AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

40TACD2025

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This Determination concerns the appeals to the Tax Appeals Commission ("the Commission") of [redacted] ("the Appellant") of the following assessments of the Revenue Commissioners ("the Respondent"):-

   (a) an assessment to VAT in the sum of €39,699.00, made on 25 April 2016 for the period March/April 2012, relating to the denial of the Appellant's claim for VAT input credits arising from purchases of what was described as being unmarked diesel ("DERV");

   (b) an assessment to VAT in the sum of €19,807, made on 19 February 2018 for the period May – August 2015, arising from the decision of the Respondent that the Appellant had made taxable supplies which were not included in its VAT return; and

   (c) an assessment to excise duty in the form of mineral oil tax in the sum of €112,647, made on 16 March 2018, relating to the sale by the Appellant of 299,004 litres of marked mineral oil ("MMO") over the period May – December 2014.

2. Hereafter in this Determination the above assessments are referred to as "Assessment 1", "Assessment 2" and "Assessment 3" respectively.

3. Both parties were represented by counsel at the hearing of these appeals.

Background

4. The Appellant is a limited liability company that was incorporated in 2009 and since then has owned and operated a fuel filling station in a part of County [redacted] close to the border with Northern Ireland. Prior to the incorporation of the Appellant, the same fuel filling station was owned and operated by [redacted], who then became its employee. [redacted] is the father of the Appellant's current Director [redacted], and of its former Director, [redacted].

5. The Appellant sells, *inter alia*, petrol, DERV and MMO. It was an agreed fact that at least part of the MMO sold at the times material to this appeal was dispensed from pumps at its filling station premises. On the same premises is located a small shop from which is sold confectionary, drinks and cigarettes.

   Assessment 1

6. On 4 April 2013, the Respondent informed the Appellant by correspondence that it was commencing an audit into its VAT affairs for the period 1 January 2010 – 31 December

2012. It is not in dispute that this audit was prompted by a pre-existing investigation by the Respondent into 'supply chains' of fuel involving other businesses and persons that it suspected were involved in fraudulent activity. The particular fraud alleged was the 'washing' of MMO, subject to reduced rates of VAT and excise duty, so that it could be re-sold as DERV, subject to standard rates, at a profit.

7. It was also not in dispute that the inquiry into the Appellant's affairs followed on from the Respondent's identification of lodgements made into two bank accounts that were attributable to cheques made out by the Appellant. One of these bank accounts was in the name of a limited liability company calle[redacted]uels Limited and the other in the name of [redacted] Logistics, a registered business name for a person called [redacted]. Although [redacted]Fuels Limited and [redacted]Logistics were ostensibly unconnected with each other, there flowed between their bank accounts in each direction large amounts of money.

8. It is necessary to note at this point of the Determination that evidence was given at the hearing by an Officer of the Respondent that, based on the Respondent's inquiries, it appeared that [redacted] was an Irish person normally resident in the United States, who was not involved in the fuel trade and, in particular, did not operate a fuel supply business under the name [redacted] Logistics. Rather, another person or persons had appropriated his identity by fraud and created and operated the business.

9. It was not in dispute in this appeal that the aforementioned cheques all related to payments made by the Appellant in return for supplies to it over the relevant period of DERV (or at least what was described as being DERV). The Appellant came to receive these supplies in circumstances where a person known only as John made an approach without invitation offering to supply the DERV at a competitive price. These payments having been made, no VAT was ever remitted to the Respondent by their recipient or recipients.

10. The foregoing was, according to the Respondent, an example of "missing trader fraud", to which the Appellant, though not a deliberate participant in the fraud alleged, was connected. This was, it believed, fraud that the Appellant ought to have foreseen.

11. On 31 May 2013, shortly after the notification of the audit, the Appellant informed the Respondent that there had been a burglary at its premises on 5 February 2013 in which much of its computer equipment and financial data had been stolen. This burglary had been reported to the Garda Síochána on the same day, a fact that was recorded in correspondence of Garda [redacted] of 27 May 2013. The Appellant further informed the Respondent that it doubted whether it would have sufficient financial information to assist

it in the conduct of the audit. In the event, the audit proceeded based on the information that remained available, including the Appellant's bank statements and copies of cheques used by the Appellant to pay for the purchase of the fuel in question.

12. On 6 January 2016, the Respondent notified the Appellant that it was expanding the scope of its audit to include the years 2013, 2014 and 2015.

13. On 25 April 2016, the Respondent made Assessment 1, whereby it denied the Appellant VAT input credits previously claimed in respect of VAT incurred on the purchase of fuel over the relevant period. In correspondence of the same date, setting out the reasons for Assessment 1, the Respondent stated that the Appellant had supplied to it 22 cheques relating to payments for fuel in the amount €212,304, including VAT, ranging in date from 1 March 2012 – 30 April 2012. These cheques had been made out variously "[redacted]" (four such instances), "[redacted]" (five such instances), "cash" (12 such instances) and "[redacted]" (one such instance). The total amount of VAT comprising the sums paid pursuant to these cheques was €39,699.12, which had been claimed by the Appellant as deductions in its VAT returns for the above period. In deciding to refuse these claims, the Respondent stated, *inter alia*:-

> "*The position of the Revenue Commissioners is that the company was not entitled to deduct input VAT in respect of the above mentioned purchases, on the following grounds:*
>
> *(a) The invoices, or some of them, were false/were not issued by the entity whose names and VAT numbers appear on the invoices.*
>
> *and/or*
>
> *(b) There was fraudulent evasion in the supply chains in question, and:*
>
> > *(i) The company's purchase were connected with that fraudulent evasion.*
> >
> > *(ii) The company/its directors knew, or ought to have known of the fraudulent evasion.*"

14. The Appellant appealed the assessment to VAT of 25 April 2016 by way of Notice of Appeal dated 24 May 2016. The grounds on which it did so were:-

> "*- The Assessment is excessive and unfounded.*
>
> *- The appellant was not a party to an alleged fraud.*
>
> *- The appellant is a careful and honest trader who acted in good faith at all relevant times and took reasonable steps to ensure the legality of the transaction(s).*

- The appellant is entitled to deduct VAT input credit on the basis that he was not and could not have known that the transaction(s) concerned was connected with an alleged fraud.

- The actions of [the Respondent] in raising the assessment are disproportionate and contrary to EU law as it requires a careful and honest trader to assume liability for the frauds of others of which that trader was not aware and could not reasonably have been aware.

- Further grounds may be quoted at a later date."

Assessment 2

15. In the course of its audit, the Respondent identified supplies made to the company [redacted] Haulage Limited in June and July 2015, for which it received the amount of €86,118.22 and in respect of which VAT charged had not been returned to the Respondent. Arising from this, on 19 February 2018 the Respondent made an assessment for the period 1 May 2015 – 31 August 2015 that held the Appellant to have a balance of VAT payable of €19,807. In correspondence accompanying the VAT assessment of the same date, this liability was described by the Respondent as being "agreed". Nonetheless, on 13 March 2018 the Appellant appealed the assessment on the grounds that:-

"*No account has been taken of the over-declared output VAT available for offset in the same period of VAT during which the overpayment of €19,807 arose.*

The output VAT over-declaration arose due to double counting of prepaid customers. This was outlined in our letter of 19 April 2017 to the Inspector of Taxes.

Further grounds may be quoted at a later date."

16. It is necessary to note at this point that prior to the hearing of the appeal, the Appellant indicated that it accepted it owed VAT on the aforementioned supplies to [redacted] Haulage Limited that gave rise to the Respondent's assessment of 19 February 2018. The parties were also agreed, however, that the sum assessed, €19,807, was an overestimate of what was owed because part of the €86,118.22 received was itself VAT and thus was not taxable. The correct amount of VAT in respect of these [redacted] Haulage Limited supplies was, it was agreed, €16,093.25.

17. This, however, did not obviate the need to hear evidence and submissions regarding the VAT assessment of 19 February 2018, on the grounds that the Respondent asserted in its Outline of Arguments that information that it had obtained from the Appellant's own books and records, after the issuing of the assessment, suggested that there were further

VAT liabilities in the amount of €7,933 arising in respect of the period 1 May 2015 – 31 August 2015.

18. In summary, the Respondent's view in this respect was derived in part from the Appellant's method of calculating its liability for VAT. This was to the effect that the Appellant's bookkeeper would (a) identify VAT charged on invoices issued over the relevant period and (b) identify from lodgements to its bank account VAT charged and received in respect of cash receipts over the same period, in respect of which no invoices had been issued. In calculating its liability, the Appellant's bookkeeper would add together these amounts of VAT, while deducting from the cash receipts element lodgements representing invoice amounts already accounted for in a preceding return period, thus avoiding double counting. It was the Respondent's case that, having received the Appellant's records and bank accounts it had (a) failed to take into account opening and closing balances when calculating what had been lodged to its account and (b) failed to take account of taxable cash receipts that went un-lodged and were instead used to pay the wages of its staff and suppliers. By the Respondent's calculation, based on the Appellant's own records it owed €4,724 of VAT in respect of the relevant period.

19. Moreover, the Respondent, being unconvinced that the Appellant's own records reflected the true amount of taxable income received over the relevant period, saw fit to carry out what it termed a "business economics" exercise, whereby, using fuel sales and a national AA average price per litre figure covering the relevant period, it estimated the true additional amount of VAT due on sales to be €7,933.

20. In addition to this, at the hearing the Respondent submitted, for the first time and without prior notice to the Appellant, that a further additional amount of VAT was due for the relevant period in the amount of €6,045. This was so, it said, on the grounds that some of the sales in question were not in respect of fuel, but rather were attributable to sales of confectionery and cigarettes. Before the end of the hearing the Respondent conceded that this further additional amount of VAT was €1,998.

Assessment 3

21. On 24 June 2016, in the course of its audit, the Respondent sent correspondence to the secretary of the Appellant in which it brought to that person's attention that anyone trading in mineral oils must comply with the Regulations contained in the Mineral Oil Tax Regulations 2012 (S.I. 231 of 2012) ("the 2012 Regulations"), in particular Regulations 23(4) and 24. The correspondence records that [redacted], the brother of [redacted], had informed officers of the Respondent that MMO was on occasion filled into drums and tanks and driven away. It also records, however, that he said a lot of the MMO

dispensed from the Appellant's pumps went directly into the tanks of tractors belonging to farmers and that he was under the impression that such supplies of MMO were not subject to the record keeping requirements imposed under Regulations 23(4) and 24 if the total amount sold did not exceed 200 litres. The officer of the Respondent expressed his disagreement with this interpretation of the law and informed the Secretary that the Appellant had 14 days within which to ensure compliance with the 2012 Regulations in question, lest it run the risk of losing its fuel trader's licence.

22. Replying to this correspondence on 29 June 2016, the Appellant's agent stated that, in the course of a meeting on 25 February 2016, it had been officers of the Respondent who had suggested that the record keeping requirements imposed under the aforementioned legislation applied only to sales over 200 litres.

23. On 16 March 2018, the Respondent made an assessment to excise duty in the form of mineral oil tax in respect of the Appellant for the period 1 May 2014 – 31 December 2014. The sum assessed was €112,647.

24. In correspondence accompanying this assessment, also dated 16 March 2018, the Respondent noted that the Appellant's return of oil movements ("ROM") for the relevant period indicated that it made sales of 439,004 litres of MMO. It stated that Regulation 18(2) of the 2012 Regulations required that a person involved in the trading of mineral oil, including but not limited to MMO, maintain records of the names and addresses of the persons to whom it sold its fuel, except where that fuel was supplied into the tanks of vehicles. Where fuel was so supplied, it was instead necessary under Regulation 18(3) to record on the ROM the aggregate quantities of each type of fuel supplied on each day. This had not been done.

25. The Appellant's position was that it was not required to keep the information prescribed under section 18(2) of the 2012 Regulations, as all of its supplies of MMO were made directly into the tanks of agricultural vehicles such as tractors. However, the Respondent was unconvinced that this claim of fact was true, stating in the correspondence of 16 March 2018 that accompanied Assessment 3:-

> "*The sale of marked mineral oil in the course of fuelling tanks of vehicles (agricultural tractors) would not arise, or would be negligible. The above has been set out in previous correspondence, and remains [the Respondent's] position*."

