41TACD2019

BETWEEN/

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments in accordance with sections 145 of the Finance Act 2001 and section 111(2)(a) of the VAT Consolidation Act 2010, in the total amount of €1,488,100, namely; an excise duty assessment dated 22 May 2014 in the sum of €1,050,133 in respect of the period 1 October - 30 November 2013, and a valued-added tax assessment dated 25 June 2014 in the sum of €437,967 in respect of the period 1 September to 31 December 2013.

2. The transactions at issue in this appeal relate to the supply of 2,787,421 litres of marked mineral oil ('MMO') to A. Ltd., to the value of €2,444,670 and to the purchase of 1,050,400 litres of road diesel ('DERV') from a company, X. Ltd. to the value of €714,000.

3. The Respondent took the view that there had been non-compliance by the Appellant with the Mineral Oil Tax Regulations 2012 and that the Appellant had not shown that the 2,787,421 litres of fuel supplied during the relevant period was used or held for use in accordance with s.99(10) (b) of the Finance Act 2001, as amended ('FA 2001'). Accordingly, an assessment was raised in respect of this transaction for the period October-November 2013.

4. The excise duty assessment represented the difference between the excise duty applicable at the standard rate and the excise duty applicable at the exceptional lower rate on the 2,787,421 litres of mineral oil supplied. This sum amounted to €1,050,133.

5. The VAT assessment represented the difference between the VAT applicable at the standard rate of 23% and the VAT applicable at the reduced rate of 13.5% on the 2,787,421 litres of mineral oil supplied. This sum amounted to €304,535 of the €437,967 assessed.

6. In addition, a sum of €133,442 included in the VAT assessment, related to the disallowance of a VAT input credit, in relation to road diesel (DERV) purchases from X. Ltd. The Respondent disallowed the VAT input credit in relation to this transaction on the basis that the Respondent was not satisfied that the transaction occurred.

7. The Appellant duly appealed.

Background

8. The Appellant traded under the style and title '[MINERAL OIL TRADER]' and was heretofore in possession of an auto fuel trader's licence and a marked fuel trader's licence.

9. The transactions the subject of this appeal are;

   - the supply of 2,787,421 litres of marked mineral oil ('MMO') to A. Ltd. to the value of €2,444,670

     and

   - the purchase of 1,050,400 litres of road diesel (DERV) from X. Ltd. to the value of €714,000.

10. MMO is diesel that is intended for use for heating or in agricultural machinery and is chargeable at a lower rate of both excise duty and VAT. By contrast, road diesel (DERV) is chargeable at the standard rates of both excise duty and VAT.

11. The Appellant's mineral oil licences were revoked on 26 March 2014 following a series of contraventions of the Mineral Oil Tax Regulations 2012. At the hearing of this appeal before the Tax Appeals Commission, the Appellant did not adduce evidence or call witnesses to contest the contraventions nor were the revocations appealed or challenged. The Appellant submitted that he did not appeal the revocation of his licences because he chose not to continue trading in mineral oil. The Appellant submitted that for this reason, no weight should be attached to his decision not to appeal the revocations. Accordingly, while the regulatory contraventions are relevant and must be considered, I attach no weight to the actual revocation of the licences.

12. By way of legislative background, recital 18 of Council Directive 2003/96/EC ('the 2003 Directive') provides*: 'Energy products used as motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant'.* Article 21(4) of the 2003 directive provides; *'Member States may also provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled.'*

13. Article 1 of Council Directive 2008/118/EC ('the 2008 Directive') provides; *'This article lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods').'*

14. Article 7(1) of the 2008 Directive [to which effect is given by section 95 of the Finance Act 1999] provides; *'Excise duty shall become chargeable at the time, and in the Member State, of release for consumption*.'

15. Chapter 1 of Part 2 of the FA 2001 as amended (comprising sections 96 to 153) relates to all excisable products including mineral oil. Section 99 of the FA 2001, as amended, deals with the liability of persons. In this regard, a charge to excise duty arises when mineral oil is released for consumption in the State. That charge will be at the standard rate unless the conditions for the application of a reduced rate are satisfied.

16. Regulation 28 of the Mineral Oil Tax Regulations deals with the 'Application of a reduced rate' of excise duty and provides that the reduced rate *'shall only be allowed'* in accordance with Regulation 28(1) where the Respondent is *'satisfied'* that such fuel;

> *(a) is intended for use other than as a propellant,*
>
> *(b) has been marked in accordance with Regulation 29,*
>
> *(c) is at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of these Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of marked gas oil and marked kerosene,*
>
> *(d) where it has been consigned to the State from another Member State or from outside the territory of the European Union, has been declared in writing to a proper officer as being for use other than as a propellant, and marked in accordance with Regulation 29.*

17. Where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, in particular Regulation 28, are not satisfied, mineral oil falls to have been supplied as road diesel, and excise duty at the standard rate applies.

18. Section 99(10) FA 2001 provides;

> *(10) where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –*
>
> *a) Such requirement has not been satisfied, or*
> *b) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,*

Then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment or lower rate.

19. The history of *inter partes* correspondence sets out attempts by the Respondent to obtain from the Appellant, information and documentation necessary to establish compliance with the regulations. In particular, letters dated 14 March 2014, 22 May 2014 and 26 March 2014, detail, *inter alia*, the contraventions of the Mineral Oil Tax Regulations 2012 arising. Relevant excerpts are set out below. The regulatory breaches and the facts underlying same were not contested in this appeal.

Submissions

Excise

20. The Respondent submitted that where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, in particular Regulation 28, were not satisfied, fuel falls to have been supplied as road diesel and excise duty at the standard rate applies. The Respondent submitted that as the Appellant failed to comply with the conditions governing applicability of the reduced rate, he is liable to pay excise duty at the standard rate.

21. The Appellant submitted that the assessments were incorrect and that there was no factual basis for them as the Appellant sold on the MMO *'in the same state as he bought it and therefore incurred no excise duty'.* However, the Appellant did not challenge the factual basis underlying the assessments and did not challenge the contraventions by him, of the Mineral Oil Tax Regulations, 2012.

22. The Appellant submitted *inter alia* that section 99(10) FA 2001 was incompatible with EU Law and the European Convention on Human Rights Act 2003. The Appellant submitted that section 99(10)(b) FA 2001 should be disapplied. In particular, the Appellant submitted that the provision infringed the principle of proportionality and resulted in an undue reversal of the burden of proof. In the alternative, the Appellant sought that the Tax Appeals Commission accede to the Appellant's request for a

preliminary reference to the Court of Justice of the European Union ('CJEU') in relation to the question of the compatibility of section 99(10)(b) with European law.

VAT

23. As regards the VAT assessment, the Appellant submitted that the assessment was '*excessive and calculated on incorrect amounts*'.

24. The Respondent submitted that where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012, in particular Regulation 28, were not satisfied, fuel falls to have been supplied as road diesel. The Respondent submitted that in such circumstances, VAT is charged at the standard rate of 23% as the supply cannot be considered to have been a supply falling within the exception provided for in paragraph 17(4) of Schedule 3 to the VATCA 2010, for the reduced rate of VAT of 13.5%.

25. As regards the disallowance of the VAT input credit deduction in respect of the transaction with X. Ltd., the Respondent stated that there was insufficient evidence that this transaction occurred. The Appellant did not adduce witness or documentary evidence to contest the Respondent's submission in this regard but relied on the well-established EU Law authorities in relation to the fundamental right to deduct VAT. The Appellant submitted that the requisite EU legal tests had not been met.

