



Excise duty – Hydrocarbon Oil Duties Act 1979, sections 2AA, 6AA and 6A – fish oil ethyl ester – biodiesel or alternatively fuel substitute – set aside for chargeable use in combined heat and power plants – no unequal treatment – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07304

Appeal number: TC/2016/02686

BETWEEN

MBP SOLUTIONS LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE RICHARD CHAPMAN QC

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 9-11 October 2018 with written submissions and correspondence on various occasions between 15 November 2018 and 25 April 2019.

Miss Helen Sainsbury, Group Chief Executive Officer, for the Appellant (assisted by Mr David Magnussen, Director of the Appellant, at the hearing and Mr Ewan West, Counsel, in respect of written submissions of law).

Mr James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. Fish Oil Ethyl Ester (“FOEE”) is a by-product of the process of separating out Omega 3 from crude fish oil. Between October 2011 and March 2015, MBP Solutions Limited (“MBP”) sold substantial quantities of FOEE to Fleetsolve Limited (“Fleetsolve”), who (with the exception of a relatively small amount which MBP purchased back from Fleetsolve and on MBP’s case an even smaller amount which MBP maintains Fleetsolve used itself) used it to fuel Fleetsolve’s customers’ combined heat and power machinery (“CHP Plants”). By a notice dated 1 December 2015, HMRC assessed MBP for excise duty in the sum of £1,022,401.60 (“the Assessment”) upon the premise that the FOEE was biodiesel or alternatively a fuel substitute and that MBP had set it aside for a chargeable use for the purposes of sections 6AA and 6A of the Hydrocarbon Oil Duties Act 1979 (“HODA 1979”). In essence, MBP argues that the FOEE in the form supplied was neither biodiesel nor a fuel substitute and in any event was not set aside by MBP for a chargeable use.

2. In the course of the hearing and in the written submissions which followed, the matters in dispute evolved to the following:

- (1) Whether or not the FOEE was a biodiesel for the purposes of HODA 1979.
- (2) Whether or not the FOEE was a fuel substitute for the purposes of HODA 1979.
- (3) Whether or not the FOEE was set aside by MBP for a chargeable use.
- (4) Whether or not there has been equal treatment between HMRC’s approach to MBP’s sales to Fleetsolve and HMRC’s approach to MBP’s other sales.

3. MBP has paid the excise duty in full. It is common ground that MBP has made a commercial recovery of most of the value of this duty through Fleetsolve and Fleetsolve’s customers where these were ultimately subject to relief from excise duty. No further details were provided by HMRC as to the reasons for such relief. No recovery has been made in respect of the FOEE which MBP purchased back from Fleetsolve or which MBP maintain was used by Fleetsolve itself. In the course of the hearing, MBP’s approach was that it only sought repayment of such sums as it had not obtained through Fleetsolve and Fleetsolve’s customers. Following the hearing, however, MBP withdrew this concession and instead invite me to make a finding as to the other issues and so to allow the parties the opportunity to resolve matters of the quantum of any repayment. HMRC dispute MBP’s entitlement to withdraw their concession.

4. I find that MBP is entitled to withdraw this concession and this decision ought not to deal with the appropriate level of repayment in the event of a finding that the Assessment ought not to have been made. This is for the following reasons. There was no formal agreement between the parties as to the repayments to be made in the event of the appeal being successful. Further, whatever the commercial outcome of the appeal, both parties were agreed that the issue for the tribunal was as to whether or not the Assessment was correctly made. Indeed, for this reason neither party addressed me in detail as to quantification. I also note that in withdrawing the concession MBP expressly invite me not to make a finding as to the amount of repayment due. In any event, the quantification of any repayment only arises if the appeal is successful; for the reasons set out below I find that the Assessment was correctly made.

The Evidence

5. I heard evidence on behalf of MBP from Mr Jens Jacobsen (MBP's sales director), Mr David Magnussen (a director of MBP), Mr A J Monaghan (a director of UK Renewable Fuels Ltd ("UKRFL")), who is another customer of MBP) and Mr Robert Walthall (a director of Croda, MBP's supplier of the FOEE). I also read a witness statement from Mr Joe Platt (an employee of MBP). Mr Platt's evidence was not challenged and so no oral evidence was adduced. I heard evidence on behalf of HMRC from Mr Kenneth Goodliffe (the officer investigating the matter), Mrs Barbra Marsden (the officer who made the Assessment) and Mr Mark Rafferty (the expert chemist relied upon by HMRC). I also read a witness statement from Mr Geoff Riley (an HMRC policy adviser). Mr Riley's evidence was not challenged and so no oral evidence was adduced.

6. An issue arose as to the weight to be given to documents from Mr Keith O'Connor, a director of Fleetsolve. Mr West submitted that Mr O'Connor was not a witness for either party. Even if his correspondence with HMRC is to be treated in the same way as a witness statement, that evidence is to be given little weight as he did not attend for cross-examination. Mr West drew my attention to the cases of *Taylor Wimpey plc v Commissioners for Her Majesty's Revenue and Customs* [2014] FTT 575 (TC) at [80] and [92] and *Brown v Dunn* (1894) 6 R 67 HL. In any event, Mr West should only be treated as a witness of fact, not an expert witness.

7. In response, Mr Puzey noted that MBP also wished to rely upon evidence from Mr O'Connor. He submitted that it is possible to assess material from Mr O'Connor against other evidence received from other sources and the extent to which it coincides or is consistent with what others say.

8. I do not treat Mr O'Connor as a witness at all, whether of fact or as an expert. He did not give oral evidence and neither party has adduced a witness statement from him. Instead, each party relies upon various documents written by or to him and conversations with him. To the extent that these involve hearsay, I admit them with limited weight. To the extent that they are relied upon as primary evidence of Mr O'Connor's position on any particular issue, I again admit them with limited weight given the absence of any written or oral witness evidence. In reaching this view, I note that neither party has sought to argue that this evidence should not be admitted and that both parties effectively submitted that they should be considered as part of the overall circumstances of the case, albeit with limited weight.

Findings of Fact

9. I make the following findings of fact, taking into account the witnesses' written and oral evidence, the documents within the hearing bundle and the submissions made on behalf of the parties in that regard. In doing so, I bear in mind that the burden of proof is upon MBP to establish that the Assessment was wrongly made pursuant to section 16(6) of the Finance Act 1994.

The production of the FOEE

10. There was no dispute as to the way in which the FOEE was produced by Croda, MBP's supplier. Croda's aim is to extract Omega 3 molecules from crude fish oil. The Omega 3 represents about 30% of the fish oil and has pharmaceutical, health and dietary based uses.