26. This being so, the Respondent stated:-

"*The requirements of Regulation 18(2) of the Mineral Oil Tax Regulations 2012 were not complied with in respect of the mineral oil recorded as "Forecourt ULSMGO" [i.e. MMO] sales in the period May to December 2014.*

The [Respondent is] unable to be satisfied that the 439,004 litres of rebated fuel (as detailed above, in respect of the period March – December 2014), which was received by the company, and the subsequent supply of which has been classified as forecourt sales, was used or held for use, for its intended purpose, i.e. other than as propellant."

27. This correspondence then stated:-

"[The Respondent is], however, prepared to accept concessionally that 140,000 litres was supplied in the course of fuelling fuel tanks of agricultural tractors.

A notice of assessment – excise – has now been issued to the company for the period 1 May 2014 – 31 December 2014. A copy of the assessment is enclosed."

28. This assessment was appealed by the Appellant to the Commission by way of Notice of Appeal dated 10 April 2018. Aside from stating in general terms that the assessment was excessive and unfounded and emphasising its integrity as a trader, the Appellant set out the following appeal grounds:-

"- All MMO sales went directly into the tanks of agricultural plant.

- The Appellant broke no regulations and is always compliant.

- A meeting was held by [the Respondent] on 25 February 2016 at the appellant's business premises in which seven people were in attendance and [the Respondent] confirmed at this meeting that any mineral oil sale under 200 litres to include the fuelling of tanks in vehicles was not compulsory in record keeping of these particular sales.

- Checks by customs officials on site on 25/7/2013, June 2014 and May 2015 showed no errors, omissions and full compliance.

- Further grounds may be quoted at a later date."

Relevant Legislation

29. Part 8 of the Value Added Tax Consolidation Act 2010 ("the VATCA 2010") concerns "*Deductions*" and Chapter 1 therein "*General Provisions".* Section 59 therein, entitled "*Deductions for tax borne or paid"*, provides at subsection (2):-

"Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—

(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her"

30. Chapter 2 of Part 9 of the VATCA 2010 is entitled "*Invoicing"* and section 66, which appears therein, entitled "*Issue of invoices and other documents"* provides, *inter alia*:-

"(*1)(a) An accountable person –*

(i) who supplies goods or services to –

(I) another accountable person

[…]

shall issue to the person so supplied, in respect of each such supply, an invoice, in paper format or subject to subsection (2) in electronic format, and containing such particulars as may be specified by regulations.

[…]

(2A) (a) An accountable person who issues or receives an invoice or other document under this Chapter, and for the purposes of section 84(1), shall apply business controls to each such invoice or other document to ensure—

(i) the authenticity of the origin of that invoice or other documents,

(ii) the integrity of the content of that invoice or other document, and

(iii) that there is a reliable audit trail for that invoice or other document and the supply of goods or services as described therein."

31. Chapter 7 of Part 9 is entitled "*Record keeping"* and section 84 therein entitled "*Duty to keep records"* provides, *inter alia*:-

"(1) Every accountable person shall, in accordance with regulations, keep full and true records of all transactions which affect or may affect his or her liability to tax and entitlement to deductibility.

(2) Every person (other than an accountable person) who supplies goods or services in the course or furtherance of business shall keep all invoices issued to him or her in connection with the supply of goods or services to him or her for the purpose of such business.

(3) The following:

(a) records kept by a person pursuant to this Chapter or section 124(7) and that are in the power, possession or procurement of the person;

(b) any books, invoices, copies of customs entries, credit notes, debit notes, receipts, accounts, vouchers, bank statements or other documents whatsoever which relate to the supply of goods or services, the intra-Community acquisition of goods, or the importation of goods by the person and that are in the power, possession or procurement of the person;

(c) in the case of any such book, invoice, credit note, debit note, receipt, account, voucher, or other document, which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person; and

(d) any linking documents that are in the power possession or procurement of the person;

shall, subject to subsection (4) and sections 91C(7) and 91E(7) and notwithstanding any other law, be retained in that person's power, possession or procurement for a period of 6 years from the date of the latest transaction to which the records, linking documents, invoices, or any of the other documents, relate."

32. Section 886 of the TCA 1997 prescribes record keeping obligations for persons carrying on any trade or profession. Subsection (1) therein defines "*records"* as including:-

" *[…]*

(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services"

33. Section 886(2) of the TCA 1997 then provides:-

"(2)

(a) Every person who –

(i) on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,

(ii) is chargeable to tax under Schedule D or F in respect of any other source of income, or

(iii) is chargeable to capital gains tax in respect of chargeable gains,

shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.

[…]

(aa) Without prejudice to the generality of paragraph (a) and subsection (4) –

(i) the records shall include records and linking documents relating to any allowance, deduction, relief or credit (referred to in this paragraph as a 'relevant amount') taken into account in computing the amount of tax payable (within the meaning of section 959A), for the year of assessment or accounting period concerned"

34. The 2012 Regulations make provision for particular record keeping responsibilities of, "*authorised warehousekeepers"* and other "*mineral oil traders*" that apply in addition to those enumerated in section 886 of the TCA 1997. These include the requirement that such persons make periodic electronic returns of oil movements to the Revenue Commissioners. Regulation 18 therein provides:-

"(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."

35. Regulation 23 of the 2012 Regulations, headed "*Delivery document procedure",* provides, *inter alia*:-

"(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.

[…]

(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."

36. Regulation 24 of the 2012 Regulations is entitled "*Direct supply of marked gas oil and kerosene"* and provides, *inter alia*:-

"(1) Where a mineral oil trader supplies marked gas oil or marked kerosene at the premises or place of that mineral oil trader—

(a) to another mineral oil trader for consignment by that other mineral oil trader, or

(b) to a person other than a mineral oil trader, in a quantity not exceeding 2,000 litres and not for delivery to any other person,

the supplying mineral oil trader shall keep a record, showing all the information relevant to that supply that is required under Regulation 23(4)."

37. Section 99 of the Finance Act 2001 is entitled "*Liability of Persons"* and subsection (10) therein provides:-

"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."

Evidence

The Appellant's Evidence

Appellant Witness 1

38. The first witness called to give evidence by the Appellant was [redacted] ("Appellant Witness 1"), a registered auditor and the Appellant's accountant since its incorporation in 2009 and, before that, for [redacted].

39. Appellant Witness 1 stated in evidence that during his time as an accountant, the only significant problem he experienced with the Respondent was in relation to the audit commenced in respect of the Appellant's affairs between the years 2012 – 2015.

40. With regard to the facts relevant to Assessment 1, Appellant Witness 1 said that they were in his opinion *"quite simple*". It was, he said, a situation of "[…] *fuel purchased, fuel paid for, VAT paid for and VAT accounted for."*

41. In examination-in-chief, Appellant Witness 1 was asked by counsel for the Respondent about the standard "*on-boarding*" checks that would be carried out by the Appellant in

respect of prospective suppliers around the time covered by the first VAT assessment. His answer was:-

> *"[…] the main one was the VAT validation check where you would go into the European website and you would check the VAT number of the proposed purchaser*."

42. In cross-examination, Appellant Witness 1 was asked whether he was the person who did this checking of the VAT numbers of prospective suppliers. In answer, he said that he was not. He said that he merely intended in his evidence to outline the process carried out by the Appellant as he understood it. He was further asked by counsel for the Respondent whether he, as the Appellant's accountant, had any role in its purchasing of fuel. He said that he did not. In short, he accepted that his role as accountant was limited to receiving information given to him by the Appellant for the purpose of preparing its accounts, which he did. He was not, for instance, informed when the Appellant was intending to change suppliers and was not privy to the nature of the Appellant's dealings with its suppliers, be it [redacted]ted, Logis[redacted]or anyone else.

43. Counsel for the Respondent opened correspondence of 19 August 2014, sent by Appellant Witness 1 to the Respondent when acting on the Appellant's behalf. Therein, Appellant Witness 1, referring to a schedule of the cheques used to pay for the fuel supplied by the person known as John, stated that "*All these cheques are endorsed by the suppliers* [sic] *sales representative,* [redacted] *(who was also a director of the supplier company)".* Counsel for the Respondent asked the Appellant why it was, when only a minority of the cheques forming part of the schedule were in fact endorsed by [redacted], he had made this assertion. No coherent answer was given to this question, save that Appellant Witness 1 appeared to suggest that as this person's name appeared on the first few cheques that he had examined, he took this to apply to all of the 22 cheques.

44. Addressing the second VAT assessment, Appellant Witness 1 stated that the error regarding the non-returning of VAT charged in respect of the supplies to [redacted] Haulage Limited was the result of an administrative mistake on the part of an employee or employees of the Appellant when using the Sage accounting system. The nature of this mistake was not outlined by Appellant Witness 1.

45. Appellant Witness 1 took issue with the business economics exercise carried out by the Respondent relating to its use of the AA's record of the average price per litre for fuel over the period relevant to Assessment 2. He said that this was a flawed approach on the basis that the AA average was skewed toward the price charged by stations in urban areas, large towns and on motorways. These stations, he said, charged prices that

exceeded those charged by stations located in rural areas, in particular stations such as the Appellant's operating close to the border where there exists heightened competition with Northern Ireland based sellers of fuel.

46. Appellant Witness 1 also gave evidence concerning Assessment 3. He made the point that the Appellant's ROM and VAT returns for the period in question, May – December 2014, told the same story: 439,004 litres of MMO had been acquired and supplied to customers. Appellant Witness 1 expressed disagreement with his understanding of the basis for the Respondent's excise assessment, namely that tractors and other agricultural vehicles would not tend to fill up on the forecourt. It was, he said, his experience as a brother of somebody involved in farming that they did.

47. Appellant Witness 1 was asked at the conclusion of his examination-in-chief what was his understanding of the term "sales invoice" in the Appellant's accounts and VAT returns. In answer to this he said that he took it to mean sales to customers relying on credit made on the forecourt of the Appellant's filling station.

48. Asked in cross-examination whether he was aware of the potential for fuel laundering in the period 2011 – 2014, Appellant Witness 1 stated: *"I live in* [redacted]*, Commissioner, so you would hear about it and you would see it documented sometimes in the papers."* He stressed, however, that the Appellant had never had any difficulty with the Respondent in this respect.

49. Appellant Witness 1 was asked by counsel for the Respondent about the Appellant's accounts for the year ending 31 October 2012. In this regard, counsel for the Respondent pointed out that the Appellant's own nominal ledger for this period showed sales receipts in the amount of €2,811,474.17, but lodgements to its bank account of only €2,014,148.02, suggesting un-lodged receipts of €797,326.10. Appellant Witness 1 did not disagree that this was what the nominal ledger showed and suggested that the explanation for the gulf between receipts and lodgements "*was obviously suppliers paid* [by the Appellant] *in cash*". When asked why this would have occurred, he replied that this was something that would have to be taken up with someone from the Appellant.

50. Regarding Assessment 3, counsel for the Respondent asked Appellant Witness 1 whether he had direct knowledge about how the Appellant's fuel was distributed and to whom it was distributed.[1] He stated that he did not. Such information did not relate to his role as its accountant. He did, however, express the view that, based on his experience

[1] Transcript of hearing, day 1, page 55;

of rural Ireland, the Respondent's 'concession' regarding the amount of fuel it was prepared to accept was put directly into the tanks of agricultural vehicles was too low.

Appellant Witness 2

51. The Commissioner next heard evidence from [redacted] ("Appellant Witness 2"), a long-standing part-time employee of the Appellant and its bookkeeper over the periods relevant to the three assessments under appeal. Appellant Witness 2 stated that her functions as bookkeeper included the preparation of the monthly ROM and VAT returns for the Appellant, as well as:-

> *"[…] sending out invoices, statements, doing bank reconciliations for the accountant, getting together all the information for him to do up the annual accounts*."

52. Appellant Witness 2 gave evidence that for each month she would enter onto the ROM system the total amount of litres purchased and sold each month of DERV, petrol and MMO. She would also "*put on all the detailed purchase invoices from the diesel, the green and the unleaded".*

53. Asked by counsel for the Appellant whether she had "*confidence in the ROM system",* she replied that she did.

54. Appellant Witness 2 stated in evidence that the Appellant's 'on-boarding' exercise for potential new suppliers involved going "*online and* [doing] *validation checks on the VAT number* […] *to make sure it was* […] *active and that it was okay."* This, she said, had been done in respect o[redacted]gistics in the wake of the approach made to it by the person called John.