Legislation

26. As set out in the **Appendix** below**,** the relevant legislation is as follows;

Section 95 Finance Act 1999 (No. 2) - Charge of Tax

Section 97 Finance Act 1999 (No. 2) - Charge of Tax

Section 104 Finance Act 1999 (No. 2) – Regulations

Section 99(10) of the Finance Act 2001, as amended – Liability of persons

Section 46(1)(a) of the VAT Consolidation Act 2010 – Rates of Tax

Paragraph 17(4) of Schedule 3 of the VAT Consolidation Act 2010 – Energy Products and Supplies

Mineral Oil Tax Regulations 2012 - S.I. 231/2012

Including, in particular;

- *Regulation 18 – Records to be kept by mineral oil traders*
- *Regulation 23 - Delivery document and procedure*
- *Regulation 25 – Return of oil movements by mineral oil traders*
- *Regulation 28 - Application of a reduced rate*
- *Regulation 41 – Keeping and furnishing of records*

For ease of reference, Section 99(10) of the Finance Act 2001, as amended is set out herein as follows;

(10) where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –

a) *Such requirement has not been satisfied, or*
b) *any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,*

Then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment tor lower rate.

Evidence

27. Documentation furnished in evidence included a booklet of *inter partes* correspondence, relating to requests by the Respondent for information and documentation regarding compliance with the Mineral Oil Tax Regulations, 2012. The correspondence details contraventions in relation to the regulations, the consequent revocation of the licences and the raising of assessments by the Respondent.

28. The Appellant did not adduce evidence or call witnesses, nor did the Appellant challenge the factual basis of the contraventions underlying the assessments.

ANALYSIS

29. The transactions the subject of the assessments in this appeal are;

- the supply of 2,787,421 litres of marked mineral oil ('MMO') to (A. Ltd.) to the value of €2,444,670

  and

- the purchase of 1,050,400 litres of road diesel (D.E.R.V.) from X. Ltd. to the value of €714,000

<u>Sales of fuel to A. Ltd.</u>

30. The Appellant submitted that MMO was supplied to him by suppliers based in Ireland and in Northern Ireland and that it was delivered to his premises within the State, from where it was sold by him, to A. Ltd. also within the State.

31. The Respondent stated that the premises of A. Ltd. was found by Revenue officials on 23 November 2013 (a date during the relevant period of October-November 2013) to be an office of approximately 1.49 square metres (16 square feet) with no storage facilities and no other obvious means of storing or dealing in large volumes of fuel, namely, 2,787,421 litres, which the Appellant submitted was supplied.

32. Correspondence from the Respondent to the Appellant dated 31 January 2014 observed that (based on records submitted by the Appellant) A. Ltd. was paid approximately €2.2million in cash by the Appellant up to 26 November 2013. The letter provides;

> *'The records submitted by your agents on 11 December 2013, indicate supplies of marked mineral oil to this customer, €2,405,937 and cash payments received in the amount of €2,225,235 approximately, up to 26th November 2013. … These payment arrangements are irregular – such large payments would normally be made by account transfer.'*

33. The Respondent submitted that such large cash transactions were irregular and that they impeded traceability by the Respondent of the source of the fuel purchased and the destination of fuel supplied by the Appellant.

34. The history of *inter partes* correspondence sets out attempts by the Respondent to obtain from the Appellant, information and documentation necessary to establish compliance with the 2012 regulations. I note on review of the correspondence that the Appellant was provided with many opportunities to comply with the regulations and to furnish the information and documentation requested by the Respondent.

35. The contraventions of the regulations are set out in particular, in letters dated 14 March 2014 and 26 March 2014. Further correspondence dated 22 May 2014 details the transaction with (A. Ltd.) and provides as follows;

> *'You produced records and a schedule of purchases for the period of 01.10.2013 to 30.11.2013, showing that you had purchased marked fuel to the value of €2,444,670 (including Value Added Tax) from* [Fuel company D, Fuel company E, Fuel company F, Fuel company G, Fuel company H and Fuel company I] *and that you had sold this marked fuel primarily to* A. Ltd.
>
> *It was established in the course of the license review and Revenue investigations, that in all, 2,787,421 litres of Marked Oil were purchased by you and allegedly sold primarily to* A. Ltd., *in the period from 01.10.2013 to 30.11.2013.*
>
> *You sought to claim, and produced documentation purporting to show, that this fuel:*

A. *Was delivered by the suppliers listed above to a premises* [within the State], *and*
B. *Sold by you to* (A. Ltd.), *as Marked Mineral Oil, and transported by you to their premises.*

As referred to in this and previous correspondence, these claims, and records, were found to be incorrect. For the reasons set out below, the Revenue Commissioners do not accept the veracity of any of the information and documents submitted by you, purporting to claim or show that the fuel was supplied to (A. Ltd.).

In relation to your supplies of Marked Mineral Oil to A. Ltd. *the delivery documents submitted were prepared by* [MINERAL OIL TRADER], *and state, in the "Deliver to" panel, that the fuel was collected. Based on your agent's letter of 14th February 2014,* A. Ltd. *collected or arranged collection of the fuel.*

The delivery documents/records prepared by [MINERAL OIL TRADER] *do not contain a full record of all details required under Regulation 23 (4) Mineral Oil Tax Regulations 2012.*
In particular:

- *The "deliver to" address has not been completed.*
- *Only four out of one hundred documents include the registration number of the delivery vehicle.*

The absence of such information is a clear breach of Regulation 24 Mineral Oil Tax Regulations 2012. In addition, in regard to all supplies and deliveries, Regulation 18 (2)(c) Mineral Oil Tax Regulations 2012 required [MINERAL OIL TRADER] *to keep a full record of the name and, where applicable, the VAT Registration number and mineral oil trader's licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned.*

In view of the absence from the records of [MINERAL OIL TRADER] *of details of the delivery vehicles, and the place of delivery the following were requested in the letter of 31st January 2014:*

A. *Explanations for omission of the place of delivery, and the collection vehicle details, from the documents submitted by you/your agent.*

B. *A Statement from* A. Ltd., *confirming the address/es of the premises at which the fuel was received, by, or on behalf of* A. Ltd.

This information has to-date not been received

Accordingly, and in particular in view of the fact that incorrect and incomplete information and records were submitted by you in respect of the movements of the fuel (collection/delivery), it is clear that you have not shown to the satisfaction of the Revenue Commissioners that the Marked Mineral Oil in question has been used, or was held for use, "for a specific purpose or in a specific manner", within the meaning Section 99(10) of the Finance Act 2001 (as amended).

The application of a reduced excise rate to gas oil shall only be allowed where the Revenue Commissioners are satisfied that such gas oil is intended for use other than as a propellant and is at all times kept for sale, sold, kept for delivery, and delivered, in accordance with the requirements of the Mineral Oil Tax Regulations 2012.

Having regard to the matters set out above, ***and****, if any requirement/s of excise law in relation to the holding or delivery of the Marked Mineral oil in question, was/were not complied with, it follows that you are liable for excise duty in respect of the product in question, at the standard rate of excise duty/without the benefit of the reduced rate.*

Breaches of Excise Law/Regulations.

