 16 instances of use of red diesel on which HMRC had relied in the Revocation Decision:

> (1) It concluded that 12 of the 16 detections relied upon by HMRC involved a "direct fill" with red diesel at the BBL Premises.
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> (2) The FTT was not satisfied that the following instances on which HMRC relied involved a direct fill of a road vehicle red diesel at the BBL Premises:
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> > (a) 21 December 2017 – Vehicle MX58 ETY. HMRC's evidence contained no indication that the vehicle had been filled at the Company's premises, whether in the form of a receipt or a statement from the driver.
> >
> > (b) 21 December 2017 – Vehicle NJ59 NOH. HMRC's evidence did not suggest that red diesel had been found in the running tank and so the FTT was not satisfied that there had been a direct fill of red diesel supplied by the Company.
> >
> > (c) 21 December 2017 – Vehicle GU58 CYL. The driver of the vehicle said that he had bought red diesel in drums and so the FTT was not satisfied that this was a situation of a direct fill.
> >
> > (d) 10 January 2018 – HMRC had said that 5 vehicles had been detected on this date with red diesel supplied by the Company in their running tanks, but they produced evidence of only 4.

14. The FTT also had evidence from HMRC officers who had been involved in intermittent observations of the Company's premises between 26 March 2018 and 25 April 2018. Officer Elliott had not referred to the outcome of these observations in the Revocation Decision and the FTT found at [167] that he was not aware of them.

15. HMRC's Officer Hall said in his witness statement ([115]) that during this period:

> "…approximately 200 customers were observed directly filling their road vehicles with red diesel and on a further 61 occasions employees of [the Company] were observed directly filling vehicles with red diesel on behalf of customers."

16. Later in this decision we will consider Officer Hall's evidence in more detail in the light of challenges that the Company makes to conclusions that the FTT drew from it. At this stage it suffices to say that the FTT broadly accepted this evidence saying:

> "123. Officer Hall's witness statement explains, as noted at [115], that approximately 200 customers were observed directly filling their road vehicles with red diesel and on a further 61 occasions employees of POL were observed directly filling vehicles with red diesel on behalf of customers during the one month period in which the intermittent observations were conducted. These numbers are striking, particularly given that the[re] was not a "round-the-clock" surveillance operation.
>
> 124. Whilst Mr Glover submitted that, in the absence of testing the tanks of the vehicles immediately after they have left the BBL Premises, we cannot know that they had successfully fuelled with red diesel, we

> consider that, on the balance of probabilities, in the vast majority of cases they would have done so. We note that the detection considered at [68] to [71][3] shows that just because a vehicle enters the BBL Premises and drives out it does not mean that it has successfully filled. We accept that proposition – however, the evidence of Officer Hall is different. He does not state that the vehicles were seen entering and/or leaving the premises. His evidence is that they were filled with red diesel at the BBL Premises, and he identified separately whether customers filled themselves or if employees of POL did this for them. Given that he has said that these direct fills were with red diesel, and Mr Glover has not submitted that the nozzle in question could not be identified, the only issue is whether red diesel was actually transmitted from the pump through the hose and nozzle and into the tank of the vehicle. We agree that this is not capable of being seen; but consider that whilst there may be a few occasions where nothing happened and there was no actual fuelling (perhaps because the card payment facility, if payment in advance is required or at least authorisation on the card, is not working, or the customer is not able to operate it) we can infer that in the vast majority of cases there was a successful fuelling of road vehicles with red diesel."

17. At [125] to [138], the FTT considered other instances, also not referred to in the Revocation Decision, where HMRC asserted that road vehicles had been filled directly with red diesel on the Company's premises. It suffices to say that the FTT accepted that HMRC's assertion was correct in many cases. However, in three cases ([132] to [133]), where the driver of the relevant vehicle had either refused to be interviewed by HMRC or had denied any knowledge of red diesel in the vehicle's running tank, and so had not told HMRC where that red diesel had been purchased, the FTT found that there was insufficient evidence to conclude that there had been direct fills with red diesel at the Company's premises.

The FTT's conclusions

18. At [153] to [155] the FTT summarised the parties' competing submissions as to the reasonableness or otherwise of the Revocation Decision. At [156] onwards, the FTT expressed its conclusions on the issue of reasonableness in the light of its findings of fact. The FTT ordered its discussion by considering:

> (1) whether HMRC had taken into account all relevant considerations ([158] to [167]);
>
> (2) whether HMRC took into account irrelevant considerations ([169] to [170]); and
>
> (3) whether the Revocation Decision was a proportionate response to the Company's breach of its obligations as an RDCO ([171] to [176]).