55. Regarding VAT returns, Appellant Witness 2 said that she used the Sage accounting system to record sales and purchases made at the 23% rate and the 13.5% rate. When the time came to make a return on ROS, the information on the Sage system would be transposed to ROS and the result would be a return grounded on accurate accounting information. On the question of how the level of sales would be calculated, Appellant Witness 2 said that it was done based on money lodged into the Appellant's bank account:-

> *"So you have got a certain amount of cash, every penny that went in. Then you put that down and then you take off your customers that paid off account, these are the ones that you would raise an invoice for and that might have a bit of credit […]*
>
> *If [the account customers] have paid you within that month […] they are all calculated up and that is taken off the main amount that you got when you went through the month*

account, because that money was already declared VAT on because those customers' invoices were raised at 23%. So that money, you don't have to declare VAT on it again. So the customers that paid during that month, that money is taken away from the overall total. Then you are left with the balance of money that you have to declare VAT on. So a percentage of that balance […] is green sales. What we thought the best and most accurate way to declare the 13.5% on the green sales was what we purchased in on that month with green. So then you took the portion of that against what we sold the green out at on that month […] for instance it was 85p […] you multiply those litres that you bought in by what you sold out with the green and then you come across … you take it away from the balance of that money and you declare 13.5% on that portion of money. And the rest of […] that money is declared at 23% and that's the […] exercise that's done every single month for VAT returns."

56. Appellant Witness 2 was cross-examined by counsel for the Respondent, who put it to her that her handling of the ROM and VAT returns depended entirely on the information provided to her by her employer, the Appellant. She accepted this as being so, describing her role as being "*to put the data on the computer".*[2] In this respect she agreed with a description of her function as being "*a link person to the accountant."*

57. It was put to Appellant Witness 2 that the "nature of the transactions between [redacted] Fuels Limited, [redacted] Logistics and [the Appellant], that's totally beyond your role". She agreed with this proposition.

58. Appellant Witness 2 was also asked whether, in fulfilling her bookkeeping function, it might have been apparent to her if invoiced sums were greater than lodgements to the Appellant's bank account. She said this was not something which she would have thought about. "*I would just have the bank statements, count up the money."*

59. Appellant Witness 2 was asked on numerous occasions in cross-examination "*how she would deal with un-lodged receipts in terms of making VAT returns"* if the VAT returns, in effect, were predicated on subtracting money lodged into the Appellant's bank account over a VAT period from the amount that was already there. In respect of this, Appellant Witness 2 accepted in her evidence that the accuracy of her work on the VAT returns was dependent on all receipts of the Appellant being lodged to its account. She cast doubt though on whether receipts would ever go un-lodged.

60. It was put to Appellant Witness 2 that for the year 2012 the Appellant's nominal ledger indicated that though it had sales receipts of €2,811,474 it had bank lodgements of only

[2] Transcript of hearing, page 73;

€2,014,000, resulting in a shortfall of €797,326. When asked to comment on this, she said that such a shortfall would not be something that would have been apparent to her and was "*beyond my role".* She suggested in her evidence that the person to whom this information might have been apparent was [redacted].

61. Regarding Assessment 2, Appellant Witness 2 stated under cross-examination that it was her understanding that VAT had not been returned on payments received from [redacted] Haulage Limited on the grounds of an "administrative error" relating to the operation of the Sage system. It was, she said, related to the mistaken "*press of a button*". No further detail was provided.

62. Appellant Witness 2 was also asked to address the Respondent's contention that, for the period in question, May – August 2015, the Appellant had a further VAT liability arising from a failure when calculating "non-invoice sales" (i.e. sales paid for in cash) to make adjustments for outstanding lodgements and wages and supplies paid for by means of un-lodged cash receipts. Appellant Witness 2 did not address the question of adjustments, but did comment on that of payments made to staff and suppliers from cash. In this regard, she accepted once again that the accuracy of the VAT return for this and other periods hinged on lodgements representing the full extent of income. A VAT report composed by or on behalf of the Appellant was then put to her indicating that in the period May – August 2015, numerous payments were made to suppliers from cash. She was not in a position to contradict that this had occurred.

63. Counsel for the Respondent asked why it was that the Appellant's till receipts could not have been used to establish what sales were made and whether this would not have been, at a minimum, a useful means of cross-checking the Appellant's liability based on sales made against the calculation arrived at identifying bank account lodgements. In reply to this, she stated that it was the view of those running the Appellant, which view she appeared to share, that till receipts were unreliable on the grounds that those operating them were prone to make errors in the pressing of till buttons.

Appellant Witness 3

64. The final witness called by the Appellant to give evidence was [redacted] ("Appellant Witness 3"). At the outset of his evidence, Appellant Witness 3 said that he had from 1997 – 2009 owned and operated the filling station now owned and operated by the Appellant. In 2009, the decision was taken to incorporate the Appellant and for it to take over the running of the family business. Appellant Witness 3 was, from that point, an employee of the Appellant. He did not become one of its directors. Giving evidence in cross-examination, Appellant Witness 3 said that initially [redacted], his son, acted as a director

until he established a separate business in Northern Ireland. He said that in or around 2010 [redacted] had resigned his directorship to commence activity in the building trade in Northern Ireland, and another of his sons, [redacted], had taken his place. Appellant Witness 3 said that some time later, in about 2014 or 2015, [redacted] commenced trading in the home heating oil business in Northern Ireland.

65. Appellant Witness 3 gave a description of the business of the filling station and its physical premises. He said that it had always been a small operation, selling only DERV, petrol and MMO from a [redacted] forecourt. On the premises was a shop, however he emphasised that it was not akin to a supermarket and sold only "*a few bars, minerals and cigarettes*". He estimated, for example, that the Appellant would sell only approximately 10 – 12 packets of cigarettes per week.

66. Appellant Witness 3 said that in the early days of the business, the filling station acquired fuel exclusively from [redacted] At a certain point, [redacted] s business in Ireland was taken over by [redacted] and the identity of the supplier changed accordingly.

67. Appellant Witness 3 stated in examination-in-chief that there existed across the road from the Appellant's filling station a competitor with a superior premises that also sourced its fuel from [redacted]. In 2009, believing that this competitor was obtaining more favourable treatment from [redacted] and because the Appellant's business in the economic downturn had need only for smaller individual supplies of fuel for cash flow reasons, the Appellant opted to acquire fuel from 'independent' suppliers, including [redacted] Oil, [redacted] Fuels and, for DERV only [redacted] istics.[3] Appellant Witness 3 stated in evidence that the Appellant opted not to acquire DERV from [redacted] ts main supplier of fuel otherwise, on the grounds that it did not offer a competitive price for it. Appellant Witness 3 said that he was very satisfied with the product supplied by the aforementioned independent suppliers, including the DERV supplied by [redacted] stics.

68. Appellant Witness 3 said that in 2012 the Appellant opted to return to acquiring its supplies of fuel from [redacted] on an exclusive basis. At some point after this, the Appellant changed again to a new exclusive supplier, namely [redacted], with whom it has remained in business ever since.

69. In response to a question put to him in examination-in-chief, Appellant Witness 3 disagreed that the prices given by the AA for fuel were representative of those charged at the Appellant's filling station. These price estimates were, he said, heavily influenced by prices charged on motorways and in urban areas and did not reflect the reality of rural

[3] Transcript of hearing, day 1, page 111;

Ireland or the fact that in the particular locality in question, there was at all times material to the appeals significant competition with rival businesses on both sides of the border.

70. On the particular nature of the Appellant's business, Appellant Witness 3 said that the Appellant's filling station was heavily used by agricultural vehicles to fill their tanks. Indeed, he said that in effect all of the Appellant's sales of MMO were made either directly into the fuel tanks of tractors and other agricultural vehicles, or, occasionally, into a bowser belonging to a construction company operating in the locality. Appellant Witness 3 further stated that farmers in the area had at some point in the past desisted from storing MMO in tanks on their farms. This, he said, was because there had been a history of theft when so stored. Instead, those farmers in need of fuel for their tractors and other farm vehicles would, if they were using the Appellant's station, drive thereto and fill perhaps €50 or €100 into their fuel tanks directly.

71. In cross-examination, counsel for the Respondent asked Appellant Witness 3 about the day-to-day running of the filling station. In answer to this, he said that he was the person who was there at opening and for closing. In the interim, however, the premises would be staffed by "*school children*" and his brother, [redacted]. All of these people were, he said, remunerated in cash.

72. Appellant Witness 3 was cross-examined in detail about the circumstances in which the Appellant entered into the purchasing of fuel from the source he believed was [redacted] Logistics. In respect of this, he said:-

> "*It would have been the same as anyone else; they would have rang up and probably maybe even someone called, there was a rep calling. He was John but someone said since he was* [redacted] *but I don't know, I never met … he never introduced himself, he was John.*"[4]

73. As regards the arrangements for ordering and supplying the DERV in question, he said:-

> *"[John] could have called, he gave a price for fuel, he ordered the fuel, he told you to pay the driver and he sent a computerised invoice and we didn't pay for it, we didn't give them the cheque until we saw the invoice. And it was a valid invoice, we were after checking his VAT number, his VAT number was valid, his invoice was valid. He had the name and address of the supplier, the product, the VAT and a docket number. There was no reason to think any different*."[5]

[4] Transcript of hearing, day 1, page 132;
[5] *Ibid;*

74. Counsel for the Respondent put it to Appellant Witness 3 that the arrangement between the Appellant and the person named John offering to supply DERV was that he would call the Appellant and name a price. To this, Appellant Witness 3 answered:-

> "*Well, effectively, he would have rung and he would have said: "I can sell you fuel. How much fuel?" And he would fix you if you wanted 10,000 litres or as I say, 15,000 litres or 20,000 litres, you could have bought it off him accordingly and I bought it according to my needs*."[6]

75. Counsel for the Respondent, noting that payment was made to numerous different people for the DERV supplied, also asked Appellant Witness 3 who he/the Appellant thought John was representing:-

> *"I'm not sure. It seems to be that there [are] a whole lot of names involved now but when he would have told me when he called, it was a Dublin based company, bu[redacted] Logistics] was on the dockets. Whoever he represented, I don't know, but it was [redacted] Logistics] on the invoices.*"

76. Appellant Witness 3 was cross-examined on how the delivery of fuel arranged by John would take place. He said that the fuel would be delivered by a "*white"* tanker bearing no livery. He said that this was the norm until about 2012 or 2013, when forecourt suppliers began insisting that fuel supplies made to them by wholesalers be made by liveried tanker. Asked was it John who drove the tanker, he said it was not. Asked if the identity of the driver would vary from time to time, he said:-

> *"Well, I wouldn't know. We didn't buy that much product off him and I might not always have been there when he came*."[7]

77. Counsel for the Respondent then inquired who, if Appellant Witness 3 was not there, would have "*meeted and greeted"* the person making delivery on behalf of the fuel supplier represented by the person known as John. To this, Appellant Witness 3 said:-

> *"Whoever was in the shop would have told him "tank 1" or "tank 2" or whatever, whoever was there at the time.*
>
> *[…]*
>
> *At weekends it may be a student […]"*

[6] Transcript of hearing, day 1, page 133;
[7] Transcript of hearing, day 1, page 137;

78. As regards payment, Appellant Witness 3 initially said that the practice in respect of this source of fuel was always that a cheque would be left in the shop for the delivery driver. He said that he would talk to John when making the order about the quantity and price and would make out a cheque, pre-signed by [redacted], for the relevant amount and to a payee named by John.[8] Appellant Witness 3 said that the instructions from John about who to pay for the delivery would vary. Sometimes it would be [redacted] Logistics, sometimes [redacted]s Limited and sometimes the cheque would be made out to "*cash".*[9]

79. However, Appellant Witness 3 appeared later to contradict his own evidence regarding how the payment was handled when, having seemed to suggest that it was he who entered the name of the payee on the cheque at the behest of John, he then asserted that there were times when the name of the payee would be left blank so that it could be entered by the supplier. This, according to Appellant Witness 3, accounted for the fact that, though he thought the Appellant was transacting with [redacted] Logistics, and notwithstanding that the invoices handed over on supply bore the name of that business, the payees on occasion were [redacted] Fuels Limited, [redacted], [redacted] and cash.