There were numerous breaches of excise law and regulations, which were identified in the course of the above mentioned correspondence, and outlined clearly in my correspondence dated 14.03.2014 and 27.03.2014. These breaches of excise law / regulations include the following:

1. ***Contravention of Regulation 18 (1) (c), Mineral Oil Tax Regulations 2012. (Logistics/Transportation of fuel).***
2. ***Contravention of Regulation 18 (2) (e), Mineral Oil Tax Regulations 2012.***
3. ***Contravention of Regulation 18 (2) (d), Mineral Oil Tax Regulations 2012.***

4. ***Contravention of Regulation 24, Mineral Oil Tax Regulations 2012. (Purchases of Marked Mineral Oil from* (Fuel Company E) *& Supplies of Marked Mineral Oil to* (A. Ltd.*).***
5. ***Contravention of Regulation 25 of the Mineral Oil Tax Regulations 2012.***
6. ***Contravention of Regulation 41 (3) (c), Mineral Oil Tax Regulations 2012.***

The above matters were in breach of Regulation 18 of the Mineral Oil Tax Regulations 2012 (Record keeping requirements), which requires that the following be kept:

(i) All records required under Section 886 of the Taxes Consolidation Act 1997 and Section 84 of the Value – Added Tax Consolidation Act 2010.

(ii) Records in respect of each specified description of mineral oil relating to, inter alia:

- *The selling or dealing in, receiving, keeping for sale or delivery, or delivery,*
- *The financing or facilitation of any transactions or activities (whether or not those transactions or activities are carried on by the mineral oil trader), and*
- *In respect of sales, the (true) name and address of the person to whom the mineral oil was sold, and the (true) address of every premises or place to which the oil was supplied or delivered.*
- *A record of every payment made or received, with a clear reference to the transaction concerned.*

It is clear from the matters set out in this letter, that:

(i) You received excisable products (Marked Mineral Oil), on which excise duty has been charged at a rate lower than the appropriate standard rate, subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and

(ii) Requirements of excise law in relation to the holding or delivery of such excisable products have not been complied with, and

(iii) It has not been shown to the satisfaction of the Revenue Commissioners that the excisable products have been used, for such purpose or in such manner.

Accordingly, you are liable for payment of the excise duty on the mineral oil in question, at the rate appropriate to it, without the benefit of any relief, rebate or lower rate.'

36. As stated above, the Appellant chose not to challenge or contest the contraventions underlying the assessments and the facts upon which those contraventions are based.

37. In terms of submissions as to fact, the Appellant in his legal submissions, submitted that he did not deliver the mineral oil to any customer but that the customer on each occasion collected the oil. The Respondent was correct in its submission that this arrangement would not have relieved the Appellant of his obligation under Regulation 23(4) of the Mineral Oil Tax Regulations 2012 as the '*consigning mineral oil trader*' to include, *inter alia*, on the delivery docket the *'deliver to'* address. In effect, nothing material turns on this particular submission.

38. The requirements of the Regulations (i.e. the detailed information and documentation which must be collated and reported to the Respondent in accordance with the regulations) seek to deliver on behalf of the fuel trader, verification of each transaction, its form and content. In particular, information and documentation to be reported in accordance with the regulations, seeks to establish and verify whether the transaction was one concerning the delivery and supply of marked mineral oil.

39. In circumstances where the transaction itself has not or cannot be verified (due to for example, the absence of sufficient information and documentation in relation to supply, transportation, storage, delivery etc.), it is difficult to see, based on the facts and circumstances of this appeal, the means by which the Appellant will meet the burden which falls to him in accordance with s.99(10)(b) FA 2001.

40. For fuel traders who wish to avail of the reduced rate of excise and VAT, they must comply with the requirements in the 2012 Mineral Oil Tax Regulations and this is set out clearly in regulation 28 and in section 99(10) FA 2001.

41. As a result of the contraventions of the regulations and the deficiencies in the books and records of the Appellant in relation to this transaction, Senior Counsel for the Respondent submitted that the Appellant had not shown to the satisfaction of the Respondent that the excisable products had been used or held for use for a specific purpose or in a specific manner as required by section 99(10) FA 2001.

42. Turning to the alleged sale of 2,787,421 litres of MMO to A. Ltd. during the period October-November 2013 and the uncontested contraventions of the 2012 Regulations in relation to that transaction, I find that the Appellant has not adduced sufficient evidence (or any evidence) to support his assertion that he is not liable to pay excise at the standard rate in accordance with section 99(10)FA 2001 and further, that he is not liable to pay VAT at the standard rate of 23% in accordance with Section 46(1)(a) of the VAT Consolidation Act 2010.

Purchases of road diesel (DERV) from X. Ltd.

43. The Appellant submitted that X. Ltd. supplied 1,050,400 litres of DERV to the Appellant in October-November 2013. The Respondent stated that an inspection of the premises during the relevant period found no obvious means of storage for such a significant level of fuel.

44. The Respondent established that there were no return of oil ('ROM') documents filed in respect of X. Ltd. post August 2015 notwithstanding the Appellant's assertion that over the period October-November 2013, X. Ltd. allegedly supplied over one million litres of fuel to the Appellant. According to its ROM movements for the period from 1 January 2013 to 31 August 2013, X. Ltd. supplied a total of less than 50,000 litres of fuel. However, the Appellant's returns for the periods October 2013 to December 2013 purport to show purchases of DERV from X. Ltd. totalling 1,050,400 litres. X. Ltd.'s premises was closed and locked when visited by officers of the Respondent on 29 October 2013, 20 November 2013 and 2 December 2013.

45. The Respondent's view was that the Appellant did not furnish evidence sufficient to establish that this supply occurred. The Respondent submitted that if this fuel was sourced by the Appellant, it was sourced from suppliers other than X. Ltd. and that

despite requests for relevant information, these sources were not identified by the Appellant.

46. The records obtained indicated purchases by the Appellant from X. Ltd. of approximately €714,000 over a six-week period in October-November 2013. Payments for the most part were stated to have been in cash or bank draft rather than account transfer. The Respondent stated that this impeded the traceability of the transactions.

47. A statement was furnished to the Respondent showing that €340,997 was due by the Appellant. The Respondent submitted that it was not credible that this company, with whom the Appellant had no history of prior dealing, would provide the Appellant with such a substantial level of credit. The Respondent submitted that the level of credit allowed by X. Ltd. to the Appellant, appeared to lack commercial reality.

48. In this regard, correspondence from the Respondent to the Appellant on 31 January 2014 provides; *'The Statement of account provided by your agents, on 11 December 2013, is a statement prepared by* [MINERAL OIL TRADER]*, and not a statement prepared and issued by* X. Ltd. *as requested in my letter of 27 November 2013. Suppliers routinely prepare and issue periodic statements of account to their customers. The record required to be submitted by you, is a statement, issued by* X. Ltd. *to* [MINERAL OIL TRADER].' The requested statement was not furnished to the Respondent however.

49. In relation to delivery documents, the letter of 31 January 2014 provides; *'Delivery documents, from* X. Ltd.*, (in the same format as other delivery documents prepared by* [MINERAL OIL TRADER]*) have been provided. These show that the diesel was delivered by* X. Ltd.*, to the premises of* [MINERAL OIL TRADER]. *The applicable regulation was Regulation 23, Mineral Oil Tax Regulations, 2012.* X. Ltd. *was required to prepare a delivery document, retain copy one, furnish copies two and three to the person in charge of the delivery vehicle, who, in turn, was required to furnish copy three to* [MINERAL OIL TRADER], *and return copy two to* X. Ltd. *(duly endorse as regards the exact quantity delivered, and the date and time of delivery). These documents submitted by you are deficient, in that the 'Oil removed from' (place of dispatch) section has not been completed.'*

50. At hearing, the Appellant claimed that A. Ltd. handled transportation of the fuel from X. Ltd.'s filling station to the Appellant's premises [within the State]. The Respondent was not provided with any documentation from X. Ltd. showing when and how this particular consignment of fuel was supplied by X. Ltd. to the Appellant.