[3] An occasion on which the FTT found that a driver drove onto the Company's premises but left without putting any fuel into the vehicle.

19. The FTT concluded at [167] that the FTT had not taken all relevant considerations into account. Almost all of the additional relevant considerations that the FTT identified could be regarded as favourable to HMRC. For example, the FTT identified evidence of additional direct fills of red diesel not mentioned in the Revocation Decision, including Officer Hall's evidence that over approximately 200 customers had been seen filling their vehicles with red diesel at the Company's premises ([167(1)] to [167(4)]. At [167(5)], the FTT referred to Mr Pepper's lack of meaningful supervision of the Company's business as an RDCO, concluding that he "showed an almost complete disregard for what was going on at the BBL Premises and took little action to ensure that he had control over the actions of [the Company's] employees at the premises". The FTT concluded that he should have known that something was seriously wrong with the way that the Company was selling red diesel, although it stopped short of finding that he actually knew of unlawful activities. At [167(6)], the FTT found that an additional relevant consideration was that the Company's premises were known locally as the place to buy red diesel for use in road vehicles.

20. Only one of the additional relevant considerations that the FTT identified was favourable to the Company: the fact, identified at [167(7)] that Mr Pepper gave a written warning to Mr Khan after receipt of HMRC's letter of 1 October 2017 threatening revocation of RDCO status and that Mr Khan was subsequently dismissed. It is clear, however, that he was not dismissed before April 2018 because, in his witness evidence, Mr Pepper did not challenge HMRC's statement that Mr Khan was recorded in video footage fuelling vehicles at the BBL Premises at that time. At [167(7)], the FTT indicated its view that the written warning and subsequent dismissal, while relevant considerations, were of little significance.

21. The FTT concluded that HMRC had taken irrelevant considerations into account, namely that for 4 of the 16 instances of misuse of red diesel mentioned in the Revocation Decision, there was no evidence, or no sufficient evidence, that the Company had sold red diesel for use in a road vehicle.

22. At [171] to [176], the FTT explained why it considered the Revocation Decision to be proportionate.

23. Accordingly, the FTT concluded that the Revocation Decision was unreasonable for two broad reasons. First, some relevant considerations had been left out of account all but one of which was favourable to HMRC. Second, some irrelevant considerations, unfavourable to the Company, had been taken into account as, of the 16 instances of misuse of red diesel referred to in the Revocation Decision, the FTT concluded that only 12 involved the Company selling red diesel for use in a road vehicle.

24. The FTT's overall conclusion is set out in the following paragraphs of the Decision:

> "178. Where a decision is found to be unreasonable, this Tribunal can still dismiss the appeal if it is shown that, had the additional material been taken into account and irrelevant factors left out of account, the decision would inevitably have been the same.

> 179. We note that since the exposition of this principle in *John Dee*, subsequent tribunals have been at pains to emphasise that if there is any doubt on the point, the matter should be determined in favour of directing a further review.
>
> 180. The relevant information which was not taken into account by Officer Elliott (for the simple reason that he was not aware of it) is set out at [167]. Not only does this show that the problem of red diesel bought from the BBL Premises being used in road vehicles was far more extensive than Officer Elliott had realised, but there were little controls over sales at the BBL Premises and the site was known locally as the place to go (by inference, for cheap fuel). By contrast, the irrelevant considerations (wrongly) taken into account comprised three detections out of what Officer Elliott had thought were 15 detections in the Stated Reasons
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> 181. We do not see any merit in seeking to over-analyse what might be meant by the word inevitable in this context. It is clear that we are not looking at "more likely than not" or even "probably". It requires us to be certain that no different decision could be taken. We accept this is a very high hurdle. However, we have no doubt that on the facts as we have found them this very high hurdle has clearly been satisfied. Accordingly, we dismiss POL's appeal."