80. Later in cross-examination, counsel for the Respondent put it to Appellant Witness 3 that, in fact, all of the 22 cheques, dating from February – April 2012, relating to the payments giving rise to Assessment 1, were signed by [redacted], not [redacted].[10] Counsel for the Respondent reminded Appellant Witness 3 that his own evidence was that [redacted] had ceased to be a director of the Appellant in or around 2010, at which point he had moved to Northern Ireland and commenced business in the construction trade and, thereafter, in home heating. Appellant Witness 3 said that, if this was correct, he must have made an error in his earlier evidence and [redacted] must have been a director in 2012 at the time the cheques were signed. Counsel for the Respondent then put to Appellant Witness 3 an undated letter from [redacted] to an officer of the Respondent, which stated:-

> *"My name is* [redacted] *and in reply to your request for me to fill out tax returns for 2014/15 on the advice of my accountant I have enclosed [proof] of resignation which took place on 1 Nov 2010 for when I worked in the south of Ireland.*
>
> *During these 2 years I neither worked nor lived in the state. I live at* [redacted] *Northern Ireland*."

[8] [redacted], Appellant Witness 3 said, would leave a collection of pre-signed cheques contained in the chequebook, in a drawer in the shop located on the filling station premises;
[9] Transcript of hearing, day 1, page 138;
[10] As noted earlier in this Determination, both [redacted] and [redacted] were sons of Appellant Witness 3;

81. Counsel for the Respondent also put to Appellant Witness 3 a 'Form B10', which was attached to the correspondence, which purported to record [redacted]'s resignation as a director of the Appellant on 1 November 2010. This document was stamped as received by the Companies Registration Office on 14 September 2012.

82. Asked why it was that a person who was not a director of the Appellant was signing its cheques after their resignation, the Appellant Witness 3 speculated that it must have been the case that he remained one of the signatories with the relevant bank.

83. Counsel for the Respondent put it to Appellant Witness 3 that there was a known problem in the period relating to Assessment 1 with the 'washing' of MMO so that it could be supplied as DERV. Appellant Witness 3 accepted that he was aware of media reports to this effect. He was then asked how he could be satisfied that the fuel he was receiving from the person known only to him as John was legitimate. His answer was that if the fuel was washed, it would inevitably result in complaints from customers on the grounds that such fuel was of an inferior quality. This had never occurred.

84. Counsel for the Respondent challenged Appellant Witness 3 both on the premise that washed diesel would necessarily be of such poor quality that it would cause motorists and other purchasing customers to make complaint and on the logic of the evidence even if the premise were accepted as being well founded. How, he asked, would Appellant Witness 3 or other persons involved in the Appellant's business be able to ascertain the quality of the fuel prior to purchasing it in the first instance? Put another way, one first had to acquire fuel before one could draw any conclusions about its quality. No cogent reply was given to this, other than to say that the bona fide nature of the supply was evidenced by [redacted]stics' possession of a valid VAT number.

85. Counsel for the Respondent asked Appellant Witness 3 why it was that John, who he purported to understand represented [redacted]Logistics, was not paid in the same manner as, for example, [redacted]els (i.e. by bank transfer). No clear answer was given to this question.

86. Counsel for the Respondent put it to Appellant Witness 3 that [redacted] Logistics *"[didn't] exist, that it is an identity stolen from a person called [redacted] whose identity was taken and a business set up in his name*." In reply, he said that he had read as much in *"[the Respondent's] reports*".

87. It was put to Appellant Witness 3 that the Appellant did not do all that could reasonably have been expected of it to ensure that, in its dealings with John, second name unknown, from Dublin, who it claimed to believe was a representative of [redacted]tics, it was not

involving itself with transactions connected to VAT fraud. Appellant Witness 3 had this to say in reply:-

> *"I wouldn't accept that at all. I followed the guidelines. The guidelines were that you checked the VAT numbers, if it's a valid VAT number, you checked the invoice, the VAT number that was on the invoice, the invoice number, all that had to be on it. I did everything within my power to, as I would do with any other company, I did everything within my power to check it. I had no other resources beyond what I did do*."[11]

88. Counsel for the Respondent then put it to Appellant Witness 3 that checking the VAT number of [redacted]Logistics would tell the Appellant nothing whatever about the real nature of the fuel, supposedly DERV, being supplied to it. Appellant Witness 3 disagreed with this, stating that the EU itself created the resource that it had utilised to do this, namely the VAT Information Exchange System ("VIES")

89. Appellant Witness 3 was then asked by counsel for the Respondent whether he had any hand in bookkeeping. In answer, he said this was the preserve of Appellant Witness 2. His role was limited to furnishing her with invoices, which could then be put "*on the system*". Appellant Witness 3 agreed with the proposition put to him that Appellant Witness 2 depended in the proper fulfilment of her role on him furnishing her with these invoices.

90. Counsel for the Respondent asked Appellant Witness 3 about how employees of the Appellant were paid. They were, he said, always paid in cash. Many of the employees were schoolchildren or older students who lived across the border in Northern Ireland. These people tended to be paid in Sterling.

91. Appellant Witness 3 was then asked in cross-examination about how the Appellant made supplies of MMO. He answered:-

> *"[…] the position is as it always was, it's forecourt sales, it never changed.*
>
> *[…]*
>
> *I mean where you take the nozzle off the pump and you put it into the tank of the vehicle, that's forecourt sales*."

92. In this respect, he clarified that the tanks to which he referred were those only of agricultural vehicles.

[11] Transcript of hearing, day 1, page 160-161;

93. Appellant Witness 3 rejected the proposition, put to him in cross-examination, that customers might come to the Appellant's station and fill tanks or drums with MMO so that they could be transported back to, for instance, their farm property. In this respect he said:-

> *"There [are] no drums really. It's all…we have a few [customers] on our books that come with a bowser,* [redacted] *Construction is one of them,* [redacted] *is another, they are on our customers list and they would fill maybe whatever their bowser would take, 700 or 800 litres, they would go through the system and they would get a computerised invoice for it. But an ordinary tractor coming in and putting in 150 litres, he can't claim the VAT back anyway so he is not going to bother with an invoice but we record them*."

94. Counsel for the Respondent then queried why, in particular during the period 1 May 2014 – 31 December 2014, the Appellant kept details of forecourt customers and their addresses for DERV sales, but not for MMO. As regards this, Appellant Witness 3 said that the Appellant had been told at a meeting with the Respondent in February 2016 that there was no obligation to keep records relating to supplies under 200 litres, made into the tanks of vehicles. He said that it was not until three months later that the Appellant was informed by a different officer of the Respondent that it was to keep records of all supplies of MMO, including those under 200 litres. From that date forward, he said, the Appellant "*kept every record".*

95. Regarding the records kept by the Appellant in the period relevant to Assessment 3, Appellant Witness 3 said:-

> *"[…] in 2014* [redacted] *would have kept a book, a daily book, and the pumps would have been read and the […] spreadsheet would have been made out and the daily supply of gas oil was taken down and it was used then and it was checked on the ROM.*"[12]

96. A letter of 24 June 2016 was put to Appellant Witness 3 by counsel for the Respondent. This letter, from [redacted], an officer of the Respondent, noted that at a meeting on 21 June 2016, [redacted] had told him that a lot of MMO sales were into the tanks of agricultural vehicles but that some also were into tanks and drums. Appellant Witness 3 speculated that what [redacted] meant by tanks and drums was bowsers towed by other vehicles owned by construction companies.

[12] Transcript of hearing, day 1, page 172;

97. It was put to Appellant Witness 3 by counsel for the Respondent that most farmers would have tanks on their premises for the purpose of storing fuel. They would not tend, he suggested, to fill the tanks of their tractors at the forecourt. Appellant Witness 3 did not accept this proposition. He repeated that there was much local concern about thefts of fuel stored in tanks on farms.

98. Indeed, Appellant Witness 3 pointed out that the Appellant's own premises had been robbed more than once. In relation to that which occurred in February 2016, just prior to notification of the Respondent's audit relating to 2013, Appellant Witness 3 said that they had lost records and computer related equipment stored in the "cigarette box" in the shop. These were stored in this place because there had been significant damage caused to the roof of the back office in which they were normally kept. On the night of the robbery they were taken by the intruders who, Appellant Witness 3 supposed, were intent on making away with the Appellant's supply of cigarettes.

99. Counsel for the Respondent then asked Appellant Witness 3 about the Appellant's fuel sales. He first put it to him in cross-examination that the Appellant's sales of MMO were 75,000 litres in May, 50,000 litres in June, 73,000 litres in July, 50,000 litres in August, 51,000 litres in September, 47,000 litres in October, 45,000 litres in November and 44,000 litres in December. In this respect, he asked why, if the Appellant's MMO was mostly sold to farmers, it retained significant sales in November and December. Appellant Witness 3 said that there was still farming activity in November and December.

100. Counsel for the Respondent then put it to Appellant Witness 3 that in 2012 it had sold 1,454,000 litres of MMO. However, from 2013, when the ROM requirements came into being, there began a sharp decline in MMO sales. Thus, in 2013 it had sold 740,534 litres of fuel, in 2014 693,005 litres and in 2015, the year that saw the introduction of the indelible Accutrace S10 marker, 483,000 litres.

101. Appellant Witness 3 said that this was attributable to, firstly, increased competition from another garage, which he said had opened filling station premises on either side of the border and was able to supply both red and green diesel. This, he suggested, meant that it was more likely that erstwhile customers would move to them. Secondly, Appellant Witness 3 said that the economic recession had a significant adverse effect on MMO sales in the period 2012 – 2015.

102. Counsel for the Respondent put it to Appellant Witness 3 that the reason for the decline in MMO sales was more likely to be connected to the introduction in 2012 of the ROM for oil traders such as the Appellant and, in 2015, the indelible Accutrace S10 marker. Appellant Witness 3 expressed his disagreement with this.

103. Counsel for the Respondent asked Appellant Witness 3 why, if the reduction in the sales of MMO was attributable to unfavourable economic conditions, the Appellant's sales of DERV did not also suffer, but in fact increased from 1,525,890 litres in 2013, to 1,853,017 litres in 2014 and to 2,555,761 litres in 2015. The explanation given by Appellant Witness 3 was that this was because, from 2012, the Appellant recommenced receiving supplies of its fuel from major fuel suppliers [redacted] and then [redacted]. This brought with it a marked increase in trade from people using fuel vouchers or cards from CSE, DCI or [redacted] Fuels.

The Respondent's Evidence

Respondent Witness 1

104. The first witness called to give evidence by the Respondent was [redacted] ("Respondent Witness 1"), an official of the Respondent involved in the conduct of audits and investigations, in particular in relation to the oil sector.

105. Respondent Witness 1 gave evidence that a new type of MMO, ULSMGO[13], first came to the market in 2009 and was marked with a substance that it was possible by some process, known colloquially as 'washing' or 'laundering', to remove. 2015 saw the introduction of the marker "Accutrace S10", which he said was, by contrast, indelible.

106. Respondent Witness 1 stated that from 2009 to 2015, there existed a significant problem with the washing of MMO so that it could be sold as DERV. This was to the financial benefit of the person or persons engaged in the washing as both the excise and VAT rate applicable to MMO was lower than that to DERV. This washed MMO could be sold for profit at a price lower than would be possible were the fuel in question genuine DERV.

107. Respondent Witness 1 gave evidence of what he termed the typical "*fraudulent supply chain*" of diesel. He stated that in his experience fraudulent profit making from the sale of MMO occurred in the following manner in the period at issue in this appeal. First, MMO would be imported into the jurisdiction and sold by a legitimate fuel wholesaler to a purchasing company. This company, or another company to which it sold the MMO, would then remove the green coloured dye, leaving it with the appearance of DERV that could lawfully be sold to and used by ordinary motorists. The company would then sell the washed MMO as DERV at a discounted price – Respondent Witness 1 estimated roughly 50 cents per litre less than the price of genuine DERV – to the operators of filling stations, in so doing charging VAT at the 23% rate applicable to DERV. This VAT charged would

[13] Ultra-low sulphur marked gas oil;

not be remitted to the Respondent, though in due course the operator of the filling station would make a deduction claim for its VAT input incurred, depriving the Exchequer of tax revenue.

108. In his evidence, Respondent Witness 1 said that he participated in the investigation of the fraudulent supply chain involving Base Garage Supplies Limited, which gave rise to the High Court proceedings *Criminal Assets Bureau v Base Garage Supplies Limited* [2018] IEHC 192. As the findings in the judgment of the High Court arising from those proceedings made clear, one of the participants in that fraud was [redacted]s Limited.