51. The history of *inter partes* correspondence sets out attempts by the Respondent, to obtain from the Appellant, information and documentation necessary to ensure compliance with the regulations. In particular, letters dated 14 March 2014 and 26 March 2014 detail the contraventions and their basis. These letters, under the heading *'Contraventions of Regulation 18(2)(d), Mineral Oil Tax Regulations (Purchases of diesel from* X. Ltd. *supplies – supplied to filling stations & hauliers)'* provide;

> *'Delivery documents, from* X. Ltd. *have been submitted, these are in the same format as other delivery documents prepared by* [MINERAL OIL TRADER]*. It is stated in your agent's letter of 14th February 2014 that all logistics/transport of diesel purchased from* X. Ltd. *and delivered to retailers and hauliers were controlled by* A. Ltd. *However, as stated previously, no records of these arrangements have been provided.*
>
> *The documents submitted by you in respect of purchases of diesel from* X. Ltd. *are deficient, in that the "Oil removed from" (place of dispatch) section has not been completed. Regardless of the role and obligations of* X. Ltd.*, who was required to prepare the delivery documents under Regulation 23, Mineral Oil Tax Regulations 2012, you were specifically required under Regulation 18 (2) (d) Mineral Oil Tax Regulations 2012, to keep a proper record:*
>
> *"for deliveries of mineral oil received by the mineral oil trader, the name, and, where applicable, the Value Added Tax registration number and mineral oil trader's licence number of the person from whom the delivery was received, and the address of the premises or place from which that delivery was dispatched".*
>
> *As referred to in previous correspondence, when Revenue Officials visited the premises of* X. Ltd. *at* [within the State] *in September 2013, they ascertained that the facilities at the premises were not capable of dealing in such quantities of fuel. …*

Information requested in the letter of 31st January 2014, from the Control Officer, namely written confirmation from X. Ltd. *of the full address of the place of dispatch, and the place of delivery, has not been provided.'*

52. The Respondent submitted that despite repeated request, the Appellant failed to furnish sufficient information and documentation in proof of the alleged transaction between X. Ltd. and the Appellant. As a result, the Respondent disallowed input credit recovery.

53. In addition, as stated above, the contraventions of the Regulations and the facts underlying them were not challenged, appealed or contested by the Appellant in the within appeal.

Findings

54. For the reasons set out above, I find that the information and documentation furnished by the Appellant in relation to the alleged purchase of 1,050,400 litres of road diesel (DERV) from X. Ltd. to the value of €714,000, is insufficient to allow me to conclude as a material fact that these purchases took place.

55. In relation to the supply of 2,787,421 litres of marked mineral oil ('MMO') to A. Ltd. to the value of €2,444,670, I am satisfied, on consideration of the regulations, the evidence and submissions, that the following regulatory contraventions occurred;

- Contravention of Regulation 18(1)(c) of the Mineral Oil Tax Regulations 2012 (Logistics/Transportation of fuel)
- Contravention of Regulation 18(2) (e) of the Mineral Oil Tax Regulations 2012
- Contravention of Regulation 18(2) (d) of the Mineral Oil Tax Regulations 2012
- Contravention of Regulation 24 of the Mineral Oil Tax Regulations 2012 (purchases of MMO from (Fuel Company E) and supplies of MMO to A. Ltd.)
- Contravention of Regulation 25 of the Mineral Oil Tax Regulations 2012
- Contravention of Regulation 41(3)(c) of the Mineral Oil Tax Regulations 2012

56. Further, I am satisfied that the Appellant has not shown that the excisable products were used or held for use for a specific purpose or in a specific manner in accordance with section 99(10) FA 2001 and as a result, I find that the Appellant is liable to pay excise at the standard excise rate in accordance with section 99(10) FA 2001.

57. In addition, where the requirements of section 99(10) FA 2001 and the Mineral Oil Tax Regulations 2012 were not satisfied, such that the fuel falls to have been supplied as road diesel, VAT is charged at the standard rate of 23% as the supply cannot be considered to have been a supply falling within the exception provided for in paragraph 17(4) of Schedule 3 VATCA 2010.

European law

The Treaty

58. Article 110 of the TFEU provides; *'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*'

59. Article 111 of the Treaty prohibits Member States from '*any repayment of internal taxation'* where products are exported to other Member States that exceeds '*the internal taxation imposed on them whether directly or indirectly'*.

60. Article 112 is not relevant as it expressly does not apply, *inter alia*, to excise duties.

61. Article 113 sets out the framework for the taxation by Member States of energy products, including mineral oil and provides; *'The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'* The Appellant submitted that incompatibility arose as between Article 113 of the Treaty and section 99(10) FA 2001 however, no specific or coherent basis for this submission was advanced.

62. In consideration of the above, I am satisfied that there is no breach of Articles 110-113 of the Treaty in relation to the operation of section 99(10) FA 2001, which merely deals with the circumstances in which the right to continue to benefit from a reduced rate of excise duty is or may be taken away, where those circumstances apply equally, regardless of the origin of the fuel. Thus, I am satisfied that there is no incompatibility between these Treaty provisions and section 99(10) FA 2001, as amended.

Case Law – Alleged reversal of the burden of proof

A Ltd.

63. The Appellant submitted that the joined cases of *Mahagében* and *Dávid, Cases C-80/11 and C-142/11*, which arise in the context of VAT and which concern the fundamental right to deduct under the VAT legislation, required the Respondent in this appeal to establish by objective evidence that the taxpayer knew or ought to have known that the activity of other traders in the chain was connected with fraud. The Appellant submitted that these principles which arise in the VAT context, should be applied in an excise law context and that the CJEU case law on the matter in relation to the reversal of the burden of proof in matters of indirect taxation also applied.

64. The cases of *Mahagében* and *Dávid*, concerned traders who were disallowed deductions because of the non-compliance of taxpayers further up the supply chain. In this appeal however, a significant factual distinction arises namely, the individual in default and in contravention of the regulations is the Appellant. It is the Appellant's default (and not the default of other traders) which led to the contraventions of the regulations, the revocation of his licences and the raising of the assessments.

65. As regards the transaction with A. Ltd., the Respondent submitted that an important distinction between *Mahagében* and *Dávid* and the within appeal was that this appeal is based not on a denial of excise duty paid on preceding purchases (such payments having been fully credited in the excise assessment) but that the assessment merely recalculated the excise duty payable based on the standard rate, while providing a credit for the excise duty previously paid by the Appellant at the reduced rate. This is to be contrasted with the position in *Mahagében* where the fundamental right to

deduct VAT input credit was denied even though the occurrence of the purchases in question on which VAT had been charged to *Mahagében* was not in dispute.

66. The Appellant also cited *Mahagében* as authority for the proposition that the establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer's rights however, I am satisfied that section 99(10) FA 2001 does not establish a system of strict liability. It provides that if the Appellant is in contravention of excise law requirements, the burden of proving the ultimate use to which the mineral oil is put, falls to the Appellant under s.99(10) (b) FA 2001. The Appellant sought by reference to EU law to contest the Respondent's entitlement to assess excise duty on the supplies in question at the standard rate, in circumstances where the contraventions of the Mineral Oil Tax Regulations 2012 were themselves not contested by him. This is so in circumstances where full compliance with the 2012 regulations is a requirement to claiming an entitlement to the reduced, rather than the standard rate of excise.