The Company's grounds of appeal

25. The Company appeals against the Decision on the following grounds:

> (1) Ground 1 – The FTT was not entitled to conclude from Officer Hall's evidence that, between 26 March 2018 and 25 April 2018, 200 customers of the Company had directly filled their road vehicles with red diesel at the BBL Premises, or that a further 61 customers had their road vehicles filled with red diesel by the Company's employees.
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> (2) Ground 2(a) – The FTT exceeded the scope of its jurisdiction when it made findings on the existence of other instances of road vehicles being directly filled with red diesel at the BBL Premises beyond those referred to in the Revocation Decision. Accordingly, the FTT was not entitled to rely on these instances in support of its conclusion that, even if HMRC had taken all relevant considerations into account, and ignored irrelevant considerations, the Revocation Decision would inevitably have been the same.
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> (3) Ground 2(b) – In any event, the additional material did not clearly demonstrate that HMRC would inevitably have made the same decision. Had HMRC approached that material properly, they might well have accepted the fundamental weakness of that material and discounted it from its decision-making process.
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> (4) Ground 3- New evidence, not before the FTT, demonstrated that there was a vacant petrol station close to Bowling Back Lane which could have been used as a "pop-up" garage unlawfully selling red diesel for use in road vehicles. That evidence called into question the FTT's conclusions that a

number of drivers were identifying the BBL Premises as the source of red diesel found in their road vehicles.

26. Ground 2(a), therefore, involves a pure proposition of law relating to the scope of the FTT's jurisdiction. It logically precedes Ground 1 and we will, therefore, address it first as both Mr Glover and Ms Barnes did in their oral submissions.

27. Grounds 2(b) and Ground 1 are related. If, contrary to the Company's submissions on Ground 2(a), the FTT was entitled to make determinations on factual matters that had not (in Mr Glover's words) "exercised the mind of the decision maker" then (i) the FTT's conclusions based on Officer Hall's evidence were not available to it on the evidence and (ii) the additional material did not justify a finding that HMRC's decision would "inevitably" be the same. We will deal with those grounds together.

28. Ground 3 is, effectively, an invitation to reconsider the Decision in the light of new evidence and the Company has accordingly made an application to rely on that new evidence which we will consider together with Ground 3.

Ground 2(a) – Scope of the FTT's fact-finding jurisdiction

29. We have already set out the FTT's power as relevant to the Company's appeals as set out in s16(4) of FA 1994. The Court of Appeal considered the scope of that power in *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525. In that case, officers of the then HM Customs & Excise had seized excise goods from the taxpayers on the grounds that they suspected excise duty had not been paid on those goods. HM Customs & Excise had a discretionary power, set out in s152(b) of the Customs and Excise Management Act 1979, to restore goods that had been seized. There was a right of appeal to the then VAT and Duties Tribunal which, on such an appeal, had the "supervisory" powers set out in s16(4) of FA 1994.

30. However, at that time, the policy of HM Customs & Excise was, with certain very limited exceptions, not to restore excise goods on which excise duty had not been paid, even if the taxpayer's conduct was not blameworthy. One of the issues arising in the case was the extent to which, in the light of a taxpayer's rights under the European Convention on Human Rights, a taxpayer could raise the alleged unlawfulness of Customs & Excise's then policy in proceedings before the then VAT and Duties Tribunal.

31. HM Customs & Excise conceded that the VAT and Duties Tribunal had the power, pursuant to s16(4), to declare unreasonable a decision refusing to restore seized goods on the basis that the policy underlying it, of paying no regard to questions of "blameworthiness", was itself unreasonable. HM Customs & Excise then made the following submission, recorded at [38] of the judgment of Pill LJ, as to the powers of the VAT and Duties Tribunal if they followed such a course:

> "…
>
> d. The Commissioners would then retake the decision, in compliance with the Tribunal's ruling. If in any subsequent appeal against a further decision, an issue arose as to whether the Appellants were

> 'blameworthy', subject to the proviso referred to below, the Tribunal's role would be as the Tribunal held in *Gora*:
>
> > '[The Tribunal] satisfies itself that the primary facts upon which the Commissioners have based their decision are correct. The rules of the tribunal and procedures are designed to enable it to make a comprehensive fact-finding exercise in all appeals.'
>
> e. Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

32. Pill LJ (with whom Longmore LJ and Chadwick LJ agreed), broadly accepted this submission in the following passage:

> "39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph. As a "tribunal" to which recourse is possible to challenge a refusal to restore goods under section 152(b) of the 1979 Act, the Tribunal in my judgment meets the requirements of the Convention."