109. Respondent Witness 1 said that investigative work into fraudulent supply chains led the Respondent to inquire into the affairs [redacted]uels Limited. He participated in these inquiries.

110. Respondent Witness 1 said that [redacted] Fuels Limited began trading in late 2011 with the aim of operating a filling station of its own in County [redacted]. It was not successful in so doing because its application for a fuel trader's licence was turned down by the Respondent and, as a consequence, it diverted its activity to purchasing large quantities of fuel and supplying that fuel to filling stations. Respondent Witness 1 said that [redacted] Fuels Limited had no known track record in the wholesale of fuel.

111. Respondent Witness 1 gave evidence that the fuel purchased by [redacted] Fuels Limited was MMO, which it acquired from " [redacted]". Respondent Witness 1 said that it did not purchase any significant supplies of DERV.

112. Respondent Witness 1 gave evidence that the investigation of suspect supply chains led it to a bank account in the name [redacted]ogistics, which as previously observed was the trading name for [redacted]. The registered address for [redacted] Logistics was a residential address, [redacted], County Dublin. Respondent Witness 1 said that its inquiries revealed that [redacted] was a person based in the United States with no connection to the fuel trade who, in 2011, had been the victim of "identity theft".

113. Respondent Witness 1 said that he came across substantial transfers of funds between the bank accounts of [redacted] Fuels Limited and [redacted] Logistics. As with [redacted] Fuels Limited, [redacted] Logistics purchased "large volumes" of MMO during the period January – August 2012, though from a different wholesaler [redacted] Fuels Limited. In this respect, Respondent Witness 1 gave evidence that he identified transfers in the total amount of €3.9 million from the bank account of [redacted] Logistics into that of [redacted] Fuels Limited.

114. Respondent Witness 1 gave evidence that [redacted] Fuels Limited filed one VAT return in the course of its existence; this being for January/February 2012. He further said that he was

aware that one of its two Directors was a person called [redacted] and that in his investigation into the affairs of that company he had not come across anyone by the name of John involved in the carrying out of its supplies.

115. Respondent Witness 1 said that an examination of the bank accounts of [redacted] Fuels Limited and [redacted] Logistics revealed, between them, 22 lodgements attributable to the Appellant over the period March/April 2012.

116. Respondent Witness 1 said that, having been prompted to inquire into the affairs of the Appellant, it became apparent that it did not have records relating to the purchases of fuel delivered to them by the person known as John. In particular, Respondent Witness 1 observed that there were no invoices available indicating from whom the fuel was purchased and no fuel movement documents required under the 2012 Regulations.

117. In their stead, Respondent Witness 1 relied on copies of the aforementioned 22 cheques, all signed by [redacted], that were obtained from the Appellant's bank. These cheques contained the following details and information:-

Date	Payee	Amount
1 March 2012	[redacted] Fuels Limited	€5,000
5 March 2012	[redacted]	€6,260
6 March 2012	[redacted]	€10,300
15 March 2012	[redacted] Fuels Limited	€5,300
16 March 2012	[redacted] Fuels Limited	€8,000
22 March 2012	Cash	€10,000
23 March 2012	Cash	€9,500
26 March 2012	Cash	€2,000
28 March 2012	Cash	€16,700
29 March 2012	[redacted]	€10,000

23 March 2012	Cash	€6,265
2 April 2012	Cash	€5,365
6 April 2012	Cash	€15,565
10 April 2012	Cash	€9,835
12 April 2012	Cash	€8,629
13 April 2012	Cash	€10,415
13 April 2012	[redacted] Fuels Limited	€12,900
18 April 2012	Cash	€4,600
17 March 2012	Cash	€10,670
20 April 2012	[redacted]	€15,000
12 April 2012	[redacted]	€15,000
30 April 2012	[redacted]	€15,000

118. Respondent Witness 1 addressed the evidence given by Appellant Witness 3 to the effect that the Appellant understood that, in buying the fuel paid for by way of the aforementioned cheques, it believed that it was transacting, through the person known as John, with [redacted] Logistics. Respondent Witness 1 observed that this assertion was not in keeping with the content of correspondence of August 2016**,** in which the Appellant's accountant stated that the Appellant understood that it was doing business with [redacted] Fuels Limited. He did accept, however, that the Appellant appeared to have run checks on the VAT number of [redacted] Logistics in or around 2012, which might indicate that it was transacting with that person, rather than [redacted] Fuels Limited. He opined though that the address of [redacted], [redacted], being one that was clearly residential and clearly not viable as a premises from which one could operate a fuel business, was

something that should have raised suspicion regarding the true nature and source of the fuel being purchased.

119. Respondent Witness 1 stated that the entirety of the VAT comprising 23% of each of the payments enumerated above was not remitted to the Respondent by the relevant payee. As he said in evidence:-

> "[redacted] *Logistics never made a return, Commissioner, […] and* [redacted] *Fuels Limited made one return for the period January/February [2012] and no return for subsequent periods*."

120. This led Respondent Witness 1 to the conclusion that the transactions involving the supply of fuel in the period March/April 2012, in respect of which payment was made by the Appellant by way of 22 cheques ranging in date from 1 March 2012 – 30 April 2012 to the payees, [redacted], cash, [redacted] and [redacted]els Limited, were connected to fraud. Furthermore, Respondent Witness 1 was of the opinion that the Appellant, being involved in a transaction connected with fraud, had not taken every precaution that could reasonably have been required of it to ensure that the transactions were not so connected. On this basis, the Appellant's claims for the deduction of the VAT paid in respect of the aforementioned fuel supplies over the period March/April 2012, totalling €39,699.00, were refused.

121. Respondent Witness 1 then proceeded to give evidence relevant to Assessment 2. This assessment had come to be made, he said, in circumstances where it was discovered during the audit that the Appellant had not remitted VAT to the Respondent on consideration received in respect of supplies made to [redacted] Haulage Limited in June and July 2015. The Respondent had assessed the Appellant as owing VAT in the amount of €19,807.19 but, on the grounds that it now accepted that the consideration of €86,118 received was inclusive of VAT, Respondent Witness 1 stated that this was an overestimate and should be reduced to €16,103. He noted that, having appealed the decision, the Appellant did not now dispute that the latter amount of VAT was due to the Respondent.

122. However, Respondent Witness 1 stated that in engaging with the Appellant over its appeal ground relating to "*double counting",* from which it subsequently resiled at hearing, he had come to hold the view, based on the Appellant's own records, that it owed VAT for the period May – August 2015 over and above the sum of €16,103. Respondent Witness 1 gave evidence as to why this was so. He re-iterated that the Appellant's method of calculating its VAT liability in each period was to look at both the invoices then issued and the money then lodged into its bank account. Having subtracted from the lodgements

the invoice amounts accounted for in preceding periods, the Appellant recorded in its VAT return VAT due on (a) invoiced sums, including "credit sales", and (b) on "non-invoice sales" (i.e. cash receipts).

123. With regard to cash receipts, Respondent Witness 1 stated, in evidence that matched the case made in its Outline of Arguments dated 28 January 2022, that the Appellant's own records indicated that its taxable income from cash receipts for the period May – August 2015 were greater than disclosed in its VAT return. This was, he said, because the Appellant (a) failed to make adjustments for the outstanding lodgements at the beginning of a return period and (b) omitted from its cash receipts calculation, which was arrived at by reference to money lodged to its bank account, income received in cash that was never lodged to its account, but rather used to pay staff wages and certain suppliers. Having taken account of opening and closing bank account balances and staff remuneration and supplies paid with un-lodged cash in hand, Respondent Witness 1 stated that, on its own accounts, it was apparent that the Appellant had made un-taxed supplies in the amount, excluding VAT, of €20,538. Respondent Witness 1 said that, by this reckoning, the Appellant therefore owed an additional amount in VAT of €4,724.

124. That, however, was not the sum that Respondent Witness 1 considered was correctly due in respect of VAT for the period May – August 2015. He gave evidence that in correspondence of 9 April 2019 he informed the Appellant that its true VAT liability arising from its failure to make adjustments for opening and closing balances and to take account of wages paid from cash was, in all probability, €7,933. This was so, he said, on the grounds that, in his view, the records of the Appellant could not be relied upon to disclose all cash received. In support of this contention he referred back to the Respondent's inquiries into the year 2012, which he said suggested that the Appellant had received income of €797,326.10 in cash that it had not lodged to its accounts. Because of this, the Respondent carried out what he described as a "business economics" exercise so as to establish by way of estimate the value of non-invoice sales made in the relevant period. This involved the identification of the numbers of litres of fuel sold on a "non-invoice" basis and then, applying average forecourt fuel prices for the period at issue calculated and published on the AA website, the estimation of the Appellant's non-invoice fuel sales. The estimate arrived at in respect of non-invoice sales was €521,111, rather than €478,687 (a difference of €42,424). This difference accounted for VAT in the amount of €7,933, as opposed to the amount of €4,724 mentioned in the preceding paragraph of this Determination.

125. Respondent Witness 1 then gave evidence that, on top of this, he had come to the conclusion that further VAT in the region of €6,045 was due for the period May – August 2015. He explained that this was so on the grounds that:-

"[…] the [AA] price per litre calculation can only represent the fuel sales and can't obviously represent the incidentals, the cigarettes, the confectionary etc. So those sales need to be quantified separately, in addition to and separate from fuels."

126. Respondent Witness 1 stated that:-

"The primary supplies in question are cigarettes, confectionary and O'Neill's sports [equipment]".

127. Respondent Witness 1 stated that his calculations regarding the need for the assessment of an additional sum of €6,045 had not been provided to the Appellant in advance of the hearing and had neither been raised in its Statement of Case nor adverted to in the Outline of Arguments. It was not in dispute that the first the Appellant had heard of this aspect of the Respondent's case was on the day of the commencement of the appeal. It should be noted at this point of the Determination that the Appellant's counsel raised objection to the introduction of this part of the Respondent's case at such a late stage.

128. Regarding Assessment 3, relating to excise duty in the form of mineral oil tax covering the period 1 May 2014 – 31 December 2014, Respondent Witness 1 said that the starting point in making the assessment was the content of the Appellant's own ROMs. In particular he said:-

"Essentially, what I did as a starting point was I extracted the purchases in respect of each product based on the monthly ROM returns for the period May 2014 – December 2014, that was the base period for the assessment."

129. There was no dispute that the amount of MMO acquired by the Appellant over the period in question was 439,004 litres.

130. Respondent Witness 1 said that the next thing he did was to examine the Appellant's VAT records over the period relevant to Assessment 3, so as to establish a 'selling price' for the MMO acquired. These disclosed sales of MMO to the value of €426,626 over this time, giving rise to a selling price of €0.9718 per litre. Of this total sum, €169,916 was recorded by the Appellant as being in respect of "non-invoice" (i.e. cash) MMO sales and €256,710 being in respect of "invoice" sales. Respondent Witness 1 said that it appeared that the Appellant's methodology in calculating non-invoice MMO was based on the

reading on the meters of its forecourt pumps. As Respondent Witness 1 put it in his evidence:-

> *"The company had its balance of lodgements, it knew the number of litres of marked mineral oil dispensed via the pumps based on its pump readings. It knew the price per litre. So it converted the number of litres dispensed via the pumps based on its reads, which were in a diary it converted that to euro at a price per litre. All of which I agree with as a methodology*."

131. In his evidence, Respondent Witness 1 stated that though he understood non-invoice sales to relate to those made from pumps, he was uncertain as to the manner in which those described as invoice sales, being the balance of €256,710, were dispensed to customers.[14] This was not of the foremost importance, however, because in his view, whether the sales were recorded as invoice or non-invoice, he was not satisfied that the MMO in question had been used for the limited purposes prescribed by legislation, being use other than as propellant for a road-going motor vehicle. Being so unsatisfied, he felt compelled by section 99(10) of the Finance Act 2001 to raise an assessment under section 99A.

132. In essence, the reason why Respondent Witness 1 was not satisfied that the MMO was sold in accordance with conditions prescribed by legislation was grounded on the Appellant's account of how it was supposed to have been supplied. It is clear that he viewed the Appellant's claim that every single litre was dispensed over the period relevant to Assessment 3 into the fuel tanks of agricultural vehicles with a high degree of scepticism. It was not, in his view, normal practice that tractors would fill up their tanks on a filling station forecourt in the same manner as would ordinary motorists. Rather, in his opinion, it was much more likely that those involved in agriculture would buy larger quantities of MMO, to be held on farm premises in either tanks or drums, wherefrom that fuel could be dispensed for farming purposes as needed.