11. The crude fish oil comes from a variety of different types of fish, although predominantly salmon and mackerel, mainly sourced from the Pacific, Atlantic and Indian oceans. The extraction takes place in Croda's factory in Leek in Staffordshire. It is achieved by a process called trans-esterification, whereby the oil is reacted with ethanol as a solvent in the presence of a strong alkaline catalyst. This has the effect of separating out the Omega 3

molecules from the non-Omega 3 molecules. The Omega 3 molecules are removed to leave various by-products, including glycerol, processing aids and FOEE.

12. Mr Walthall explained that the by-products are distilled to produce three separate cuts: an ethyl ester light distillate which includes fatty acids; a solvent stream of ethanol; and a black and viscous heavy residue which is glycerol and 30% ethyl ester. Mr Walthall said that the cuts are separated into three different tankers. The FOEE which is the subject of this appeal is the ethyl ester light distillate. However, this FOEE is not pure as it will still retain a residual amount of glycerol, ethanol and salts. I am told by MBP (and there is no reason to doubt it) that Croda is the only UK supplier of a fish-based ethyl ester created using ethanol.

MBP's operations

13. MBP specialises in using oil and fat-based by-products which would otherwise be discarded as waste for applications such as animal feed, composting, anaerobic digestion and biofuel. As part of these operations, MBP works with Croda to sell the by-products (and particularly the FOEE) resulting from the extraction of Omega 3 as set out above. Mr Walthall's evidence was that this was effectively on a profit-share basis; the by-products are given to MBP to sell in the market and, following such sales, MBP pays a proportion of the profits to Croda. MBP also purchases FOEE from other Omega 3 producers worldwide.

14. FOEE (whether from Croda or any other supplier) is delivered to MBP's tank in Liverpool. FOEE is also delivered to other premises outside the UK. The tank is a "live tank" whereby the FOEE deliveries all go to the same tank and mix with each other giving rise to fluctuating quality and composition rather than separate batches remaining separate.

15. MBP makes sales of the FOEE from its storage tanks to a variety of customers for a variety of uses. One of those uses is for biofuel. MBP's website provides the following information about its supply of biofuels.

"MBP Biofuels

MBP has a range of biofuels with various specifications. MBP seeks to engage with the customer in order to understand his specific needs and the capacity of his technical equipment. Based on our vast experience of the application of biofuels in different settings, MBP will recommend a suitable biofuel as well as set up a supply chain. In order to ensure a completely safe process, MBP will arrange trial deliveries as well as recommend competent 3rd party technical consultants.

...

Biodiesel sales

MBP Biodiesel as Engine fuel – our biodiesel is produced by transesterification used [sic] vegetable oils animal fats and can be used (alone or mixed with conventional diesel) in diesel engines. ... Our biodiesel for Engine Fuel is named MBP Biodiesel NS ...

...

MBP Biodiesel as Heating Fuel – our biodiesel for heating is our most refined and processed biofuel for heating purposes. It is a high quality product and can easily replace any biofuel and conventional fuel like for example #2 diesel, gasoil, light heating oil or E01, as a more environmentally friendly fuel.

...

Our biodiesel for heating is named MBP Biodiesel XNS."

16. I was provided with three product information sheets in respect of a product named “MBP Biodiesel Extra Non-Standard”. The first of these is dated 24 September 2012 and is entitled “MBP Biodiesel Extra non-standard: heating.” The second of these is also dated 24 September 2012 and makes no reference to heating. The third of these is dated 11 November 2013 and also makes no reference to heating. The specifications on the information sheets differ slightly. All include the following wording:

“Composition:

Various fats and oils of fish origin, estrified with Ethanol and blended into a homogenous oil fuel product.

...

Application:

...

The use of this Bio diesel is only intended for professional industrial use in diesel engines lorries or for electricity generation, may also be used as a substitute for light heating oil/gasoil. Not to be used in cars or boat engines.”

17. Mr Magnussen said in evidence that the reference in the product information sheets to “professional industrial use” meant use after processing. He said that the necessary processing would be assessed on a case by case basis, such as the removal of carbon and glycerol and the addition of chemicals. I do not accept that this is a proper reading of “professional industrial use” in the context of the product information sheets. There is no mention in these information sheets of a requirement for further processing and the term “professional industrial use” does not signify such processing.

Supplies to Fleetsolve

18. Fleetsolve carries on business in the provision of sustainable power solutions. Amongst other things, Fleetsolve designs, manufactures, installs and operates bio-fuel CHP Plants.

19. The evidence in Mr Platt’s unchallenged witness statement sets out the early relationship between MBP and Fleetsolve. Mr O’Connor of Fleetsolve approached Mr Platt in 2011. Mr O’Connor informed Mr Platt that Fleetsolve had installed a CHP Plant at Croda’s premises in Leek. In September 2011, Mr Platt met with Mr O’Connor at Fleetsolve’s offices. Mr O’Connor explained that chicken oil was used as fuel in a Fleetsolve unit at a Tesco store in Accrington. Mr O’Connor’s evidence was that after several streams of fuel were discussed a deal was agreed for 50 tonnes of FOEE from Norway.

20. Mr Platt also states that in late January 2012 he agreed a 1,600 tonne contract for the supply of FOEE and, on 3 February 2012, Mr O’Connor provided him with details of his CHP tanks and fuel polishing rigs.

21. On 23 May 2012, Fleetsolve and MBP signed a non-disclosure agreement in respect of Fleetsolve’s confidential information. Mr Platt maintains that this was in order to protect Fleetsolve’s technology in respect of its fuel polishing rigs and burning technology.

22. On 30 May 2012, Mr Platt and Mr Magnussen met with Mr O’Connor at their offices. Mr Magnussen’s evidence was that Mr O’Connor explained Fleetsolve’s business concept of using high quality waste oils in customised CHP Plants based on diesel engines, as well as sales into other traditional heating plants.

23. The hearing bundle includes contracts dated 7 November 2012 and 19 December 2012. The 19 December 2012 contract states that it replaces the 7 November 2012 which it declared void. The product is defined as FOEE and under the heading “Technical Specification” is

written “See product data sheet MBP biodiesel XNS September 2012.” The contract also includes the following:

“It is planned that the material will come from Norway, but MBP reserve the right to supply material from the UK.

The base scenario is that product is supplied directly from supplier without antioxidant addition, in order to optimise supply chain. However, if product is supplied with antioxidant MBP will invoice the higher price as long as Fleetsolve is notified in advance of the delivery.

Material without antioxidant will be supplied directly from the factory in Norway or the UK, should MBP supply material from storage facilities then the material will have antioxidant added.”