33. The Company emphasises that Pill LJ was accepting a submission that the Tribunal had the power to decide "the primary facts upon which the Commissioners have based their decision". But we do not consider that this demonstrates that Pill LJ was seeking to limit the scope of the primary facts that the FTT could find to those that have, as Mr Glover put it, "exercised the mind of the decision maker". Such a limitation would sit oddly with the remainder of Pill LJ's judgment. Pill LJ was concluding that the Tribunal had the power to decide, as a matter of primary fact, whether the taxpayer was "blameworthy" and determine, in the light of that finding, whether the administrative decision of HM Customs & Excise, to refuse to restore seized goods, was reasonable. Yet, on the Company's interpretation of Pill LJ's judgment, if HM Customs & Excise had completely ignored highly relevant indications of a lack of blameworthiness, the tribunal would not be able to make factual findings as to the presence or absence of those indications because they had not "exercised the mind of the decision maker". That would be a strange conclusion which would deprive the tribunal of any meaningful ability in such a case to determine that HMRC's administrative decision was unreasonable.

34. The Company also argues that, as the FTT made findings about the presence of other direct fills that were not referred to in the Revocation Decision, the Company was deprived of the ability to engage with the administrative discretion of HMRC in relation

to those alleged direct fills. That, it argues, disturbed the carefully calibrated division between the powers of the FTT and HMRC, referred to in paragraphs 15 and 16 of the judgment of Underhill LJ in *CC&C Ltd v Revenue & Customs Commissioners* [2014] EWCA Civ 1653. We reject that submission. As Underhill LJ noted, the statutory scheme certainly recognises the desirability of HMRC having a wide discretion on administrative decisions. But it also recognises the FTT's important function as a fact-finding tribunal. HMRC had expressly based their administrative decision, to revoke the RDCO authorisation, on factual assertions, that the Company was frequently allowing its customers to fuel road vehicles directly with red diesel. The carefully calibrated division between the roles of the FTT and HMRC was respected, not disturbed, by the FTT having the power to make further findings, following a hearing at which the Company could present its case, as to the number of occasions on which road vehicles were filled directly with red diesel at the BBL Premises.

35. Our conclusion is not altered by the judgment of the Court of Appeal in *HMRC v Smart Price Midlands* [2019] 1 WLR 5070. In that case, at paragraph 19 of her judgment, Rose LJ said that:

> "…[The] role of the FTT in these appeals will be to decide for itself any disputed primary facts *on which HMRC's decision was based* and then consider whether [HMRC's decision] was one which a reasonable officer could make on the basis of the facts as found."
>
> (our emphasis)

36. The Company emphasises the words we have highlighted but, like the very similar passage in *Gora*, we do not consider that Rose LJ was seeking to limit the FTT's fact-finding power on the lines for which the Company argues. In any event, in this case, the "primary facts on which HMRC's decision was based" included HMRC's assertion that the Company had, on a significant number of occasions, allowed its customer to fill their road vehicles with red diesel at the BBL Premises. Accordingly, when the FTT made findings as to how prevalent the Company's behaviour was, it was making findings as to primary facts on which HMRC's decision was based.

37. We dismiss the Company's arguments on Ground 2(a).

Ground 1 and Ground 2(b)

38. At the heart of both of these grounds is a complaint as to conclusions that the FTT drew from Officer Hall's evidence.

39. We have already set out Officer Hall's evidence to the effect that approximately 200 customers had been seen directly filling their road vehicles with red diesel at the BBL Premises and that the Company's staff made a further 61 such direct fills for its customers.

40. That evidence was, on close inspection, quite general in nature. It did not say who had seen the direct fills in question. The implication, not made express in the witness statement, was that there had been covert video surveillance of the BBL Premises by HMRC officers, and that Officer Hall had himself reviewed the resulting video footage

and counted the number of direct fills. That implication was reinforced by the fact that Officer Hall extracted a sample of that footage and exhibited it to his witness statement (though the FTT was not shown it in video form) and then described in his witness statement what he thought was taking place in those video extracts. That description covered three separate purchases of fuel from the Company made on 14 April 2018. Officer Hall's evidence was that one transaction involved a red VW Golf being filled "with red diesel". One involved a blue drum being filled with "an oil like liquid" and a silver drum also being filled. One involved a Skoda Octavia being filled "from the shutter pump", although it contained no description of what the "shutter pump" was or even a positive assertion that the "shutter pump" was dispensing red diesel.