133. It is clear that Respondent Witness 1 viewed it as likely that the Appellant's explanation regarding the dispensing of fuel directly into the tanks of agricultural vehicles was in fact born out of the need to justify the absence of records detailing the information specified in Regulation 18(1) and/or 23(4) of the Mineral Oil Tax Regulation 2012, including, *inter alia,* the names and addresses of the recipients of the supplies of MMO. As has already been set out in this Determination, the view expressed on behalf of the Appellant was that

[14] It is also worthy of note that the Appellant's till readings (or "Z readings") for MMO over the period relevant to Assessment 3, which one would have thought would align with the Appellant's "non-invoice" sale, was €245,719. Respondent Witness 1 was not himself able to explain this discrepancy.

such information did not have to be kept in respect supplies of fuel made directly into the tanks of vehicles, including those of MMO directly into the tanks of agricultural vehicles.

134. Notwithstanding that he was a witness as to fact rather than law, Respondent Witness 1 expressed disagreement in his evidence with the Appellant's view expressed in the preceding paragraph. The merits of the Appellant's and the Respondent's respective views on the meaning of the law under the Mineral Oil Tax Regulation 2012 is something that the Commissioner addresses hereunder in the part of this Determination headed "Analysis" and there is no further need to consider it at this point.

135. Nonetheless, in his evidence Respondent Witness 1 did make the point that, whatever the merits as a matter of law of the Appellant's view as regards its record keeping obligations in respect of sales of fuel, it was notable that, when it came to supplies of DERV, its own VAT records disclosed, *inter alia*, both the names and addresses of those persons to whom it made 'non-invoice' sales in the period in question. Respondent Witness 1 queried why the same information would not be kept as part of its VAT records in relation to sales of MMO.

136. Respondent Witness 1 further gave evidence that, whatever about the information required to be kept by a fuel trader pursuant to Regulation 18(1) and Regulation 23(4) of the 2012 Regulations, he had not in the course of his inquiries come across "*daily totals of all supplies of each product* [i.e. DERV, MMO, Petrol etc]**."** The significance of this is discussed in the "Analysis" part of this Determination.

137. Respondent Witness 1, having formed his view that he was not satisfied that the supplies of MMO made by the Appellant were used for prescribed purposes, made Assessment 3 pursuant to section 99A of the Finance Act 2001 on 16 March 2018. He did so in respect of the supply of 299,004 litres of MMO, giving rise to a duty payable of €143,229.00 for the period in question which, taking into consideration that the Appellant had already paid mineral oil tax in the amount of €30,582, resulted in a liability on the part of the Appellant of €112,647.00.

138. Respondent Witness 1 stated in evidence that he had made an assessment on the supply of 299,004 litres of MMO, rather than on the full 439,004 litres enumerated in the Appellant's ROMs as having been acquired over the period in question, on what he described as a "concessionary" basis. In essence, his evidence was that, although he doubted that substantial quantities of MMO were sold directly into the tanks of agricultural vehicles belonging to farmers in the locality, in the interests of reaching agreement with the Appellant, he had been prepared to accept that 140,000 litres of 'invoice' supplies of

MMO may have been made from storage tanks on the Appellant's premises either into the fuel tanks of agricultural vehicles or for some other legitimate purpose under law.

139. Respondent Witness 1 was cross-examined on the subject of Assessment 3. Respondent Witness 1 agreed with counsel for the Appellant that the ROMs filed by the Appellant disclosed that it had dispensed 439,004 litres of MMO over the relevant period, at a price of 97.18 cents per litre (leading to sales of MMO to the value of €426,626).

140. Counsel for the Appellant put it to Respondent Witness 1 that his evidence regarding the Appellant's failure to keep records of "daily totals" of the supplies of particular types of fuel was incorrect. In this respect, counsel produced in his cross-examination a daily report that he said was kept by the Appellant for the month of May 2014 and set out its total sales of DERV, petrol and MMO. In response to a proposition put to him in cross-examination, Respondent Witness 1 accepted that the document proffered to him there and then did appear on its face to constitute a record of daily totals for that period.

141. Counsel for the Appellant observed that Respondent Witness 1 accepted the accuracy of the figures outlined in his client's ROMs filed over the relevant period. He then put it to Respondent Witness 1 that:-

> *"[…] you have green diesel and it is being pumped out to customers and we are happy with the level of litres being sold, how does that green diesel become excisable as white diesel […]"*

142. Respondent Witness 1 answered this by stating that he simply was not satisfied, in part because of a want of records, that the MMO in question had been used for the limited purposes permitted by law, with the effect that it had to have the full amount of excise duty applicable to DERV applied to it.

143. This being so, counsel for the Appellant asked Respondent Witness 1 to explain the logic of his decision that 140,000 litres of MMO out of the 439,004 litres sold over the relevant period be subject to duty in the form of mineral oil tax at the rate applicable to MMO rather than DERV. He put it to Respondent Witness 1 that to do so was devoid of any logical basis. Respondent Witness 1 agreed that there was no formula underpinning this aspect of the assessment. It was, he said, a concession made so as to encourage settlement with the Appellant. He stated that such concessions were not out of the ordinary in the Respondent's dealings with taxpayers and he was entitled to make them without conceding that the Appellant's assertions relating to the use of all of the MMO was the truth.

144. Counsel for the Appellant then proceeded to cross-examine on matters relating to Assessment 1. He put it to Respondent Witness 1 that any fraud arising from transactions involving [redacted] Fuels Limited/[redacted] Logistics was attributable to "failings" of the Respondent, in particular the decision to issue them with VAT numbers. In making this proposition counsel for the Appellant seemed to accept that [redacted] Fuels Limited and [redacted] Logistics were operating under the control of the same persons. Respondent Witness 1 did not agree that the Respondent was at fault in permitting the registration of [redacted] Logistics and [redacted] Fuels Limited for VAT.

145. More particularly, counsel for the Appellant put it to Respondent Witness 1 that criticism had been made of the Appellant for failing to recognise that the address of [redacted] Logistics was one that was residential and patently unsuitable for an oil trading enterprise. Surely, he suggested, this criticism should be directed to the Respondent who permitted [redacted] Logistics to become VAT registered in the first place. Likewise, should the refusal in 2011 of [redacted] Fuels Limited's application for a licence to operate a filling station business not have raised red flags; and should the absence of any VAT return on the part of [redacted] Logistics in 2011, even though it was registered in the early part of that year, not have been cause for significant concern? Counsel for the Appellant put this point to Respondent Witness 1 in cross-examination in the following terms:-

> *"[…] I suppose what I am getting at here […] there is an element of a VAT liability being landed on the Appellant that seems to be more correctly a [Respondent] failing. [The Respondent] have had quite a few attempts here and quite a few opportunities to protect their own VAT base and now, just because it is convenient, they decide 'Oh we will let the trader take the hit for it'. Would that not be an interpretation*?"

146. Respondent Witness 1 did not agree that it would, or even that the question was relevant. He said that, in making the assessment, the only question had been whether, in entering into transactions for the purchase of fuel from someone purporting to repre[redacted] Fuels Limited/[redacted] ogistics, the Appellant had taken every reasonable precaution to ensure that the transactions were not tainted with fraud.

147. Counsel for the Appellant also put it to Respondent Witness 1 that it was clear that the fraudulent activity involving th[redacted] uels Limited/ [redacted]ogistics was on a large scale. Supplies of fuel in excess of €20 million appeared to have been made by them. He asked Respondent Witness 1 whether the involvement of the Appellant was, compared to some other companies that acquired fuel from them, minor. Respondent Witness 1 did not disagree with this. What he did disagree with, however, was the proposition put to him by

counsel for the Appellant that the scale of the Appellant's purchases would have made it any less clear that what they were purchasing was suspect.

148. Lastly, counsel for the Appellant put questions in cross-examination to Respondent Witness 1 regarding Assessment 2. He firstly put accounts to Respondent Witness 1 for the years 2011 and 2012 that showed that the Appellant had spent money on sponsorship. He did not have to hand accounts for the year 2015 showing the same. He further put it to the Respondent Witness 1 that it was implausible that the purchasing of O'Neill's sports gear would be for any other reason than sponsorship of a local sports team. Respondent Witness 1 agreed that it seemed unlikely to him that the purchasing of such gear would be for any other purpose and was unlikely to have been sold as a taxable supply.

149. Counsel for the Appellant re-iterated that the Appellant accepted that it owed tax on the supplies to [redacted] Haulage Limited that occurred in June and July 2015.

Respondent Witness 2

150. The next witness called to give evidence by the Respondent was [redacted] ("Respondent Witness 2"), an officer of the Respondent for approximately 20 years, now seconded to the Department of Foreign Affairs but previously the Manager of the Control Offices for Customs and Excise in the [redacted] area. Respondent Witness 2 gave evidence that between 2010 and 2014 he was a member of a "special project unit" tasked to examine the problem of oil laundering in the border area and nationally as well.

151. Respondent Witness 2 gave evidence in examination-in-chief that on 21 June 2016 he carried out a site visit at the Appellant's premises, where he encountered [redacted], who was at that moment in charge of the premises. He said that during the visit, [redacted] told him that as far as the Appellant understood matters, no records needed to be kept of sales of MMO if the sales were under 200 litres. Respondent Witness 2 said that [redacted] told him that, as such, it had no records of MMO sales. Respondent Witness 2 said that he asked [redacted] whether MMO was dispensed at the Appellant's filling station into tanks and drums brought there by customers. He said that [redacted] said that this did happen. He also said, however, that [redacted] said that a lot of the purchasing of MMO was by persons filling their agricultural vehicles directly.

152. Respondent Witness 2 said that on 24 June 2016, three days after the site visit, he wrote to the Appellant in order, *inter alia*, to inform it that the Regulation 24 of 2012 Regulations

required that, in respect of sales of MMO, it was obliged to keep records containing the information specified in Regulation 23(4) of the same legislation.

Respondent Witness 3

153. The penultimate witness called by the Respondent was [redacted] ("Respondent Witness 3"), a retired officer of the Respondent. Respondent Witness 3 was called to give evidence regarding a meeting between representatives of the Respondent, which he attended with colleagues, and Appellant Witness 1 and [redacted] on behalf of the Appellant, which occurred on 6 November 2014.

154. Respondent Witness 3 gave evidence that he was told by Appellant Witness 1 at this meeting that the method of payment of fuel suppliers depended on the preference of the supplier. Some preferred payment by electronic funds transfer, others by draft, others by cheque and some by cash. Respondent Witness 3 said that he asked Appellant Witness 1 whether all cheques were made out to the relevant supplier. The answer was that they were. Respondent Witness 3 asked [redacted]gistics was a "big supplier" of fuel. He said that the answer of Appellant Witness 1 was that he did not know.

Respondent Witness 4

155. The final witness called in the hearing was [redacted] ("Respondent Witness 4"), who gave evidence regarding what occurred at a meeting at which he was in attendance that occurred on 25 February 2016, between representatives of the Respondent and of the Appellant, including Appellant Witnesses 1, 2 and 3. At this meeting, documents, including the cheques provided to the person called John in return for the supplies of fuel made to the Appellant's premises were given to the Respondent. Under cross-examination Respondent Witness 4 said that another officer of the Respondent, [redacted], informed the Appellant at this meeting that it was not required to record the details of those who received supplies of fuel directly from forecourt pumps into the fuel tank of their vehicles.

Submissions

Appellant

Assessment 1

156. It is necessary to observe that counsel for the Appellant began his submissions by appearing to accept, or at least not dispute, the existence of fraud perpetrated by [redacted] Logistics/[redacted] Fuels Limited and persons connected to those businesses.[15]

157. Counsel for the Appellant then referred in submission to *Kittel v Belgium,* ECLI:EU:C:2006:446 ("*Kittel"*). In this case, which related to the question of when a taxable person engaged in economic activity may be refused VAT input credits to which they are prima facie entitled, the Court of Justice held from paragraph 54:-

> "*54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 Gemeente Leusden and Holin Groep [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 Kefalas and Others [1998] ECR I-2843, paragraph 20; Case C-373/97 Diamantis [2000] ECR I-1705, paragraph 33; and Case C-32/03 Fini H [2005] ECR I-1599, paragraph 32).*
>
> *55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 Rompelman [1985] ECR 655, paragraph 24; Case C-110/94 INZO [1996] ECR I-857, paragraph 24; and Gabalfrisa, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see Fini H, paragraph 34).*
>
> *56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.*
>
> *57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice."*

158. However, counsel for the Appellant also placed emphasis on the statement of the Court of Justice at paragraph 51 of *Kittel* that:-

> "[…] *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*

[15] Transcript of hearing, day 3, page 6;

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."