67. The Respondent stated that Ireland would be in default of its obligations if it permitted non-compliance. I accept the submission of the Respondent that section 99(10) of the FA 2001 does not establish a system of strict liability going beyond what is necessary to preserve the public exchequer's rights.

68. The case of *Dávid* also involved a factual situation where it was accepted that the VATable services had been carried out. Again, that is to be distinguished from the within appeal where the documentation furnished by the Appellant was insufficient to support a conclusion that the purchases from X. Ltd. actually occurred.

69. Further, I accept the submission of the Respondent that the principles contained in *Mahagében* and *Dávid* are not transposable to the assessment to excise duty at issue in this appeal, since no right to deduct arises in relation to excise duty as it is not a turnover tax.

70. Another case relied on by the Appellant was the case of *Weber's Wine* Case C-147/01. In *Weber's Wine,* the domestic tax authorities imposed a tax which was incompatible with Union Law where this tax was subsequently passed on.

71. The assessment challenged by the Appellant in this appeal is not based on any domestic legal provision that seeks to deny to the Appellant a right to recover from the State, duties levied in breach of EU law.

72. The Respondent correctly submitted that there was no contest on the fact that excise duty in this appeal *was* applicable. The matter in issue was the amount of excise duty applicable, not the fact of its applicability. In addition, the issue of unjust enrichment did not arise in this appeal and for that reason, I do not consider *Weber's Wine* to be relevant to the matters under consideration in this appeal. Similarly, as regards the reliance placed by the Appellant on the cases of *San Giorgio,* Case C-199/82 and *Michailidis,* Case C-441/98 and Case C 442/98, I do not consider these cases to be relevant as no provision of Irish law upon which the contested additional excise duty assessment is based, has been declared to be incompatible with the TFEU.

73. As regards reliance by the Appellant in relation to the doctrine of supremacy of EU law, in accordance with *Simmenthal,* Case C-106/77, there has not been established an incompatibility between Irish law and EU law and, as a result, the application of the doctrine of supremacy in the context of this appeal does not arise.

X. Ltd.

74. In relation to the disallowed deduction of €133,442 regarding the alleged purchase of 1,050,400 litres of road diesel from X. Ltd., as set out above, I have found as a material fact that the documentation furnished by the Appellant was insufficient to allow me to conclude as a material fact that the purchases from X. Ltd. took place.

75. As a result, in circumstances where the Appellant has been unable or unwilling to demonstrate through adequate information and documentation, that this transaction occurred, there was no basis for the deduction in the first place and therefore, no infringement of a right in denying the deduction.

76. In *Mahagében*, the taxpayer was in principle, entitled to a VAT deduction. In this appeal however, the Appellant was unable to furnish books and records in proof of the X. Ltd. transaction.

77. At paragraph 53 of *Mahagében* and *Dávid,* the Court recalled its 2006 decision in *Kittel* and stated:

> *'According to the Court's case-law, traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT (see Kittel and Recolta Recycling, paragraph 51).*
>
> *On the other hand, it is not contrary to European Union law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, to that effect, Case C-409/04 Teleos and Others [2007] ECR I-7797, paragraphs 65 and 68; Netto Supermarkt, paragraph 24; and Case C-499/10 Vlaamse Oliemaatschappij [2011] ECR I-14191, paragraph 25).'*

78. In this regard, the Respondent submitted that the duty to take every precaution had not been complied with on behalf of the Appellant. The Respondent submitted that the level of record-keeping imposed by the Mineral Oil Tax Regulations 2012 to keep essential books and records, was entirely reasonable but notwithstanding the requirements of the regulations, it was uncontested that the Appellant failed in material respects to comply with his obligations in this regard. Thus, the Respondent submitted that the Appellant was not a trader who took every precaution which could

reasonably be required of him, to satisfy himself as to the legitimacy of the transaction concerned. I accept this submission on behalf of the Respondent.

79. In this regard the Respondent asserted that the *Mahagében*, *Dávid* and *Kittel* criteria were satisfied as regards the supply to X. Ltd. on the basis that the Appellant knew or could not but have known that it was not possible for X. Ltd. to have supplied him with 1,050,000 litres of fuel in a five-week period in October-November 2013, given the small resource that the company had. The Respondent submitted that the dealings were almost exclusively in cash and that it was not commercially credible that hundreds of thousands of euro credit was advanced to the Appellant by X. Ltd., in circumstances where the Appellant had not previously done business with X. Ltd..

80. The Appellant responded to queries by stating that A. Ltd. delivered the fuel from X. Ltd. to the Appellant's premises [within the State] however, when the Respondent requested documentation in support of that arrangement, documentation was not provided.

81. In circumstances where I concluded that there was insufficient evidence adduced by the Appellant that the X. Ltd. supply had taken place as a matter of fact and as there was no basis for the deduction in the first place and therefore, no infringement of a right in denying the deduction, it is not necessary to enter into a consideration of whether the Appellant knew or ought to have known that by his purchases, he was taking part in a transaction connected with fraudulent evasion of VAT.

Alleged reversal of the burden of proof - conclusion

82. In conclusion, and for the reasons set out above, I find that the Appellant has failed to establish a basis upon which section 99(10)(b) FA 2001 should be disapplied in accordance with the principles contained in the *Minister for Justice v Workplace Relations Commission*, Case C-378/17 and I therefore decline to disapply this provision.

83. In relation to the excise duty assessment in the sum of €1,050,133 and that part of the VAT assessment that relates to the VAT rate increase (i.e. the sum of €304,535), I am satisfied that the cases of *Mahagében* and *Dávid* do not support the Appellant's submission and that the Appellant's reliance on these authorities is misconceived and I determine that the assessments shall stand.

84. In relation to that portion of the VAT assessment which relates to the disallowance of an input credit deduction (i.e. €133,442) as regards the alleged purchases from X. Ltd., and having concluded that the documentation furnished by the Appellant was insufficient to allow me to conclude as a material fact that the purchases from X. Ltd. took place, I determine that the assessment shall stand.

Statutory Interpretation

85. The Appellant claimed that section 99(10) FA 2001 was ambiguous and that the ambiguity should be resolved in favour of the taxpayer pursuant to the *contra proferentem* approach to statutory interpretation referenced by the High Court in *McGarry v Revenue Commissioners* [2009] ITR 133.

86. However, I find no such ambiguity in the provision. On an ordinary literal interpretation, the meaning and import of the provision is clear: the person who has received the excisable products on which a reduced rate has been charged subject to a requirement that they be used for a specific purpose (i.e. as MMO) must, under section 99(10)(b) comply with '*any requirement of excise law in relation to the holding or delivery of such excisable products*' and must show '*to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner*'. The subsection provides that if the Appellant is in contravention of excise law requirements, that the burden of proving the ultimate use to which the mineral oil is put, falls to the Appellant under s.99(10)(b) FA 2001. Thus, I do not accept the Appellant's submission on the matter of statutory interpretation.

The principle of proportionality

87. It is well established that national rules which are intended, *inter alia*, to transpose the provisions of a Directive into the domestic legal order of the Member State concerned, must be consistent with the principle of proportionality.