41. Officer Hall's evidence was challenged in cross-examination and the Company urged the FTT to treat it with caution. At [118], the FTT summarised aspects of the Company's submissions on Officer Hall's evidence as follows:

> "Mr Glover stated that he had watched [the video clips] and submitted as follows:
>
> (1) none of the vehicles which were filled with oil from the pump were stopped and tested – just because Officer Hall had observed the red diesel nozzle from the pump in the tank of the road vehicle did not mean that there had been a successful fill;
>
> (2) Mr Pepper did not appear in any of the footage; and
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> (3) the filling of the blue drum was not a direct fill, and it was not known what was filled into the blue drum or the silver drum."

42. Mr Glover, who had appeared before the FTT, told us that Officer Hall accepted in cross-examination that where his witness statement made bare assertions that red diesel had in fact been supplied, he could not state that this was the case.

43. The Company submits that, in the light of the distinct lack of particulars in Officer Hall's evidence, and his answers given in cross-examination, the FTT was not entitled to the conclusions set out at [123] and [124]. It makes particular criticism of the following passage of [124]:

> "Given that [Officer Hall] has said that these direct fills were with red diesel, and Mr Glover has not submitted that the nozzle in question could not be identified, the only issue is whether red diesel was actually transmitted from the pump through the hose and nozzle and into the tank of the vehicle. We agree that this is not capable of being seen; but consider that whilst there may be a few occasions where nothing happened and there was no actual fuelling (perhaps because the card payment facility, if payment in advance is required or at least authorisation on the card, is not working, or the customer is not able to operate it) we can infer that in the vast majority of cases there was a successful fuelling of road vehicles with red diesel."

44. First, the Company says that Officer Hall had not identified <u>any</u> basis for his belief that the road vehicles observed were being filled with red diesel, still less any use of a

"red nozzle"[4]. He had accepted in cross-examination that he could not be sure that red diesel was indeed being supplied. In those circumstances, Mr Glover submitted that the Company was not obliged to challenge Officer Hall as to whether the nozzle could be identified. Indeed, having obtained the answers that were given in cross-examination, it would be positively unwise to do so.

45. Second, the Company challenges the FTT's conclusion that the "only issue" was whether red diesel was actually transmitted through a pump into a vehicle. Had the Company known the significance that the FTT would place on Officer Hall's vague evidence, it could have marshalled its own evidence which might conceivably have shown that there was a switch of tanks so that red diesel was no longer being dispensed through a "red nozzle". In making that submission, the Company emphasised that the FTT only gave HMRC permission to rely on Officer Hall's witness evidence (subject to the Company's right to object at the hearing) some 13 days prior to the hearing.

46. Before addressing the detail of these arguments, we note the uncontroversial principle that appeal courts should be reticent about interfering with findings of fact made by a first instance court or tribunal. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, Lewison LJ explained the principled reason for that reticence as follows:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include
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> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

[4] The term "red nozzle" is something of a shorthand expression. Exhibited to Officer Metcalfe's witness statement was a picture of a pump at the BBL premises that was said to dispense white diesel and red diesel through separate nozzles labelled "diesel" and "gas oil" respectively. The nozzle dispensing gas oil had a red collar, a few inches thick, at the point where the hose was attached to the nozzle. The words "Gas Oil", were written in white lettering on a red background on the pump, directly above this "red nozzle".

> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

47. We are acutely conscious of the risk of "island-hopping" in this case. We agree that, on its face, Officer Hall's witness statement was somewhat lacking in particulars. However, his answers given in cross-examination would have shed further light on that evidence. Moreover, there was other relevant evidence as to the layout of the BBL's premises, the tanks used to store different types of fuel and the pumps used to dispense them in, for example, the witness statements and exhibits of both Mr Pepper and Officer Metcalfe. In his skeleton argument, Mr Glover suggested that the FTT might have ignored the circumstances of the BBL Premises and the number of pumps there, some of which were visible outside and some of which were located inside buildings in reaching its conclusions. However, that suggestion on its own is not sufficient to meet the high hurdle necessary to challenge the FTT's findings of fact. We were not taken through evidence before the FTT as to the layout of the BBL Premises and the pumps located there. Nor was it explained specifically how any findings of the FTT were demonstrably at odds with that evidence. The FTT showed that it was aware that there was more than one pump at the BBL Premises as it quoted from Officer Hall's evidence referring to both a "shutter pump" and an "inner pump" and it had clearly seen the photographs of the outside pump that Officer Metcalfe took as those photographs helped to demonstrate the existence of a "red nozzle".