159. Reference was also made to the Opinion of Mazák AG in *Netto Supermarkt GmbH,* ECLI:EU:C:2007:638, in which he stated:-

"*43. As regards, more particularly, the principle of proportionality, the Court has already pointed out that, whilst it is legitimate for the Member State to seek to preserve the rights of the Treasury as effectively as possible, such measures must not go further than is necessary for that purpose.*

44. In that regard it should be noted that although the supplier is, as a taxable person under the common system of VAT, liable to payment of VAT, as a tax on consumption, VAT is finally to be borne by the ultimate consumer. Without, obviously, having themselves a natural benefit from or interest in the payment of VAT and without being supposed to bear the tax economically, taxable persons act thus as tax collectors for the State and in the interest of the public purse.

45. Viewed against that background, it would to my mind clearly be disproportionate to hold, in circumstances such as those in the main proceedings, a taxable person liable for the shortfall in tax revenues caused by fraudulent acts of third parties. A taxable person can certainly be expected to assume the task attributed to him under the common system of VAT with all due diligence and care and be held responsible for any shortcomings in that regard. But it falls, as regards shortcomings outside the sphere of influence of the taxable person, to the Member State to ensure – in the interest of the public purse – the overall functioning of the system and to prevent any evasion, avoidance or abuse. The corresponding risks should therefore also be borne by the Member State."

160. Counsel for the Appellant submitted that there was no evidence, or even suggestion, that the Appellant had "colluded" with whichever persons controlled [redacted] Fuels Limited and [redacted] Logistics in perpetrating VAT fraud. It was clear that it had no "influence" over them and was a "careful and honest trader" who had gone to the trouble of verifying the VAT number of [redacted] Logistics prior to transacting with it. Thus, to refuse the Appellant VAT input deductions to which it was prima facie entitled was a disproportionate infringement of its rights in the name of the prevention of the evasion of tax. In this respect, he submitted:-

"*In 25 years of trading, […] the Appellant seems to have fallen foul once. I suppose there should be an element of benefit of the doubt.*

[…]

So this is a fraud of others; [redacted], [redacted]. I don't think it is fair that the Appellant should be the insurer of last resort […] They did supply the diesel, they did pay over the output of VAT, and pursuant to an output of VAT, you should be entitled to an input VAT.[16]

161. Counsel for the Appellant emphasised that it was essential to bear in mind that, though the High Court in *Criminal Assets Bureau v Base Garage Supplies Limited,* held tha[redacted] Fuels Limited was involved in the carrying out of fraud connected to VAT, this judgment post-dated the transactions whereby the Appellant purchased its fuel from it and from [redacted] Logistics. When, in 2012, the Appellant was purchasing fuel from them, there would have been no means of knowing that they intended to perpetrate a fraud on the Exchequer. What was now known of their conduct was known as a consequence of a protracted investigation by the Respondent. In carrying out its check of the VAT number o[redacted]stics prior to entering into business with it and Fuels[redacted]ted:-

"[…] it was taking as many precautions as could reasonably be expected at that particular time and the test should be applied at the very early stage, rather than with the benefit of hindsight. Hindsight is flawless. We all know now [of the conduct of VAT fraud] but that is after protracted […] investigation, case law etc."

Assessment 2

162. In respect of this assessment, counsel for the Appellant began by accepting that VAT in the amount of €16,103 was owed on supplies made to [redacted] Haulage Limited.

163. As regards the additional €7,933 that the Respondent argued should be added to the assessment on the grounds that the Appellant, in making its VAT returns, had failed to take account of opening and closing balances and wages and supplies paid with un-lodged cash receipts, counsel for the Appellant argued that the Appellant's returns were based on "real data" as opposed to the "imputed" figures arrived at by the Respondent on the basis of AA figures and a "business economics exercise".

Assessment 3

164. In respect of this assessment, counsel for the Appellant made the point that the Appellant's contemporaneous ROMs over the period May – December 2014 showed that 439,004 litres of MMO had been dispensed at its premises. Its VAT returns for the same time showed that the amount received in respect of these supplies had been €426,000.

[16] Transcript of hearing, day 3, page 11;

This, he said, meant that a price of 97.18 cents per litre had been charged, which was "*the correct price"* for MMO.

165. Counsel for the Appellant called into question the logic underlying the assessment of the Respondent. He observed that Respondent Witness 1 had stated in evidence that, in arriving at the assessed figure, he had not been "satisfied" that the MMO bought was in fact used for fuelling the tanks of tractors. He noted, however, that 140,000 litres had been taxed at the rate appropriate to MMO. There did not appear, in his view, to be any obvious basis for the conclusion that some, but not all, of the MMO recorded on the Appellant's ROM for May – December 2014 should be subject to the reduced excise rate applicable to MMO.

166. Counsel for the Appellant took issue with the contention of the Respondent that it had failed to keep adequate records relating to its customers purchasing MMO. Although Regulation 18(2) of the 2012 Regulations mandated that retention of names and addresses of fuel customers, this was subject to Regulation 18(3) of the same secondary legislation, which provided that the height of the information that had to be obtained and kept in respect of fuel sales made directly into the fuel tanks of vehicles on the forecourt was (a) daily measurements of meter readings of the volume of the types of fuel held in storage tanks and (b) the aggregate quantities of each specified type of fuel supplied on each day in the course of fuelling the tanks of vehicles. This was what had been done and, thus, it was compliant with the record keeping requirements imposed under the 2012 Regulations.

167. Counsel for the Appellant said that there was nothing improbable about the Appellant's account that the supplies of MMO over the period May – December 2014 were directly into the tanks of tractors and other agricultural vehicles, which were entitled to make use of MMO. The area in which the premises was located was rural, with the primary economic activity being agriculture. The tanks of tractors were large and, by his calculation, only 18 supplies per day into the tanks of such vehicles would account for the quantity of MMO at issue.

168. In fact, what counsel for the Appellant thought lacked plausibility was the suggestion, implicit he said in the assessment made by the Respondent, that the Appellant could, on a routine basis over the period May – December 2014, permit the filling of ordinary vehicles at its station with MMO and yet not be faced with examples of instances where its customers had been caught with such fuel in their tanks. It would, counsel suggested, be inevitable that a percentage of those who filled their personal vehicles with MMO would be discovered with it in their tanks, with the equally inevitable consequence that the

Appellant would be identified as the source. Where were these people, he asked? In the submission of counsel for the Appellant, the absence of such persons, or any reference to them, at hearing suggested they did not exist.

169. Lastly, counsel for the Appellant made the point that the pumps at the station at which MMO was dispensed had, as required by legislation, a notice on them underlining that it was a criminal offence to use MMO in the fuel tank of a motor vehicle.

Respondent

Assessment 1

170. As regards this assessment, which concerned the refusal of the Respondent to allow VAT to be deducted in respect of payments made to the bank accounts [redacted] Fuels Limited and [redacted] Logistics by means of 22 cheques, counsel for the Respondent began by opening to the Commissioner the aforementioned High Court judgment of Stewart J in *Criminal Assets Bureau v Base Garage Supplies Limited.* As noted already in the part of this Determination outlining the evidence given at heari[redacted]Fuels Limited was a respondent in this proceeds of crime application brought by the Criminal Assets Bureau, which culminated, *inter alia,* in findings being made concern[redacted]Fuels Limited to the effect that it had in 2012 and 2013 been involved in missing trader VAT fraud related to the sale of laundered MMO.

171. In the instant case, the Appellant had, according to the evidence of Appellant Witness 3**,** entered into an agreement to purchase fuel from, it would seem, [redacted] Logistics. The Appellant did so in circumstances where the supposed representative [redacted] indicated that it was prepared to sell DERV to the Appellant at a price lower than that offered by the Appellant's existing supplier. A further reason for purchasing from this new source was that the Appellant felt that a filling station competitor in the locality would receive more favourable treatment from a major fuel supplier that was another possible alternative source of DERV. Notably, it was the Appellant who had been approached without invitation with the offer of this comparatively cheap supply of DERV.

172. Counsel submitted that it had been accepted by Appellant Witness 3 that it was well known that there was a significant fuel laundering problem in the [redacted] area in or around 2012. This being so, counsel submitted that the Appellant could not but have been aware that buying cheap fuel from a previously unknown supplier that had initiated contact without request was a risky business and a high level of caution was essential. Yet despite this, the Appellant acted in anything but a careful manner. The height of the Appellant's 'due diligence' was to perform checks on a VAT number assigned to [redacted]stics.

173. Moreover, counsel submitted that there were numerous other 'red flags' regarding this new source of supply that must have been evident to the Appellant. The fact that the DERV arrived in unmarked 'white' trucks did not appear to be of concern, but should have been. Indeed, counsel noted that Appellant Witness 3 had indicated in his evidence that other fuel traders insisted on deliveries being made by 'liveried' trucks, though he saw no need for this or other precautionary measures such as the recording of the registrations of the vehicles that made the deliveries of DERV.

174. Overall, the manner of the delivery and the method of payment was, to put it mildly, unorthodox. Appellant Witness 3 was not usually on hand to take delivery and make payment. This was handled in the main by one or other of the staff, who were for the most part students paid in cash. According to his evidence, Appellant Witness 3 would receive a call not long before delivery from "John" (second name unknown and unsought) setting out who the cheque in question was to be made out to. This might be to [redacted] Fuels Limited, who Appellant Witness 3 said he did not understand the supplier to be, or [redacted] Logistics, or "cash", or somebody called [redacted]. Why, counsel for the Respondent asked, would cheques need to be made out to anyone other than the entity or person with which or with whom the Appellant believed it was transacting?

175. These cheques of course were pre-signed by [redacted], with the figure and payee entered only later by Appellant Witness 3. Counsel submitted that this was all "*very, very far short of what would be required in terms of basic due process* […] *checking out supplies".*[17] He then submitted:-

> "*So in terms of the triangular nature of the payments or in terms of fuel coming in from unknown people and it being thought it was from [redacted] Logistics] and cheques going to [redacted]uels & others] it makes no commercial sense. There is no commercial reality to it and from that perspective and in my respectful submission, it does raise concerns*."

176. Counsel for the Respondent observed that Appellant Witness 3 appeared to take the view that conducting business in this manner was prudent on the basis that if the DERV supplied was 'washed' MMO, the result would be the receipt of complaints from customers about the quality of its fuel. Counsel submitted that this was, as a matter of the most basic logic, unsustainable. One would only discover that the fuel was of a lesser quality than legitimate DERV *after* a purchase had been made. In any event, counsel did not accept the premise that washed MMO would give rise to problems, or to problems of

[17] Transcript of hearing, day 3, page 53;

such an extent, that customers would make complaint to the Appellant of the quality of the DERV supplied to them on the forecourt.

177. Counsel for the Respondent opened the judgment of the High Court in *Fergus Byrne v Revenue Commissioners* [2021] IEHC 262, in proceedings constituting an appeal on a Case Stated from an Appeal Commissioner, for the purposes of underlining the inadequacy of the Appellant's conduct in relation to the transactions giving rise to the refusal of input VAT. In that case, Mr Byrne, who was the operator of two filling stations, had been approached by a person representing themselves as an agent for "[redacted] Oil", which had an arrangement with "[redacted] Fuels" so as to obtain lower prices for fuel. Mr Byrne was offered the opportunity to acquire fuel delivered by "[redacted] Oils" pursuant to an arrangement that would operate in the following manner, as described by the High Court at paragraph 12 of its judgment:-

> *"Invoices would be issued to Mr Byrne from [redacted] Oil, however Mr Byrne would make payments for the fuel directly to [redacted] Fuels. Mr. Byrne gave evidence that he knew of [redacted] Fuels, as it was part of a larger fuel company, [redacted] Limited, but had not previously heard of [redacted] Oil.*
>
> *[…]*
>
> *14. Mr. Byrne confirmed in his evidence that he received VAT invoices from [redacted] Oil and made payments by way of bank draft to [redacted] Fuels*."