24. There was no dispute that the supplies which were the subject of the Assessment were made to Fleetsolve. Mr Jacobsen’s uncontested evidence (which I accept) was that MBP generally delivered FOEE to Fleetsolve and that some supplies were collected from Croda on an ex works basis. MBP’s written submissions asserted that some FOEE was sold directly from Croda in Leek to Fleetsolve. Insofar as this is intended to mean that Croda made sales in addition to those which were the subject of the Assessment, this has no relevance to the appeal. Insofar as this simply means that Fleetsolve collected some FOEE from Croda then this adds nothing to Mr Jacobsen’s evidence. In either event, the FOEE which was delivered to or collected by Fleetsolve was physically separated from the other FOEE at the point of such delivery or collection at the latest.

25. There was also no dispute that MBP did not process or add to the FOEE supplied by Croda or its other suppliers. Although the contract provided for circumstances in which MBP would add antioxidant (which acts as a preservative) there was no evidence that they did so.

The purpose of the supplies

26. MBP accepts that (with the exception of a small amount) the FOEE was used in the CHP Plants but that it did not know that that was the case.

27. I find that, on the balance of probabilities, the whole of the FOEE which was the subject of the Assessment was used in CHP Plants. This is because the only evidence presented by MBP to say that any of the FOEE was used for heating or other non-dutiable purposes was a spreadsheet prepared by MBP. However, no evidence was given as to how this was compiled or where the underlying information came from. As such, MBP has not discharged its burden of proof in establishing its assertion that some of the FOEE was not used for CHP Plants.

28. I note that Fleetsolve informed HMRC in a letter dated 11 July 2014 that, “Fleetsolve source their liquid bio mass with the sole intention of it being used wholly and exclusively to power CHP systems that have been built or converted by Fleetsolve.” As set out above, I recognise that this can only be evidence of what Fleetsolve told HMRC given that Mr O’Connor (the writer of the letter) has not given evidence. However, although of limited weight for that reason, it still outweighs the absence of substantiated evidence from MBP as to intended use by Fleetsolve.

29. I also find that, on the balance of probabilities, MBP knew that the purpose of the supply of the FOEE to Fleetsolve was for the FOEE to be used in CHP Plants. This is for the following reasons.

30. First, it is of note that neither Mr Magnussen nor Mr Jacobsen’s witness statements asserted they did not have in mind that the FOEE was intended to be used in CHP Plants. The

highest that they put the point is that Fleetsolve would not disclose the exact end use and that the end use was not important to MBP.

31. Secondly, Mr Jacobsen said in his oral evidence that he knew that Fleetsolve designed and maintained CHP Plants for its customers and that he was under the impression that Fleetsolve supplied CHP Plants for Tesco's. Similarly, Mr Magnussen said that he knew all the time that Fleetsolve managed CHP Plants. Further, Mr Magnussen was asked how much of the FOEE he thought at the time of the supplies would be used in CHP Plants. Mr Magnussen said he thought it would be 80% to 85%, with about 7% outside the UK, some volume loss and some heating. On being asked where this understanding came from, he said that he was guessing and that it was nothing that Mr O'Connor had said. Although he was doing his best to be helpful, I find from his inability to explain where these percentages came from that he was using hindsight. I find that he had in mind at the time of the supplies that the FOEE was intended to be used in CHP Plants as (for the reasons set out below) the focus was upon use in engines and he and others at MBP did not direct their minds to other uses.

32. Thirdly, all the contemporaneous documentation relates to use in engines and shows MBP engaging in the process of providing an appropriate product for those engines. This is particularly shown by the following.

33. In an email dated 19 June 2012, Mr Platt gave Mr O'Connor advice as to, "a good replacement for Cat 3 grade 2 tallow used in your engines." Mr O'Connor responded by noting that Fleetsolve was, "the operator of the engine."

34. In an email dated 4 September 2012 to Mr Platt and Mr Vallero of MBP, Mr O'Connor stated as follows:

"In order to establish the best fuel for each of our engine sizes we test each oil for (plus additional quality tests) CV values, oxygen content, polymerisation levels ignition properties for both compression ignition and external ignition.

Yes we have tested in a lab flash bulb experiment and also through one of our engines and whilst it does burn it does not produce the expected heat output. We have re-esterified the oil with absolute ethanol to good effect but we lose up to a 1/3 of the product. If we can establish exactly what the 15% is made up of we can treat it correctly or if we can't we will blend it with heavier oils."

35. In an email to Mr Platt dated 22 July 2014, Mr O'Connor took issue with the specification of the FOEE. Mr O'Connor stated as follows:

"The fuel supplied under this contract more often than not does not meet the contractual specification, we have notified MBP of this but up till now our engines and fuel systems have been able to cope with the variances so we have been ok with operating on this fuel. The last batch of fuel we believe came from Peru and having ran with Peruvian fuel in the past, coupled with the test results detailed we had no reason to question the typical variance from the test results from T29. Unfortunately, this fuel, although similar to previously supplied fuel, has an unknown issue that has led to the contamination of all our fuel filtration systems and the damage of a number of our engines, damage we have not sustained previously throughout our trading history with MBP."

36. I note that Miss Sainsbury refers me to a letter dated 11 July 2014 from Mr O'Connor. Although this letter is of limited weight given that Mr O'Connor is not a witness, it is the only evidence as to how Fleetsolve presented its own operations to HMRC. Mr O'Connor stated as follows:

“Fleetsolve design, manufacture, install and operate bespoke bio-fuel CHP, boiler and generator systems (referred to as CHP hereon in) in a wide range of outputs for high profile sustainable projects throughout the UK. We provide a fully comprehensive operating package under contract to our clients which includes the service and maintenance of the complete CHP system, 24 hour remote monitoring and the supply of a certified and audited renewable bio-fuel. Our clients utilise the heat and power of CHP for use in their own buildings and all government incentives and payments are made directly to our clients.”

37. Miss Sainsbury submits that this letter proves that Fleetsolve’s operations are far wider than just CHP Plants, as the definition “CHP” also includes boiler and generator systems. I do not agree. I find that Mr O’Connor is using the definition CHP to refer to engine-based CHP systems with the effect that the boiler and generator systems referred to are themselves CHP Plants. On one level, this is because MBP has not provided any evidence to differentiate the types of system which Fleetsolve supplies. On another level, this is because Mr O’Connor goes on to explain the nature of its systems and in doing so describes the use and sourcing of fuel for engines as follows:

“Bespoke Systems

The unique nature of the Fleetsolve CHP system is that the engines have been specifically designed to operate on untreated, aggressive residues and end of waste materials to fuel our engines, which, when used in a standard non-Fleetsolve engine would cause detrimental damage or failure. Fleetsolve’s modified engines do not rely on either traditional EN14214 biodiesel or fossil fuel diesel to operate and as such are fully warranted by Fleetsolve. This is in contrast to other mainstream diesel engine manufacturers who rely on EN14214 biodiesel to maintain warranty.