48. We were not provided with a complete statement of questions put to Officer Hall in cross-examination, or his answers given to those questions. There was no transcript and there was no application for the notes of the FTT panel to be made available to us. In saying this, of course, we are not doubting Mr Glover's account of what happened in cross-examination. But the process of cross-examination requires an advocate both to ask questions and think carefully and instantly about the answers given. It would be very difficult for the advocate even to keep an accurate note of questions and answers, still less to have a full recollection of them. No notes of the cross-examination, whether made by Mr Glover or his instructing solicitors were made available.

49. That makes it very difficult for us, at this remove from the FTT hearing and the evidence, to gauge the significance or otherwise of Mr Hall's apparent acceptance that he could not be sure that red diesel had been supplied. For example, at one extreme, Officer Hall might have come to accept in cross-examination that he had been labouring under a complete misapprehension and that what looked like fuelling with red diesel could well have been entirely innocent refuelling of vehicles with non-rebated fuel. At another extreme, he could simply have been accepting the obvious proposition that, since he could not actually see inside a fuel hose attached to a vehicle, he could not say conclusively that fuel was indeed passing through it. The first kind of admission might well make it difficult for the FTT to accept, based on Officer Hall's evidence alone, that over 200 customers directly filled their road vehicles with red diesel at the BBL Premises; the second kind of admission would leave it open for the FTT to infer that fuel was being transferred since people are not generally in the habit of putting a fuel hose into their tank and standing by for a period unless something was happening. There is a clear suggestion in the Decision that the FTT thought that Officer Hall's concession was closer to the latter extreme than the former as it refers at [124] to an acceptance of

Mr Glover's apparent argument that fuel could not be seen passing through the fuel hose. The Decision as a whole is impressively considered and reasoned and meticulous in detail. We see no reason to suppose that the FTT misunderstood the scope or import of any matters that Officer Hall accepted in cross-examination.

50. It is also possible that Officer Hall's acceptance of a lack of certainty arose because none of the vehicles seen fuelling in the video footage were stopped there and then and tested for red diesel. That issue is referred to at [118(a)]. We do not, however, consider that the FTT was precluded from finding that red diesel was dispensed simply because vehicles leaving the BBL Premises were not tested. Much would depend on the layout of the Company's premises and whether there was a clear indication that particular pumps seemed to be connected with particular types of fuel. Evidence on those matters did not all have to come from Officer Hall. Officer Metcalfe had explained the presence of a "red nozzle" that appeared to be used for the purpose of red diesel. It may well be that, having heard all of this evidence, the FTT concluded that Officer Hall must have seen road vehicles being fuelled from a "red nozzle" which was held out as dispensing red diesel and could be inferred actually to be dispensing red diesel. We would be at risk of "island hopping" were we to conclude that there was no basis on which Officer Hall's evidence could be accepted.

51. We attach little weight to the Company's submissions that Officer Hall's evidence (and indeed other evidence of additional observations of direct fills with red diesel) was served late in the day. On instructions, Ms Barnes confirmed that the additional HMRC witness evidence was served on the Company in April 2019, some 5 months prior to the hearing, together with a copy of an application to the FTT for permission to rely on that additional evidence. It appears that there was some mix-up on the part of the FTT's administration with the result that the Company was not asked for its representations as to whether the additional evidence should be admitted until around August 2019. That prompted the Company to object to the admission of additional witness evidence and the FTT's case-management decision, 13 days before the hearing, that the evidence could be admitted, subject to any objection from the Company which would be dealt with at the hearing itself. The Company did object, but the FTT decided to admit the evidence anyway, although it would consider carefully the extent to which that evidence was relevant (see [31] and [32]). With that background, we consider that the Company had ample opportunity to consider the import of HMRC's additional witness evidence, and their possible response to it. No doubt conscious of this, the Company did not argue before the FTT that the evidence was served so late that it would be procedurally unfair to admit it and it has not sought to appeal against the FTT's case-management decision to admit the evidence, as distinct from the FTT's substantive conclusions drawn from it.

52. Those reasons lead us to the conclusion that the Company's appeal on Ground 1 fails. We will not, therefore, interfere with the FTT's factual conclusions that drew on Officer Hall's evidence.