88. The Respondent submitted that section 99(10) did not infringe the principle of proportionality and that there had been no basis advanced by the Appellant that would support the disapplication of section 99(10)(b) FA 2001. Further, the Respondent submitted that no such basis existed.

89. The Appellant cited *Daly v Revenue Commissioners* [1995] 3 IR 1 in support of his submission in relation to proportionality however, the *Daly* case arose in relation to the adjustment of the tax year and to the year into which deductions fell. In this appeal, the Appellant has not been denied the opportunity of claiming credit in relation to the excise duty paid and thus I do not consider the *Daly* case to be relevant to this appeal.

90. The case of *ROZ-ŚWIT Zakład Produkcyjno and ors*, Case C-418/14 involved proceedings between the company *ROZ-ŚWIT* and the Director of the Wrocław Customs Chamber ('the Director') concerning the refusal of the Director to grant ROZ-ŚWIT the benefit of the rate of excise duty applicable to heating fuel because of its failure to submit within the specified period, a list of statements that the fuel purchased was for heating purposes.

91. In effect, the Polish legislation made a trader liable for excise duty where the relevant Polish excise regulations had not been complied with, even in circumstances where there was no loss of duty.

92. The Court, at paragraph 33 of the *ROZ-ŚWIT* case, Case C-418/14 stated: *'it follows that both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed in accordance with their actual use.'*

93. In that case, under the Polish national legislation, first sellers of heating fuel were required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased were for heating purposes and secondly, where such a list was not submitted within the prescribed time limit, the excise duty rate laid down for motor fuel was applied to the heating fuel sold even though the intended use of that product for heating purposes had been established and was not in doubt. Paragraphs 34 and 35 of the judgment provides;

> *'Consequently, a provision of national law, such as Article 89(16) of the Law on excise duty, under which, in the event of failure to submit a list of statements from purchasers within the time limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if, as was found in the dispute in the main proceedings, those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96.*
>
> *In the second place, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality.'*

94. It is clear that the Polish legislation differs from section 99(10) of the Finance Act 2001. Section 99(10) FA 2001 permits the Respondent to form a view based on infringements and contraventions of the Mineral Oil Regulations by the trader, that they are not satisfied that the use requirement of the fuel has been met. It was the automaticity of the higher rate (to furnish purchaser statements within a specified time limit) *notwithstanding* that the fuel was heating fuel that the Court held infringed the principle of proportionality.

95. The within appeal is also factually distinct in that in the Polish case, it was established that the fuel in question *was* heating fuel and *was* supplied.

96. In conclusion, I am satisfied that there is no infringement of the principle of proportionality where the Respondent has formed a view, based on a deficiency of documentation to indicate otherwise, that the use and purpose of the fuel (which has

to be maintained in order for the reduced rate to continue to apply) was not maintained.

Alleged incompatibility of section 99(10) with the European Convention on Human Rights Act 2003

97. Insofar as the Appellant contended that section 99(10)(b) FA 2001 was incompatible with the European Convention on Human Rights Act 2003 ('ECHRA') this is not a claim which may be advanced before the Tax Appeals Commission as the jurisdiction to make such declarations is limited to the Superior Courts in accordance with section 5(1) of the ECHRA.

Constitutionality

98. The Appellant's submission on constitutionality did not accord with Article 34.3(2) of the Constitution whereupon no question as to the validity of any law having regard to the provisions of the Constitution shall be raised in any court, save the High Court, the Court of Appeal or the Supreme Court. As a result, the question of the constitutionality of section 99(10) FA 2001 is a matter beyond the remit of the Tax Appeals Commission. Consequently, this question was not pursued at hearing.

Conclusion

99. For the reasons set out above, I find that the information and documentation furnished by the Appellant in relation to the alleged purchase of 1,050,400 litres of road diesel (DERV) from X. Ltd. to the value of €714,000, is insufficient to allow me to conclude as a material fact that these purchases took place**.**

100. In relation to the supply of 2,787,421 litres of marked mineral oil ('MMO') to A. Ltd. to the value of €2,444,670, I am satisfied, on consideration of the regulations, the evidence and submissions, that regulatory contraventions occurred in accordance with regulations 18(1)(c), 18(2)(e), 18(2)(d), 24, 25 and 41(3)(c) of the Mineral Oil Tax Regulations 2012

101. I am satisfied that the Appellant has not shown that the excisable products were used or held for use for a specific purpose or in a specific manner in accordance with section 99(10) FA 2001 and as a result, I find that the Appellant is liable to pay excise at the standard excise rate in accordance with section 99(10)FA 2001.

102. Where the requirements of section 99(10) FA 2001 and requirements of the Mineral Oil Tax Regulations 2012 were not satisfied, such that the mineral oil falls to have been supplied as road diesel, VAT is chargeable at the standard rate of 23% as the supply cannot be considered to have been a supply falling within the exception provided for in paragraph 17(4) of Schedule 3 VATCA 2010.

103. For the reasons set out above, I am satisfied that there is no basis upon which section 99(10) FA 2001, should be disapplied for incompatibility with EU law in accordance with Case C-378/17, *Minister for Justice v Workplace Relations Commission.*

104. On the issue of whether the Tax Appeals Commission should refer a question to the CJEU as a preliminary reference pursuant to Article 267 of the TFEU, no question was articulated or specified by the Appellant and I am satisfied that none arises.

Burden of proof

105. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments are incorrect. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayer to demonstrate that it falls within the relief, see *Revenue Commissioners v Doorley* [1933] 1 IR 750 and *McGarry v Revenue Commissioners* [2009] ITR 131.

106. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'

107. Having considered the evidence and facts, the relevant legislation and related case law, I determine that the Appellant did not succeed in discharging the burden of proof in this appeal.

Determination

For the reasons set out above:

I. I determine that the excise duty assessment dated 22 May 2014 in the sum of €1,050,133 in respect of the period 1 October - 30 November 2013 shall stand,

and

II. I determine that the VAT assessment dated 25 June 2014 in the sum of €437,967 in respect of the period 1 September - 31 December 2013 shall stand.

This appeal is determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

July 2019

The parties to this appeal have not requested the Appeal Commissioner to state and sign a case for the opinion of the High Court

APPENDIX - LEGISLATION

Section 95 Finance Act 1999 (No. 2) - Charge of Tax

(1) Subject to the provisions of this Chapter, and any regulations made under it, a duty of excise, to be known as mineral oil tax, shall be charged, levied and paid –

(a) on all mineral oil –

(i) released for consumption in the State, or
(ii) released for consumption in another Member State and brought into the State,

and

(b) on all coal that is brought into, or produced in, the State

(2) Liability to mineral oil tax on mineral oil shall arise at the time when that mineral oil is –

(a) Released for consumption in the State, or
(b) Following release for consumption in another Member State, brought into the State.

Section 97 Finance Act 1999 (No. 2) - Rates lower than standard rates

(2) The standard rate in relation to light oils means the appropriate rate for petrol and in relation to any other mineral oil product means the rate for that product when it is used as propellant.

(3) The application of a rate lower than the standard rate concerned may be subject to the satisfaction of the Commissioners as to the use or intended use of the mineral oil concerned, and they may, accordingly, prescribe or otherwise impose conditions for –

(a) the keeping for sale or selling, or

(b) the delivery or keeping for delivery,

of such mineral oil

Section 104 Finance Act 1999 (No. 2) - Regulations

(1) The Commissioners may, for the purposes of managing, securing and collecting mineral oil tax or for the protection of the revenue derived from that tax, make regulations.