Supply Chain

Fleetsolve source their liquid bio mass with the sole intention if it being used wholly and exclusively to power CHP systems that have been built or converted by Fleetsolve.”

38. As set out above, I do not accept that MBP has discharged the burden of proof of establishing that Fleetsolve in fact used the FOEE other than in CHP Plants. In any event, MBP does not say that it knew at the time of making the supplies that the FOEE referred to in its schedule would not be used in CHP Plants.

Processing by Fleetsolve

39. There is a dispute of fact as to the extent to which Fleetsolve processed or added to the FOEE. MBP’s position is that Fleetsolve processed and added to the FOEE substantially. Mr Magnussen explained in his witness statement that, at the meeting on 30 May 2012, Mr O’Connor said that Fleetsolve needed to process the FOEE from MBP and blended antioxidants and potentially other oils from other suppliers. Mr Magnussen concluded from this (although he accepted that it was not specifically said to him) that the FOEE was not distributed in the form provided by MBP. In the course of his oral evidence, Mr Magnussen said that he assumed that MBP removed sediment and water and further assumed that he added lubricant (because of the oil being very dry due to its low sulphur content) and antioxidants (as a preservative).

40. Mr Jacobsen explained in his witness statement that, at the meeting on 26 September 2012, Mr O’Connor explained that Fleetsolve needed to process the FOEE in order to reduce polymers and glycerol. Mr O’Connor (he said) had told him that centrifuges were used to clean the FOEE and that sometimes polishing was also necessary. Mr Platt explained in his

witness statement that he was informed by Fleetsolve that FOEE was processed using fuel polishing rigs and was blended with tallow or similar materials. In the course of his oral evidence, Mr Jacobsen said that the FOEE could be used as a fuel in the state it was supplied by MBP. However, he qualified this by saying that whilst it would work fine if it was to be burnt to produce heat only, if it is used in more sophisticated equipment then this would give rise to problems with oxidation and a lack of lubrication. This is because it is very dry and has no lubrication and so it can spoil pumps. As such, on being asked if the FOEE will work as a fuel, he said, "Yes, but problems will come."

41. Mr Walthall referred to the CHP supplied by Fleetsolve and used by Croda. He explained as follows in a letter which has been treated as his witness statement:

"The FOEE is used on the Leek site as bio fuel in a diesel engine Combined Heat and Power plant (CHP) which was designed, installed and has been maintained by Fleetsolve Ltd since 2013. The FOEE requires further processing on site before use in the CHP as it cannot run reliably on unprocessed FOEE. The processing, which consists of settling and several filtration steps, is designed to remove free glycerine and water from the FOEE before it is combusted in the engine. Failure to remove these components before use would result in engine failure."

42. In the course of his oral evidence, Mr Walthall provided further evidence as to the use of FOEE in Croda's CHP Plant. He referred to the different streams of by-products (as set out above) and said that Croda had originally wanted the CHP Plant to run on the cheapest cuts, being the heavy residue and ethanol streams. However, they quickly decided with Fleetsolve that the FOEE distillate stream was more appropriate. He said that this worked quite well and that the engine ran on FOEE for three or four months without issue. He said that the FOEE was not put straight into the engine as the glycerol needed to be separated out. The FOEE therefore went through a series of filters on site, one outside the CHP Plant and one as part of the CHP Plant itself. He said that if the engine was run on untreated FOEE without removing the glycerol the engine would stop after 24 hours. After three or four months of use with FOEE, Croda tried to use the heavy residue and ethanol streams. However, this proved too difficult and, on going back to FOEE, the engine suffered a catastrophic failure.

43. HMRC rely upon various documents from Fleetsolve in asserting that there was only limited processing or blending. Mr O'Connor stated in his email to MBP dated 22 July 2014 that FOEE supplied to him had previously been below the contractual specification but that his engines still ran on it. In a letter to HMRC dated 11 July 2014, Mr O'Connor stated as follows:

"Fleetsolve supplies to its clients, under contract a liquid bio mass product in its neat unaltered and raw state without any additives or the further processing as commonly associated with bio-fuels."

44. Similarly, in an email dated 6 November 2014, HMRC asked Mr O'Connor to confirm whether the FOEE was used in its neat, unaltered and raw state without additives or further processing. Mr O'Connor stated as follows:

"This is correct. We only filter the fuel on site at a generating site once fuel has been delivered to remove any sediment or water that may damage the engine, we do nothing else. This is further verified by the independent audits carried out by the CHPQA and Ofgem."

45. Having considered the parties' submissions and all the evidence, I find that Fleetsolve's only processing of the FOEE supplied by MBP was the removal of glycerol and water. This is for the following reasons.

46. First, the only processing used for Croda's CHP was filtering out the glycerol and water.

47. Secondly, neither party has presented any witness evidence from Fleetsolve itself. This is a greater problem for MBP than for HMRC, as this means that it cannot discharge its burden of proof with any witness evidence from Fleetsolve itself.

48. Thirdly, Mr Jacobson and Mr Magnussen accepted that they were assuming that lubricants and antioxidants were added. There is therefore no evidence that it was so added.

49. Fourthly, there does appear to be an inconsistency between what Mr O'Connor told MBP about the addition of antioxidants and blending the FOEE and what Mr O'Connor told HMRC in the letters and emails referred to above. In the absence of witness evidence from Mr O'Connor, I am not in a position to prefer either what he said to MBP or what he said to HMRC and so discount both sets of evidence in this regard.

UKRFL's involvement

50. UKRFL is another of MBP's customers and is a competitor of Fleetsolve in respect of the supply of raw materials and fuel, although (unlike Fleetsolve) UKRFL does not supply equipment. UKRFL's main customer at the relevant times was Tesco.

51. Mr Monaghan, UKRFL's director, gave evidence as to what UKRFL does with the FOEE it purchases from MBP. Although he said he has no technical expertise, he said that UKRFL refines the FOEE and processes it in various tanks. He said that UKRFL supplies fuel for power and heating, does not know what the end use will be when UKRFL purchases the FOEE, and only knows what it is to be used for when he sells to a customer. I accept Mr Monaghan's evidence, particularly as HMRC did not take issue with what he said in this regard.

52. It is common ground that, of the 8,048.89 metric tonnes of FOEE supplied by MBP to Fleetsolve, MBP subsequently purchased back 823.51 metric tonnes ("the Repurchased FOEE") and sold this to UKRFL.