53. In those circumstances, Ground 2(b) can be dealt with briefly. Usually when an FTT finds that a decision such as the Revocation Decision is unreasonable, that is because the decision is either disproportionate, fails to take account of matters favourable to the

taxpayer, or it takes into account irrelevant matters that were thought to support HMRC's decision. Here, the FTT found that the Revocation Decision was proportionate and that relevant factors not taken into account included many more instances of direct fills with red diesel at the BBL Premises than Officer Elliott was aware of and Mr Pepper's failure to supervise the Company's RDCO business or to have regard to warning signs indicating that red diesel was being misused at the BBL Premises. Admittedly, the FTT found that, of the 16 instances of the Company supplying red diesel used in road vehicles referred to in the Revocation Decision, only 12 could be proved. It also found that the Revocation Decision did not take into account the written warning given to Mr Khan and his subsequent dismissal, but the most material factors to the FTT's conclusion of unreasonableness consisted of factors that tended to support HMRC's decision.

54. A case could certainly have been made for a conclusion that the Revocation Decision was reasonable because (i) even allowing for the fact that not all of the specific instances referred to in the Revocation Decision could be proved, the Company was, just as HMRC alleged, allowing large numbers of customers to fill their road vehicles directly with red diesel at the BBL Premises and (ii) revoking the Company's RDCO status was a proportionate response to the Company's behaviour. On that approach, given the FTT's clear findings of Mr Pepper's failures of supervision, and the FTT's reasoning at [167(7)], the FTT might well have concluded that disciplining Mr Khan was such an inadequate response as not even to constitute a relevant consideration.

55. However, HMRC have not invited us to depart from the FTT's conclusion that the Revocation Decision was unreasonable and we will, therefore, proceed on that basis. Even approached in that way, the FTT was clearly entitled to conclude that, faced with many more direct fills of red diesel in road vehicles than Officer Elliott was aware of at the time, it was "inevitable" that HMRC would make the same decision if they took into account all relevant considerations, and only relevant considerations, and that neither the disciplining and subsequent dismissal of Mr Khan, nor the over-estimate of the instances of misuse of red diesel in the Revocation Decision counted greatly in the balance. The Company argues against that conclusion, suggesting that, had the matter been remitted back to HMRC, they might have come to accept the shortcomings in Officer Hall's evidence. We do not accept that submission. The FTT had been content to accept Officer Hall's core conclusions following a contested hearing and, in our decision on Issue 1, we have concluded that it was entitled to do so. We see no realistic possibility of HMRC doing otherwise had the FTT remitted the matter back to them.

56. We dismiss the Company's appeal on Grounds 1 and 2(b).

Ground 3

57. The essence of Ground 3 is that, had the FTT been shown further evidence, that the Company obtained after the hearing, it would have reached a different conclusion on the extent to which drivers of road vehicles found using red diesel were identifying the BBL Premises as the source of that red diesel. It is argued that the new evidence demonstrates that a vacant filling station could have been the location of a "pop-up" business selling red diesel, and since it was located in the Bowling Back Lane area of

Bradford drivers could well have been seeking to identify that pop-up business and premises.

58. That approach raises the issue identified by the Upper Tribunal at [101] to [106] of *Anglian Water Services Ltd v HMRC* [2018] UKUT 431 (TCC). The Upper Tribunal only has power under s11 of the Tribunals, Courts and Enforcement Act 2007, to entertain appeals on questions of law. It is not entirely straightforward to see how the FTT made any error of law in failing to draw a particular conclusion from evidence that was not put before it. However, both parties have approached this issue on the footing that the Upper Tribunal has power to admit the new evidence and to set aside the determination of the FTT if that is warranted by the new evidence. Since we have reached the clear conclusion that the new evidence should not be admitted, we are content to proceed on this basis. Like the Upper Tribunal in *Anglian Water Services Ltd*, we do not consider that a conclusion should be expressed on the important question of the Upper Tribunal's powers in this regard unless necessary.

59. We start with the evidence itself. It consists of a photo taken by "Google Earth" showing a road, with a filling station adjacent. The photo identifies the location as 221 Wakefield Road. We are prepared to take judicial notice of other maps that identify Wakefield Road as meeting Bowling Back Lane at a roundabout at the most western point of Bowling Back Lane. The Google Earth photo does not provide a ready means of identifying how far the vacant garage is from the BBL Premises.