(1A) Without prejudice to the generality of subsection (1), regulations made under this section may contain such incidental, supplementary and consequential provisions as appear to the Commissioners to be necessary for the purposes of giving full effect to the Directive, Council Directive NO. 95/60/EC of 27 November 1995 and Commission Decision No. 2001/574/EC of 13 July 2001.

(2) In particular, but without prejudice to the generality of *subsection (1)*, regulations made under this section may—

(*a*) govern the production, movement, importation, treatment, sale, delivery, warehousing, keeping, storage, removal to and from storage, exportation and use of mineral oil;

(*b*) provide for securing, paying, collecting, remitting and repaying mineral oil tax;

(*c*) regulate the issue of licences granted under *section 101* ;

(*d*) require a person who produces, imports, treats, sells, delivers, keeps, stores, deals in, exports or uses mineral oil to keep in a specified manner, and to preserve for a specified period, such accounts and records relating to such mineral oil as may be specified and any other books, documents, accounts or other records (including records in a machine readable form) relating to the production, importation, treatment, purchase, receipt, sale, delivery, keeping, storage, removal to or from storage, disposal, exportation or use of mineral oil and to allow any officer to inspect and take copies of, or extracts from, such books, documents, accounts and other records (including, in the case of records in a machine readable form, copies in a readable form);

(*e*) require any person mentioned in *paragraph (d)* to notify the proper officer of all places and premises and of all vessels, storage tanks and pipelines intended to be used by him or her in the carrying on of his or her business and provide for the method of such notification;

(*f*) require any person mentioned in *paragraph (d)* to furnish, at such times and in such form as may be specified, such information and returns in relation to mineral oils as may be specified;

(*g*) require a person who is an owner of or who is for the time being in charge of any motor vehicle constructed or adapted to use liquefied petroleum gas or substitute fuel as a propellant in that vehicle to give such information in relation to the supply or use of such mineral oil as may be specified;

(*h*) require as a condition of allowing in respect of any mineral oil the application of a rate lower than the appropriate standard rate for the mineral oil concerned or any exemption or relief from mineral oil tax, subject to such exceptions as the Commissioners may allow, that there shall have been added to that mineral oil at such time and in such manner and in such proportions as may be prescribed, one or more prescribed markers and that a declaration to that effect is furnished;

(*i*) specify the substances which are to constitute a prescribed marker for the purposes of *paragraph (h)* and specify the procedures for the approval of such markers;

(*j*) prohibit the addition to any mineral oil of any prescribed marker except in such circumstances as may be prescribed;

(*k*) prohibit the addition to or mixing with any mineral oil of any substance, not being a prescribed marker, including any substance which is calculated to impede the identification of a prescribed marker;

(*l*) prohibit the importation, keeping for sale, transportation or delivery of any mineral oil to which has been added any substance, not being a prescribed marker, including any substance which is calculated to impede the identification of a prescribed marker;

(*m*) prohibit the importation, sale or delivery of any mineral oil in which a prescribed marker is present unless it is present in the proportions prescribed and unless such mineral oil is intended for use for a purpose other than combustion in the engine of a motor vehicle and a declaration to that effect is furnished;

(*n*) require containers for the storage or transportation of mineral oil to be marked in such a manner as may be prescribed;

(*o*) require that aviation gasoline shall be deposited in a tax warehouse prior to its delivery for home use;

(*p*) prohibit the use of aviation gasoline otherwise than as a fuel for aircraft;

(*q*) prohibit the taking of aviation gasoline into a fuel tank in or on a motor vehicle;

(*r*) provide that aviation gasoline shall not be mixed with any other substance, save with the permission of the Commissioners.

(3) Regulations made under this section may make different provisions for persons, premises or products of different classes or descriptions, for different circumstances and for different cases.

Section 99(10) of the Finance Act 2001, as amended – Liability of persons

(10) where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –

c) Such requirement has not been satisfied, or
d) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,

Then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment or lower rate.

Section 46(1)(a) of the VAT Consolidation Act 2010

Tax shall be charged, in relation to the supply of taxable goods or services, the intra-Community acquisition of goods and the importation of goods, at whichever of the following rates is appropriate in any particular case.

(a) [23 per cent] of the amount on which tax is chargeable other than in relation to goods or services on which tax is chargeable at any of the rates specified in [paragraphs (b), (c), (ca) and (d)]

Paragraph 17(4) of Schedule 3 of the VAT Consolidation Act 2010 – Energy products and supplies . Certain supplies with reduced rate. Particular provisions in accordance with Article 102 of the VAT Directive (provides for the 13.5% VAT rate for MMO)

(3) The supply of gas of a kind used for domestic or industrial heating or lighting whether in gaseous or liquid form, but not including –

(a) motor fuel gas within the meaning of section 42(1) of the Finance Act 1976,

(b) gas of a kind normally used for welding or cutting metal, or

(c) gas sold as lighter fuel

(4) The supply of hydrocarbon oil of a kind used for domestic or industrial heating, excluding gas oil (within the meaning of the Mineral Oil Tax Regulations 2001(SI No. 442 of 2001) other than gas oil which has been duly marked in accordance with [Regulation 34(2)(a)] of those Regulations.

Mineral Oil Tax Regulations 2012 - S.I. 231/2012

Regulation 18 – Records to be kept by mineral oil traders

18. (1) A mineral oil trader shall for mineral oil tax purposes, in addition to any other records required under section 886 of the Taxes Consolidation Act 1997 and section 84 of the Value-Added Tax Consolidation Act 2010 , keep in respect of each specified description of mineral oil a record of—

(*a*) the selling or dealing in, receiving, keeping for sale or delivery, or delivery,

(*b*) the financing or facilitation of any transactions or activities (whether or not those transactions or activities are carried on by the mineral oil trader), and

(*c*) any supplies of goods or services received, to enable the undertaking of such transactions or activities or in connection with such transactions or activities,

by that mineral oil trader.

(2) The records required under paragraph (1) shall be kept in such form as the Commissioners may require, and, subject to paragraph (3)(*b*), shall show for each purchase, sale, supply and delivery of mineral oil—

(*a*) the nature and date of such purchase, sale, delivery or supply, and the quantity of mineral oil concerned,

(*b*) for purchases and sales, the name and address of the person from whom the mineral oil was purchased or to whom it was sold,

(*c*) for all supplies and deliveries made by the mineral oil trader, the name and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned,

(*d*) for deliveries of mineral oil received by the mineral oil trader, the name, and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person from whom the delivery was received, and the address of the premises or place from which that delivery was dispatched,

(*e*) a record of every payment made or received, with a clear reference to the transaction concerned.

(3) Any mineral oil trader who is not an authorised warehousekeeper shall keep a record of—

(*a*) daily measurements or meter readings of the volume of mineral oil of each specified description held by that mineral oil trader in a storage tank or other vessel, and

(*b*) the aggregate quantities of each specified description of mineral oil supplied on each day in the course of fuelling the fuel tanks of vehicles, and paragraph (2) shall not apply to such supplies.

(4) A mineral oil trader shall keep separate records for each premises or place at which mineral oil is sold, dealt in or kept for sale or delivery.

Regulation 23 - Delivery document and procedure

23. (1) In this Regulation "consigning mineral oil trader" means a mineral oil trader who supplies mineral oil and who consigns it for delivery from a premises or place in the State, whether that

delivery is carried out by that mineral oil trader or by another person on that mineral oil trader's behalf.