53. With the exception of the Repurchased FOEE, HMRC now accept that the supply-chain between MBP and UKRFL is such that the duty point is with UKRFL. Given the significance which MBP places on the treatment of the MBP and UKRFL supply-chain, I set out the relevant parts of HMRC's letter dated 27 March 2019 as follows:

"As you know, HMRC met with representatives of both MBP and UKR at our premises on 15 November 2018 to discuss the facts of the particular supply-chain between the two companies. As a result of our discussions and the additional information about how this particular supply-chain operates which was provided, we have reconsidered our position on the supplies made by MBP to UKR. We now accept that the precise circumstances of the supplies being made by MBP to UKR mean that setting aside the biofuel for chargeable use is not occurring at MBP in this particular supply-chain.

In reconsidering our position we have taken into account the precise details of how this supply-chain operates which you and your customer have explained to us. In particular, the specific knowledge of how the product will be used that both you and this customer have when the product is supplied by you.

This means that you do not have to account for excise duty on the Fatty Acids Ethyl Esters that you supply to UKR.

This does not mean we have changed our view regarding the historic assessment covering the supplies you made in the supply-chain to Fleetsolve

Ltd, and which is now pending judgment following the appeal hearing which we attended last October. Our view still remains that setting aside occurred at MBP when product was supplied to Fleetsolve Ltd for the reasons that we presented in our case at that hearing.

As we discussed on 19 March, our view is that MBP still remains liable to the excise duty on the 'buyback fuel' on which you have previously corresponded with us. This is because it passed the excise duty-point when you first supplied it to Fleetsolve Ltd.

You have previously raised the concern that this may have resulted in double taxation if two companies have accounted for the duty. However, because we think the liability for this excise duty rests with MBP we cannot repay the excise duty to MBP. I hope you understand our position."

Further witness evidence

54. Before leaving the witness evidence, I note that Mr Goodliffe and Mrs Marsden also gave oral evidence and were cross-examined. In large part, their evidence related to the matters which they considered in the course of their investigations. I do not take into account their opinions in reaching my decision.

The Law

55. The dispute centres upon sections 2AA, 6AA and 6A of HODA 1979, which provide as follows:

"2AA Biodiesel

(1) In this Act

'biodiesel' means diesel quality liquid fuel –

- (a) that is produced from biomass or waste cooking oil,
- (b) the ester content of which is not less than 96.5% by weight, and
- (c) the sulphur content of which does not exceed 0.005% by weight or is nil.

(2) In subsection (1) –

(a) 'diesel quality' means capable of being used for the same purposes as heavy oil;

(b) 'liquid' does not include any substance that is gaseous at a temperature of 15C and under a pressure of 1013.25 millibars;

(c) 'biomass' means vegetable and animal substances constituting the biodegradable fraction of –

(i) products, wastes and residues from agriculture, forestry and related activities, or

(ii) industrial and municipal waste.

...

6AA Excise duty on biodiesel

(1) A duty of excise shall be charged on the setting aside for a chargeable use by any person, or (where it has not already been charged under this section) on the chargeable use by any person, of biodiesel.

(2) In subsection (1) 'chargeable use' means use –

- (a) as fuel for any engine, motor or other machinery,
 - (b) as an additive or extender in any substance so used [,or]
 - (c) for the production of bioblend.
- (3) The rate of duty under this section [is the same as that in the case of heavy oil].

6A – Fuel substitutes

(1) A duty of excise shall be charged on the setting aside for a chargeable use by any person, or (where it has not already been charged under this section) on the chargeable use by any person, of any liquid [which is not -]

- (a) hydrocarbon oil,
- (b) biodiesel,
- (c) bioblend,
- (d) bioethanol,
- (e) bioethanol blend [or
- (f) aqua methanol.

(2) In this section ‘chargeable use’ in relation to any substance means the use of that substance –

- (a) as fuel for any engine, motor or other machinery; or
- (b) as an additive or extender in any substance so used.

(2A) But the use of water is not a chargeable use if –

- (a) the water is comprised in an emulsion of water in gas oil, and
- (b) the emulsion is stabilised by additives.”

56. The only authority relied upon by the parties in respect of the construction of these sections of HODA 1979 was *Bio Power (UK) Ltd v HMRC* [2012] UKFTT 316 (TC) (Judge Kevin Poole and Mr Terry Bayliss) (“*Bio Power*”). Although not binding on me, both parties agree (as do I) that this case is a compelling analysis of the proper construction of “setting aside for a chargeable use” within HODA 1979 (see paragraphs [47] to [60]). In essence, setting aside for chargeable use requires separation and an underlying purpose for that separation. In particular, the FTT stated as follows:

“[47] The concept of ‘setting aside’ is an elusive one. Neither party referred us to any authority on the meaning of the phrase, nor have we found any authority through our own researches. The phrase must therefore be given its ordinary meaning.

[48] The Oxford English Dictionary gives a number of definitions for the phrase ‘so set aside’ in various different contexts, the most relevant of which for present purposes is ‘to separate out for a particular purpose’.

[49] This highlights the fact that the concept of ‘setting aside’ involves two interlinked elements, some kind of separation and an underlying purpose for that separation.

...

[60] It is important to recognise that it is the separation of the goods *for the particular purpose* that amounts to setting them aside. So in our original

example, let us assume the order had been received and entered into the computer system but before a warehouse operative received and acted on the pick list instruction, it was decided that the goods needed to be moved to a different storage location in order to utilise the warehouse space more efficiently. Even though the distributor has received and entered the order for the goods on its computer system, it is clear that the reason for moving them is nothing to do with the fulfilment of that order and therefore the movement of the goods does not amount to ‘setting aside’ the goods for delivery to the customer.”

57. Although it does not have the force of law, both parties referred to paragraphs 4.1 and 4.2 of Excise Notice 179e as being reflective of the law. These paragraphs provide as follows:

“4.1 When Excise Duty is chargeable.

Excise Duty is due on the setting aside (see paragraph 4.2 below) or use of biofuels for a ‘chargeable use’. ‘Chargeable use’ means the use of that substance either:

- (a) as a fuel for any engine, motor or other machinery
- (b) as an additive or extender in any substance used as fuel for any motor, engine or other machinery
- (c) for the production of bioblend or bioethanol blend.

Excise Duty isn’t chargeable if you set aside or use biofuel:

- as a heating fuel
- for any other non-motor fuel use

4.2 When is Excise Duty payable on biofuels?

The Excise Duty point for biofuels is the time when they’re:

- sent out from entered premises
- set aside
- used as a motor fuel

‘Set aside’ means the point at which it’s decided that the product is going to be used as a motor fuel. This decision means that the fuel has been set aside for a chargeable use.”

58. Mr West and Mr Puzey both provided helpful written submissions on the law. In large part, they were in agreement as to the legal framework set out above. However, two points of dispute arose: the meaning of “capable” within section 2AA(2)(a) of HODA 1979 and the party whose purpose is relevant.