60. The Company argues that this evidence would have had an important influence on the outcome had it been available to the FTT. It points out that both Mr Pepper and Officer Kewley of HMRC said in their evidence that residents of Bradford sometimes refer to "Bowling Back Lane" as indicating an area, and not just a road. Therefore, the Company argues, when drivers said they purchased their red diesel at premises "on Bowling Back Lane" or "from the pump on Bowling Back Lane" or some similar formulation, they could quite easily have been referring to the garage that was located on Wakefield Road, but in the same locale as Bowling Back Lane.

61. We consider that this submission overstates the significance of the Google Earth photo. There is no evidence at all that any business was actually being conducted from the Wakefield Road premises between October 2017 and May 2018. Still less is there any evidence that suggests that red diesel was sold at the premises. Not one of the drivers stopped said that they had bought their red diesel from a garage "on Wakefield Road". In short, the new evidence simply shows a vacant filling station on a different road from the BBL Premises, albeit in the same locale, accompanied by speculation from the Company as to events that might have happened.

62. Moreover, the FTT found that, in the case of four drivers stopped, there was specific evidence linking the purchase of red diesel to the BBL Premises other than drivers giving generic references to "Bowling Back Lane" [5]. For example, some drivers provided receipts showing precisely where their red diesel had come from. That, coupled with the evidence of Officers Hall and Metcalfe to the effect that red diesel was

[5] See paragraphs [64] to [67], [68] to [71], [98] to [99] and [102] to [105]

being placed into road vehicles at the BBL Premises means that it overstates matters to say that the single Google Earth photograph would have had a significant outcome on proceedings.

63. We will apply the following approach, drawing on the decision of the Upper Tribunal in *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 214 (TCC), when deciding whether to admit the new evidence:

> (1) We will have regard to the following familiar three criteria set out in *Ladd v Marshall* [1954] 1 WLR 1489 since those provide important guidelines as to how we should exercise our discretion:
>
> > (a) whether the new evidence could, with reasonable diligence, have been obtained and put before the FTT;
> >
> > (b) whether the new evidence would probably have had an important influence on the result, though it need not be decisive;
> >
> > (c) whether the evidence is apparently credible.
>
> (2) We will recognise, however, that the *Ladd v Marshall* criteria are not a straitjacket and it may be appropriate, having regard to the overriding objective, to admit the new evidence even where one or more criteria are not present – see for example, *Zipvit v HMRC* [2018] EWCA Civ 1515.

64. Applying the *Ladd v Marshall* criteria in reverse order, we are quite satisfied that the Google Earth photograph is "apparently credible" and there is indeed a vacant garage at 221 Wakefield Road. We have already explained why we do not consider that the photograph would have had an "important influence" on proceedings. The Company acknowledges that the evidence could, with reasonable diligence, have been obtained prior to the FTT hearing.

65. Therefore, only one of the three *Ladd v Marshall* criteria is satisfied. The Company nevertheless argues that we should exercise our discretion to admit the new evidence. It characterises the failure to put evidence of other potential pop-up garages before the FTT as a collective failure of both the Company and HMRC for which HMRC, given their "duty of candour" to the Tribunal, should shoulder their share of blame.

66. HMRC accepted that they have some "duty of candour" in proceedings such as this, but we do not need to set out the precise scope of that duty to reject the Company's submission at [65]. The Company knew that HMRC were asserting that drivers were identifying the BBL Premises specifically when they referred to Bowling Back Lane. It was also much better placed than HMRC to know who its competitors were, where they were based and to which of those competitors the drivers interviewed by HMRC might have been referring. It is clear from [81] of the Decision that Officer Ferguson was even-handed in his evidence, himself identifying other filling stations in the vicinity drawing on his knowledge of Bradford. However, we reject the submission that HMRC can be criticised for not drawing to the Tribunal's attention the premises at 221 Wakefield Road noting that, as we have already pointed out, there is no evidence that these premises were even being used as a pop-up garage at the relevant time. In short, it is fair and just, and in accordance with the overriding objective, that the Company

should bear the consequences of failing to marshal all the evidence that, with hindsight, it wished it had. We will not exercise our discretion to admit the new evidence and the Company's appeal on Ground 3 accordingly fails.

Disposition

67. The Company's appeal is dismissed on all grounds.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE GUY BRANNAN

RELEASE DATE: 12 March 2021