(2) Subject to paragraphs (3) and (7), a consigning mineral oil trader shall, for each delivery of mineral oil and before the mineral oil concerned is consigned for delivery from the premises or place concerned, complete an approved document (referred to in these Regulations as a "delivery document") in three copies (referred to in this Regulation as "copy one", "copy two" and "copy three") and numbered in a consecutive series.

(3) Paragraph (2) does not apply to mineral oil that is—

(*a*) not subject to tax under section 95 of the Act of 1999,

(*b*) supplied in the course of fuelling the fuel tank of a vehicle,

(*c*) delivered to another Member State in accordance with the requirements of Chapter 2A or 2B, as the case may be, of Part 2 of the Act of 2001, or exported under a customs procedure,

(*d*) marked gas oil and marked kerosene to which Regulation 24(1) applies.

(4) A delivery document shall include—

(*a*) the name, address, Value-Added Tax registration number and the mineral oil trader's licence number of the consigning mineral oil trader,

(*b*) the address of the premises or place from which the mineral oil is to be consigned for delivery,

(*c*) the name, address and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of each person to whom the mineral oil is to be delivered,

(*d*) the address of every premises or place to which a delivery is to be made,

(*e*) the date on which the delivery is dispatched,

(*f*) the quantity and specified description of mineral oil to be delivered,

(*g*) the registration number of the vehicle used for the delivery,

(*h*) in the case of deliveries of marked gas oil or marked kerosene, or any other mineral oil supplied at a reduced rate of tax or subject to a relief from tax, the following statement,

"This mineral oil product is delivered at a reduced rate of tax and must not be used as a propellant or kept in the fuel tank of a motor vehicle.",

and

(i) such other particulars as may be required by any Regulation in Part 8 in relation to any specified description of mineral oil.

(5) The consigning mineral oil trader shall retain copy one and, before the mineral oil concerned is consigned for delivery, give copy two and copy three to the person in charge of the delivery vehicle.

(6) The person in charge of the delivery vehicle shall—

(*a*) retain copies two and three during the course of the delivery and, except where paragraph (7)(*a*) applies, give copy three to the person receiving the delivery,

(*b*) following the delivery, endorse copy two with details of—

(i) the quantity actually delivered, and

(ii) the date and time when that delivery was made,

and return that copy so endorsed to the consigning mineral oil trader.

(7) For deliveries not exceeding 2,000 litres of marked gas oil or marked kerosene, to a person other than a mineral oil trader—

(*a*) a single delivery document may be used where several such deliveries are made in the course of a single journey by the delivery vehicle,

(*b*) the person in charge of the delivery vehicle may, instead of a copy of the delivery document, provide the person concerned with any other record that includes the information set out in paragraph (4) that is relevant to that person,

(*c*) an additional delivery that is not included in the delivery document at the time the marked gas oil or marked kerosene is consigned for delivery may be made where—

(i) the details of the delivery are not known at the time the marked gas oil or marked kerosene is removed for delivery, and

(ii) those details are entered on the copy of the delivery document to be returned to the consigning mineral oil trader under paragraph (6)(*b*).

(8) Without prejudice to any other requirement under these Regulations for the keeping of records—

(*a*) any mineral oil trader who is required by paragraph (5) to retain copy one, or to whom, in accordance with paragraph (6)(*b*), copy two is returned, and

(*b*) any person to whom, in accordance with paragraph (6)(*a*), copy three is given,

shall keep such copy as a record.

Regulation 25 – Return of oil movements by mineral oil traders

25. (1) A mineral oil trader who—

(*a*) is required, under section 101 of the Act of 1999, to hold an auto-fuel trader's licence or a marked fuel trader's licence, or

(*b*) produces, sells or deals in, keeps for sale or delivery, or delivers liquefied petroleum gas, or heavy oil for use for air navigation,

shall furnish to a proper officer, in such form as the Commissioners may require, a return (referred to in these Regulations as a "return of oil movements") of the mineral oil of each specified description produced, sold, dealt in, kept for sale or delivery, supplied or delivered by that mineral oil trader during a month or such other period as the Commissioners may require.

(2) A mineral oil trader shall, for a return of oil movements—

(*a*) complete a return form issued by the Commissioners for that purpose,

(*b*) sign a declaration on that form to the effect that the particulars shown are correct, and

(*c*) furnish the return by the 25th. day following the last day of the month or other period referred to in paragraph (1).

(3) A return of oil movements shall be made by electronic means and in accordance with Chapter 6 of Part 38 of the Taxes Consolidation Act 1997 (No. 39 of 1997).

(4)(*a*) A return of oil movements that is specified for the purposes of Chapter 6 of Part 38 of the Taxes Consolidation Act 1997 , by order made by the Commissioners under section 917E of that Act, is specified as a specified return for the purposes of section 917EA of that Act.

(*b*) A mineral oil trader who is required, under paragraph (1), to make a return of oil movements is specified as a specified person for the purposes of section 917EA of the Taxes Consolidation Act 1997 .

Regulation 28 - Application of a reduced rate

28. (1) The application of a reduced rate to gas oil or kerosene shall only be allowed where the Commissioners are satisfied that such gas oil or kerosene—

(*a*) is intended for use other than as a propellant,

(*b*) has been marked in accordance with Regulation 29,

(*c*) is at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of these Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of marked gas oil and marked kerosene,

(*d*) where it has been consigned to the State from another Member State or from outside the territory of the European Union, has been declared in writing to a proper officer as being for use other than as a propellant, and marked in accordance with Regulation 29.

(2) Without prejudice to the generality of paragraph (1)(*b*), the Commissioners may permit the use of unmarked gas oil or kerosene at a reduced rate, by a person authorised by them in writing to receive such gas oil or kerosene for such use, subject to such conditions, including the giving of security, as the Commissioners may require in any particular case.

Regulation 41 – Keeping and furnishing of records

41. (1) In this Part, "record" means any record that is required to be kept under these Regulations.

(2) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept for a period of not less than six years from the date of the last entry in that record.

(3) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept—

(*a*) in the case of a record to be kept by an authorised warehousekeeper who is the proprietor of a mineral oil tax warehouse, at the mineral oil tax warehouse concerned,

(*b*) in the case of a record to be kept by an authorised warehousekeeper who is a tenant in a mineral oil tax warehouse, either at that mineral oil tax warehouse or at the registered place of business of that authorised warehousekeeper,

(*c*) in the case of a record to be kept by any other mineral oil trader, or by a coal trader, at the premises or place where, as the case may be, mineral oil or coal is sold or dealt in, or kept for sale or delivery, by that mineral oil trader or coal trader,

(*d*) in the case of a record to be kept by a liable coal user, at the place where Value-Added Tax records are required to be kept by that liable coal user.

(4) In the case of any record that is kept by a mineral oil trader or coal trader in accordance with paragraph (3), at a premises or place outside the State, that mineral oil trader or coal trader shall, where required to do so by a proper officer, produce that record for examination by a proper officer—

(*a*) in the case of a record that is kept in an electronic form, immediately on notification of that requirement by a proper officer, and

(*b*) in any other case, at a Revenue office or such other place as the proper officer may allow, within ten working days of a notification.

(5) Except where the Commissioners may otherwise require, a record may be kept by any electronic or other process that—

(*a*) ensures the integrity of that record, and

(*b*) allows that record to be produced in a legible form, or reproduced in a permanent legible form when so required by a proper officer.