The meaning of “capable”

Submissions

59. Mr West submitted that “capable” should be given its ordinary meaning. The Oxford English Dictionary defines capable as, “Having the needful capacity, power or fitness for (some specified purpose or activity).” He said that this connotes a particular length or use, quality of performance or type of use. Mr West also said that “capable” is not to be correlated with “optimum”.

60. Mr Puzey agreed that “capable” is not to be correlated with “optimum”. He said that Mr West’s dictionary definition does not add anything.

Discussion

61. I find that the ordinary meaning of “capable” in this context is simply whether or not the biofuel can be used for the same purpose as heavy oil. Another way of putting this is as to whether or not the biofuel is able to be used for the same purpose as heavy oil. This does not include any assessment of how well this is achieved or what the effects of doing so are; it simply involves an assessment of what the biofuel can do (or is able to do).

The party whose purpose is relevant

Submissions

62. Mr West adopted the analysis in *Bio Power* that the requirements for setting aside for a chargeable use required a physical act that was performed for a specific purpose. He submitted that the knowledge or belief of a person as to the use for which the product may be deployed in the future by another person is not sufficient to be an intention (on the part of the person performing the physical act) that the physical act is performed for the purposes of a chargeable use. In essence, the argument is that it is the intention of the person carrying out the setting aside that is important, not the intention of the person receiving or using the biofuel (or knowledge, belief or suspicion about such intention).

63. In support of this argument, Mr West relied upon the following points: if Parliament had intended that the knowledge or belief of any person as to the future actions or intentions of another person was to determine the point at which set aside occurred, it could and would have said so; a test of belief would be unworkable in practice without further indication of how that was to be established; belief would have to be objectively assessed; it is not clear whether a mere suspicion would be sufficient; an objective test would fail for legal certainty; and a person intending to use a product one way could choose to use it differently once it has been supplied.

64. Mr Puzey submits that it is within the contemplation of the legislation that knowledge of how the fuel will be used by another person is sufficient. He relied upon the following points: if Mr West is correct, there would be no purpose in the words “setting aside” and the test would simply be upon the occurrence of the chargeable use itself; *Bio Power* supports the position that knowledge of future use is sufficient; the issue is evidential; and the position is supported by Article 2(3) of Directive 2003/96/EC as follows:

“3. When intended for use, offered for sale or used as a motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in this Directive shall be taxed according to use, at the rate for the equivalent heating fuel or motor fuel.

In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed at the rate for the equivalent motor fuel.”

Discussion

65. The relevant purpose is that of the person performing the physical act of setting aside. Ascertaining such a purpose is essentially a matter of evidence; if the person setting aside does so for the purpose of a chargeable use then a duty point arises, whereas if there is no such purpose then it will not. Evidence of knowledge of what another person is going to use the biofuel for is simply one factor to be taken into account when deciding whether or not the necessary purpose exists. Neither the existence nor the absence of such knowledge is necessarily determinative of the question of purpose; its significance depends upon the facts

of the individual case. The same is true of evidence of belief falling short of knowledge or alternatively of suspicion.

66. When seen in this context, there is no need for the legislation to refer to the intentions of other parties or for there to be a test for knowledge, belief or suspicion as these features do no more than feed into the factual enquiry when deciding whether or not the person setting aside does so for the purpose of a chargeable use.

67. The fact that a person intending to use a product for one purpose could choose to use it differently once it has been received does not affect the position as the relevant purpose is at the time of the setting aside.

68. Article 2(3) does not take the matter any further. The term “intended for use” still begs the question as to whose intention that is. Similarly, “offered for sale ... as” focuses upon the way in which the seller designates the purpose.

Determination of the Issues

Whether or not the FOEE was a biodiesel for the purposes of HODA 1979

Submissions

69. Miss Sainsbury maintains that the FOEE is not a biodiesel. She says that a significant level of processing took place by Fleetsolve. This was envisaged by the reference on the product information sheets to “professional industrial use”, which, Miss Sainsbury submits, means that it must be processed to a specification suitable for engines and so means if and when that is the end use intended by the buyer, rather than meaning immediate direct use. This processing comprised the removal of water and glycerol. Miss Sainsbury maintains that further processes, polishing and blending took place in order to deal with the polymerised carbon residue but has been unable to provide any detail as to what these processes and blending actually involved. MBP’s correspondence in the early stages of their business relationship referred to Fleetsolve having the capacity for blending, polishing, treatment, re-esterification, processing, cleaning, adding oxtab additives and batch tank storage. Miss Sainsbury says that the witness evidence was such that the FOEE is not capable of being used in engines in an unmodified state other than as fuel for heaters. Miss Sainsbury makes the point that Fleetsolve’s activities and processes converted or improved the FOEE into a commercially viable engine oil, although MBP accepts that they do not know exactly what those activities and processes were.

70. Mr Puzey submits that MBP designated the FOEE as biodiesel by referring to it as “MBP Biodiesel XNS” and stating in its product information sheets that it is, “only intended for professional industrial use in diesel engines, in lorries or for electricity generation, may also be used as a substitute for light heating oil/gasoil.” The product information sheets do not indicate that further processing is required before it is considered to be fuel. It is not sold simply as a raw material to which further ingredients must be added. Although the witnesses refer to discussions with Mr O’Connor about processing of the FOEE, Mr O’Connor has repeatedly and unequivocally informed HMRC that the FOEE fuel they purchased from MBP was put to use in an unaltered state and was simply filtered at the power generating site to remove any sediment or water.

71. I also heard evidence from Mr Rafferty, who is authorised by the Government Chemist to carry out hydrocarbon oils analysis under schedule 5 of HODA 1979. Mr Rafferty works for a testing laboratory trading as Eurofins, whose only client is HMRC. Although Mr Rafferty was presenting expert evidence, the parties correctly treated this as being on behalf of HMRC rather than independent expert evidence. Mr Rafferty considered an excel

spreadsheet containing the results of tests carried out on Fleetsolve's behalf by a company trading as Intertek. In particular, Mr Rafferty stated as follows in his witness statement.

"[10] According to the results received, of the thirty samples tested (from January 2013 to January 2015), only 3 failed the total ester requirement for neat biodiesel i.e. Ester content is not less than 96.5% by weight. The lowest recorded result was 94.07% (m/m). This demonstrates that most of the biodiesel (FOEE) produced is of a very high quality, and that most of these products produced met the legal definition for biodiesel as to ester content as defined in HODA.

[11] As explained above, these samples are Fatty Acid Ethyl Esters and as such not covered by European Standard EN14214 (liquid petroleum products – Fatty Acid Methyl Esters for use in diesel engines and heating applications – Requirements and test methods).

[12] It appears however that this standard EN14214 was applied in testing the FOEE and according to the results received the product does not meet the standard, in many cases, in respect of:

- a. Total contamination (maximum permitted 24mg/kg)
- b. Water content (maximum permitted 500mg/kg)
- c. Oxidation Stability (at 110°C) (minimum 8.0(H)).

[13] Where the product has not met the standard in these respects, very little processing to the product would be required to pass the EN14214 standard:

- a. Total contamination and water content could be reduced by drying and filtering the biodiesel.
- b. Oxidation Stability: Improved by the simple addition of an additive i.e. 2,6-di-tert-butyl-4-hydroxytoluene (BHT) at 1000mg/kg. Standard EN14214 states that it is strongly recommended this additive should be added before storage."

72. Mr Rafferty also considered two of MBP's specification sheets, denoting these as "Product A" for the FOEE specification as at 24 September 2012 and "Product B" for the FOEE specification as at 21 November 2013. Product A only fell short of EN14214 by reference to its iodine content. As to Product B, his opinion was as follows:

"[19] I considered the specifications of Product B ... when compared against the requirements of EN14214 (2012+A1:2014) ... The ester content aside, the product described fails to meet the standard in respect of water content, solid impurities content (listed as total contamination in EN14214), oxidation stability and iodine content (marginally and within the reproducibility values for the stated method). I consider that this is still a very high grade bio-diesel product and in order to pass the EN14214 specification all that would be required is simple processing by drying, filtering and addition of the additive (BHT) at 1000mg/kg."

73. Mr Rafferty was cross-examined at some length. He stood by the evidence in his witness statement and his view that the FOEE was good quality biodiesel. However, he accepted that it had a low oxidation stability and that the greater the residue the greater the chance of the injectors becoming blocked which would stop the fuel getting into the engine and cause it to seize.

74. In submissions, Miss Sainsbury was critical of Mr Rafferty's evidence. She notes that Mr Rafferty's evidence was based on Fleetsolve's spreadsheets, he did not obtain the

certificates of analysis which that data was based upon, he did not consider how the FOEE was sampled and he did not carry out any sampling of his own.

Discussion

75. I find that, on the balance of probabilities, 90% of the FOEE which is the subject of the Assessments met the definition of biodiesel in section 2AA of HODA 1979.

76. For the purposes of section 2AA(1)(a) and 2AA(2)(c), the parties agreed that the FOEE is produced from biomass.

77. Although the specification of the FOEE provided for greater than 96.5% by weight ester content (the requirement at section 2AA(1)(b)), the analysis carried out by Intertek and explained by Mr Rafferty stated that 10% (being three out of thirty samples) fell below this threshold. As this is the only evidence in respect of the FOEE actually supplied, I find that it is more likely than not that this is representative of the FOEE as a whole.

78. As regards section 2AA(1)(c), there was no suggestion that the sulphur content of the FOEE exceeded 0.005% by weight or was nil.

79. The FOEE was diesel quality as defined by section 2AA(2) as it was capable of being used for the same purposes as heavy oil. I reach this view for the following reasons.

80. First, it was capable of being used as a fuel even in its form as supplied as Mr Walthall's evidence was that an engine could run on it for 24 hours.

81. Secondly, it was in fact used in Croda's CHP Plant without any processing other than drying and filtration. As such it can be used in this way as it was used in this way.

82. Thirdly, there is no evidence that any processing by Fleetsolve changed the FOEE's nature. Crucially, MBP was unable to say exactly what Fleetsolve did to the FOEE. As I have found above, on the balance of probabilities this was restricted to drying and filtering.

83. Fourthly, for the reasons set out above, I do not accept that the product information sheet's reference to "professional industrial use" envisaged further processing before use.

84. Fifthly, there is no evidence that any processing by Fleetsolve was necessary in order for the FOEE to be able to be used in the same way as a heavy oil. To the contrary, Mr Rafferty's evidence (which, particularly in the absence of any contradictory evidence in this regard, I accept) was that only drying, filtering and the addition of an antioxidant was required in order to bring the FOEE up to the standards of EN14214. Even if I am wrong in saying that there were no additives and that in fact antioxidant was added, this only goes to the longevity of the FOEE rather than its capability of being a fuel. Taking the evidence as a whole, therefore, I find that this processing or (if I am wrong to say that additives were not added) addition of antioxidants go to the quality or commercial benefit of the fuel not its capability for use for the same purposes as a heavy oil. In reaching this view, I note that a fuel does not need to meet the standards of EN14214 in order to be a biodiesel for the purposes of HODA 1979.

Whether or not the FOEE was a fuel substitute for the purposes of HODA 1979

Submissions

85. Mr Puzey submitted that if the FOEE was not biodiesel it was a fuel substitute for the purposes of HODA 1979. He effectively relied upon the same arguments as his primary position that it was a biodiesel.

86. Miss Sainsbury did not address the issue of FOEE as a fuel substitute. However, I take her arguments that (on MBP's case) the FOEE cannot be used as a fuel without further processing and additives as being equally applicable to this issue.

Discussion

87. I find that the 10% of the FOEE which was not a biodiesel was a fuel substitute for the purposes of section 6A HODA 1979. Alternatively, to the extent that I am wrong to find that the FOEE was a biodiesel at all, I find that it was instead a fuel substitute. I repeat the same reasons as those set out in paragraphs [80] to [83] above.

Whether or not the FOEE was set aside by MBP for a chargeable use

Submissions

88. Miss Sainsbury submits that the FOEE was not set aside by MBP for a chargeable use. She says that it was accepted by both parties that MBP did not do anything to the FOEE, thereby distinguishing the facts of this case from *Bio Power*. By contrast, MBP carried out processing and added to the FOEE. It was only Fleetsolve that could know how the FOEE was used by the end user; MBP had no knowledge of this. This lack of knowledge is unsurprising, as Fleetsolve only talked generally about its CHP, boiler and generator business and the technology used in the systems that consume the oil as this was a trade secret. Miss Sainsbury stated that, "the only thing that MBP actually knows is that none of its liquid is used for taxable use in its current form without further modification as it is not capable of being used commercially as a viable fuel." Finally, Miss Sainsbury maintains that it is clear that the Repurchased FOEE did not have a chargeable use as it was purchased back by MBP and then sold to UKRFL. Further, some eventual use was non-dutiable as shown on MBP's spreadsheet.

89. Mr Puzey submits that at the very latest the FOEE was physically set aside when MBP supplied it to Fleetsolve. Further, MBP believed that the FOEE was going to be used for a chargeable use. This is because MBP promoted itself as knowing its customers' requirements, Mr O'Connor was clearly not secretive about the existence of Tesco's CHP Plants, Mr Monaghan and Mr Jacobson accepted that he knew that Fleetsolve's business was the operation and maintenance of CHP Plants, Mr Magnussen said that he estimated 80% to 85% of the FOEE supplied to Fleetsolve was to be used for CHP Plants, and Mr O'Connor said that MBP knew what the FOEE was to be used for. Mr Puzey submitted that the repurchasing of fuel by MBP does not affect the position as the duty-point had already arisen.

Discussion

90. The starting point is that MBP did not present any evidence or submissions to the effect that the CHP Plants were not a chargeable use. As such, to the extent that MBP set aside the FOEE for use in CHP Plants, it follows that they were set aside for a chargeable use. As a result of my findings as to the FOEE being biodiesel or a fuel substitute, I find that this chargeable use is as a fuel for the CHP Plants (for the purposes of section 6AA(2)(a) and 6A(2)(a) of HODA 1979).

91. If I am wrong as to this, it is instead an additive or extender in any substance used as a fuel for the CHP Plants (for the purposes of section 6AA(2)(b) and 6A(2)(b) of HODA 1979) because the combination of the FOEE and any other substance used by Fleetsolve was used as a fuel for the CHP Plants.

92. I find that MBP did physically set aside the FOEE. This occurred when the FOEE was removed from MBP's tanks in order to be delivered to Fleetsolve. At that point, the FOEE

designated as being sold to Fleetsolve was physically separated from the rest of the FOEE remaining in MBP's storage tanks.

93. The occasions that Fleetsolve collected the FOEE from Croda are not to be treated any differently as the FOEE was still being physically separated from other FOEE at the point of collection at the latest. Even if the separation was being carried out by Croda rather than MBP, Croda would be doing so as MBP's agent as the sales were still attributed to MBP (as shown by the fact that they are included in the Assessment at all as sales by MBP). Even if I am wrong as to this, MBP has failed to provide any evidence as to the occasions upon which the FOEE was collected rather than delivered and so has not discharged its burden of proof in that regard.

94. I find that MBP set aside the FOEE for the purpose of use in CHP Plants and so for a chargeable use. This is for the following reasons.

95. First, for the reasons set out above, MBP knew that the purpose of the supply of the FOEE to Fleetsolve was for the FOEE to be used in CHP Plants.

96. Secondly, MBP worked with Fleetsolve to meet Fleetsolve's requirements. This is clear from the evidence of Mr Potts. I find that MBP therefore had use in CHP Plants in mind in doing so.

97. Thirdly, MBP held out the FOEE as being for such use in its product information sheets. It is right that it could also be used for heating but this is presented as a secondary use and there is no evidence that this is what was intended for Fleetsolve.

98. Fourthly, there was no credible evidence that MBP had in mind at the time the FOEE was physically set aside that it would be used (as distinct from a hypothetical possibility that it could be used) for non-chargeable use. Put simply, I find that MBP had in mind that this was FOEE to be supplied to Fleetsolve so that it could use it in CHP Plants.

99. The Repurchased FOEE is not to be treated any differently. There was no evidence (or even any assertion) that MBP knew at the time of the sale of the Repurchased FOEE to MBP that MBP would be buying it back. As such, it is not to be distinguished from the rest of the FOEE with the effect that the duty-point arose at the time of setting aside. MBP did not submit that a duty-point can be cancelled or varied once it has arisen. In any event, any claim for rebates or remission are outside the scope of this appeal, which simply deals with whether or not there was a duty-point upon the sale by MBP to Fleetsolve.

Unequal treatment

Submissions

100. Miss Sainsbury argues that HMRC has been inconsistent (and so unequal) in its treatment of MBP's supplies to Fleetsolve and its supplies to UKRFL. HMRC has historically accepted that UKRFL was the duty point for supplies. However, HMRC subsequently withdrew assessments of UKRFL and moved the duty point to MBP. By their letter dated 27 March 2019, HMRC now treat the duty point as with UKRFL. Miss Sainsbury has not provided any legal submissions as to the effect of this.

101. Mr Puzey submits that MBP is conflating different supplies to different customers. Correspondence between HMRC and UKRFL to the effect that HMRC were treating UKRFL as setting aside FOEE did not relate to the Repurchased FOEE and was specific to the relationship between UKRFL and its customers. Similarly, HMRC's letter dated 27 March 2019 deals with the relationship between MBP and UKRFL, which HMRC treats as factually different to MBP's relationship with UKRFL. Mr Puzey further submitted that the

Repurchased FOEE was to be treated differently to other FOEE sold to UKRFL as the duty-point had arisen on MBP's original supply to Fleetsolve.

Discussion

102. In *Reed Employment Ltd v Revenue and Customs Commissioners* [2014] EWCA Civ 32, [2014] STC 1026, Arden LJ (as she then was) explained the principles of equal treatment and fiscal neutrality as follows at [9]:

“[9] The principle of equal treatment requires that comparable situations be treated in the same way unless the difference is objectively justified (*M&S 2* at para 52). We do not have to consider objective justification because HMRC has not sought to rely upon it. The principle of fiscal neutrality again precludes unequal treatment of similar claims where the difference in treatment leads to distortion in competition (*M&S 2*, paras 47-49). It is not enough that the difference in treatment is capable of leading to such distortions: it must actually lead to competitors being placed in a better position.”

103. MBP is not suggesting that it is being treated differently to its competitors, as the suggestion appears to be that its own sales to Fleetsolve are being treated differently to its own sales to UKRFL. As such, it appears that MBP is relying upon the principle of equal treatment rather than the principle of fiscal neutrality.

104. I find that there is no unequal treatment between MBP's supplies to Fleetsolve and MBP's supplies to UKRFL. The same test is being applied to both sets of supplies with the effect that the different factual matrices produce different outcomes.

105. The Repurchased FOEE turns upon the relationship between MBP and Fleetsolve, not the relationship between MBP and UKRFL. This is because, for the reasons set out above, the duty-point is at the time of the supply to Fleetsolve, not the subsequent supply to UKRFL.

106. As regards MBP's other supplies to UKRFL, these turn upon the nature of the relationship between MBP and UKRFL. Mr Monaghan's evidence (which as set out above I accept) was that at the time that UKRFL purchased its FOEE from MBP, UKRFL did not know what the end use would be as each of its end users had a different use which may or may not be chargeable. Given that UKRFL did not know whether the FOEE was for a chargeable use at the time of purchase, MBP could not know either and there is no evidence that MBP had any particular purpose in mind at that time in supplying UKRFL. For the reasons set out above, this is different to the position with its supplies to Fleetsolve.

Disposition

107. For the reasons set out above, I dismiss the appeal.

Right to apply for permission to appeal

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

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

Release date: 1 AUGUST 2019