178. The High Court also noted in the same judgment:-

> "*The Determination quotes an exchange, cited as having taken place during the cross-examination of Mr. Byrne, in which Mr. Byrne accepts that the triangular payment arrangement entered into by him was 'unusual'. However, while accepting that the payment arrangement was unusual, Mr. Byrne gave evidence that he accepted it without question as it was 'just an arrangement between two companies that that's the way they want their business done'."*

179. The Appeal Commissioner who heard the appeal of Mr Byrne concluded that he had displayed a marked lack of curiosity about the reasons for the triangular payment arrangement, which was a factor that should have raised serious concerns about the prospect of fraud in the chain of supply. The Appeal Commissioner was of the view, based on this and other circumstances relating to Mr Byrne's transactions, that the only reasonable explanation was that a fraud was occurring and Mr Byrne had not taken every precaution that could reasonably have been required of him to ensure that he was not participating in fraudulent transactions. He thus was denied VAT input credits claimed in

respect of those supplies. On appeal, the High Court found that the Appeal Commissioner had not erred in so finding.

180. Counsel for the Respondent highlighted what he said were the obvious parallels between the facts of *Byrne v Revenue Commissioners* and those in the instant case. Like Mr Byrne, the Appellant had been approached by a person with whom they had no previous business relationship offering the prospect of reduced price fuel. Like Mr Byrne, the entity with whom they professed to believe they were transactin[redacted] ogistics, was not, at least in many instances, the entity or person to whom payment was ultimately made out. Like Mr Byrne, the Appellant accepted the delivery of fuel from trucks that were unmarked. Instructions as to who was to be paid and how the relevant cheque was to be handed over were given late in the day. Such unorthodox arrangements occurred in a climate where, by the admission of the employee who gave evidence on the Appellant's behalf, Appellant Witness 3, reports of fuel laundering abounded. In the submission of counsel for the Respondent, the Appellant's attitude that all of this could be treated without suspicion was manifestly wrong. The Appellant's approach to the risk posed was to, in essence, do nothing and for this reason, the VAT input deductions sought had been correctly refused.

Assessment 2

181. As regards this assessment, counsel for the Respondent began by re-emphasising that the liability arising in respect of the VAT due on the supplies to [redacted] Haulage Limited in June and July 2015 was not in dispute. It was further agreed that the sum assessed in respect thereof, €19,807.19, was excessive and should be reduced to €16,103.

182. As regards the additional VAT not included in Assessment 2, which the Respondent believed was due to it for the period in issue, counsel submitted that Respondent Witness 1 had in his evidence given a detailed explanation as to why this was so and his methodology in its calculation. He said that there had been little if any "contrary engagement" with the Respondent's calculation by the witnesses called by the Appellant and emphasised the onus rested with the Appellant to prove the facts necessary to show that the calculation was incorrect.

183. Lastly in relation to this aspect of the appeal, counsel for the Respondent submitted that it had been accepted in evidence by Respondent Witness 3 that the purchase of O'Neill's sports gear was an improbable item for resale by a filling station. Accordingly, it was dropping its case relating to VAT liability thereon. This left only €1,998 worth of VAT on 'non-tax' sales in issue. Counsel for the Respondent submitted that, were the Commissioner to permit the advancement of this claim, this Appellant's liability should be

increased by this amount, along with the sum of €7,933 that he said should arise from the Appellant's failure to take into consideration opening and closing account balances and wages and supplies paid for by the Appellant from cash that were not taken into consideration by Appellant Witness 2 when seeing to the Appellant's VAT returns.

Assessment 3

184. As regards this assessment, counsel for the Respondent began his submission by referring to the statement of [redacted], the brother of Appellant Witness 3 and fellow employee of the Appellant, made to Respondent Witness 2 during his site visit, that sales were made into tanks and drums in addition to directly into the tanks of agricultural vehicles. This, counsel said, was significant. So too was the admission of Appellant Witness 3 in evidence that certain construction workers were prone to fill their bowsers at the Appellant's station. The reason why it was significant was that it ran contrary to the very basis of the Appellant's case made on appeal that it was not required to keep certain records because the only supplies made were directly into tractors and the like.

185. Counsel then submitted that no coherent explanation had been given as to why some of the supplies of MMO for the period in question were recorded as being "*invoice sales*" and "*non-invoice*" sales. The Appellant's own explanations to the Respondent had been to the effect that the distinction between the two was that the latter constituted sales dispensed from pumps on the forecourt. Where then had the invoice sales been dispensed from? Counsel for the Respondent posed the following question:-

> *"If it was the case that there was but one tank that was sealed and delivering MMO into the tanks of tractors, then why would you have invoice sales and why would you have different sales and why is there two different systems and why is it not all explained and accounted for* […]"

186. Counsel for the Respondent then moved to the 2012 Regulations. In this respect he submitted, *inter alia*, that Regulation 18(1) therein required those involved in the selling or dealing in fuel to record information on their ROM. Together, subsections (2) and (3) of Regulation 18 set out the information that had to be recorded. Thus, subsection (2) provides that persons selling or dealing in fuel must detail, *inter alia*, the nature, date and quantity of the sale and the identity and address of the person from whom fuel was purchased or to whom it was sold. Subsection (3) creates an exception where fuel is suppled "*in the course of fuelling the tanks of vehicles".* In such circumstances, subsection (3) mandates that the information that must be recorded on the fuel trader's ROM is *"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 "*the aggregate*

quantities of each specified description of mineral oil supplied on each day in the course of fuelling the fuel tanks of vehicles".

187. Counsel for the Respondent then drew attention to Regulation 23 of the 2012 Regulations, concerning the information that a "consigning mineral oil trader" must include on a "delivery document". This includes: the name, address, Value-Added Tax registration number and the mineral oil trader's licence number of the consigning mineral oil trader; the address of the premises or place from which the mineral oil is to be consigned for delivery; 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; the address of every premises or place to which a delivery is to be made; the date on which the delivery is dispatched; the quantity and specified description of mineral oil to be delivered; the registration number of the vehicle used for the delivery; and, in relation to dockets made out in respect to the supply of fuel subject to a reduced rate of excise, including MMO, a statement that such fuel must not be used as a propellant in the tank of a motor vehicle.

188. Counsel for the Respondent recognised that the Appellant was making the claim that it did not make deliveries of fuel and thus Regulation 23 would not apply to its supplies (though it is worth noting the he did not appear to concede that this claim was true as a matter of fact). However, he then drew attention to Regulation 24, entitled "*Direct Supply of marked gas oil and marked kerosene",* which prescribes that where a fuel trader supplies MMO to a person at their own premises, in an amount not exceeding 2,000 litres, which is not for delivery to any other person, that fuel trader is obliged to "*keep a record showing all the information relevant to that supply that is required under Regulation 23(4)"* (i.e. the information to be included on a delivery docket). Regulation 24(3) then provides that where this information cannot be obtained by the supplier of the MMO it is incumbent on them to *"inform a proper officer immediately*".

189. However, counsel for the Respondent submitted that, even if it was held that all the Appellant was required to do over the period at issue by way of record keeping was maintain the 'daily totals' of its fuel, including MMO, held and supplied, this had not been done. Counsel for the Appellant had, in cross-examining Respondent Witness 3, produced documents that that it was suggested constituted such daily totals for the month of May 2014. This was the first time that this witness had seen these documents. Moreover, counsel for the Respondent submitted that what the Appellant was in effect doing was asking the Commissioner to infer from these documents ostensibly relating to May 2014 that records as required by Regulation 18(3) of the 2012 Regulations were

also kept for June – December 2014, these being the other months relevant to Assessment 3. This, it was submitted, was an inference that could not, or should not, be drawn.

190. Counsel for the Respondent then returned to the admissions made by persons connected to the Appellant that it had made supplies of MMO otherwise than into the tanks of farm vehicles. Where, he asked, were the records relating to these supplies containing the information specified in Regulation 18(2) of the 2012 Regulations? No explanation had been provided as to their absence.

191. Counsel for the Respondent submitted that all of this led Respondent Witness 3, quite reasonably in his view, to be unsatisfied that all of the 439,004 litres of MMO held by the Appellant over the course of the period May – December 2015 was supplied to be used for the limited purposes prescribed by legislation. Being so unsatisfied, Respondent Witness 3, as a consequence of section 99(10) of the Finance Act 2001, felt compelled to apply the standard, rather than the reduced, rate of excise on the MMO in question and make Assessment 3 pursuant to the powers conferred on him by section 99A of the Finance Act 2001.

Material Facts

192. The facts that are material to this appeal that are not in dispute are as follows:-

- the Appellant is a limited liability company incorporated in 2009, that operates a fuel filling station in County [redacted], near the border with Northern Ireland;
- the area in which the Appellant's filling station is located is rural;
- on the forecourt of the Appellant's filling station is located a small shop from which are sold items such as confectionary, cigarettes and drinks;
- the Appellant sells petrol, DERV and MMO from the filling station premises;
- the filling station has four pumps on its forecourt;
- [redacted] is a Director of the Appellant;
- prior to [redacted] becoming a Director of the Appellant, [redacted], his brother, was a Director;
- [redacted] ceased to be a Director of the Appellant on or about 2010;
- prior to the incorporation of the Appellant, [redacted], the father of [redacted] and [redacted], owned and operated the fuel filling station;

- [redacted] was at all times material to these appeals an employee of the Appellant, as was his brother [redacted];
- [redacted] tended to open and close the filling station in the morning and at night, but would often not be present during the day;
- during the day the filling station would be staffed by employees, who were local schoolchildren or students, as well as by [redacted];
- at some point in early 2012, a person known as John approached the Appellant with an offer for the supply of DERV;
- the price at which he offered to supply this DERV was less than that offered by the Appellant's existing supplier;
- the Appellant had no history of doing business with this person, in particular in purchasing fuel from him;
- [redacted] understood that John was representing [redacted] Logistics and it was this business from whom the Appellant was purchasing its fuel;
- the Appellant had no history of dealing with [redacted] Logistics;
- [redacted] Logistics was the trading name of a person by the name of [redacted];
- prior to purchasing fuel, the Appellant checked whether the VAT number of [redacted] Logistics was valid. This was done by use of the VIES website;
- the fuel delivered by John to the Appellant came in trucks bearing no livery;
- the Appellant paid for the fuel by way of cheques;
- prior to the making of each delivery John would instruct [redacted] as to who to make the cheque in question out to;
- as regards the 22 cheques relating to the period in issue in respect of Assessment 1, four of the cheques were made out to [redacted] Fuels Limited, five to [redacted], twelve to cash and one to [redacted];
- the cheques in question were pre-signed by [redacted];
- the total amount of VAT paid by the Appellant by way of the 22 cheques was €39,699.00;
- the Appellant claimed deductions in respect of this VAT pursuant to section 59 of the VATCA 2010;

- all of the VAT paid by the Appellant by way of the 22 cheques, whether to [redacted] Fuels Limited, [redacted], [redacted] or cash was not returned to the Respondent;
- in its judgment of 16 April 2018 in *Criminal Assets Bureau v Base Garage Supplies,* the High Court found [redacted]els Limited to have carried out VAT fraud involving the supply of MMO;
- the 22 cheques, or the proceeds therefrom, were lodged into two separate bank accounts – one in the name of [redacted] Fuels Limited and the other in the name of [redacted] Logistics;
- significant sums of money moved between the accounts in the name of [redacted] Fuels Limited and [redacted] Logistics;
- the Appellant's method of calculating its VAT liability for each return period was to add the total amount of sales by invoice to the total amount of cash receipts lodged to its bank account in that period, while deducting the amount of cash receipts attributable to invoice amounts already accounted for;
- over the period May – December 2014 the Appellant acquired 439,004 litres of MMO;
- the total amount received for this fuel when sold by the Appellant was €426,626;
- the Appellant supplied a portion of the MMO it held over the period May – December 2014 into tanks and/or containers other than the fuel tanks of vehicles;
- the Appellant did not keep records containing the names, addresses and VAT numbers of the persons who purchased its MMO;
- in a meeting of 25 February 2016 the Appellant was informed by an officer of the Respondent that it was not required to record the details of persons who received supplies of fuel into their fuel tanks directly from the Appellant's forecourt pumps.

193. In addition, the Commissioner makes the following findings of fact in relation to matters that were not agreed, or in relation to which agreement was not clear:-

- the fuel in question in respect of Assessment 1, for which the Appellant claimed the VAT input deductions at issue, was MMO that had been subjected to a 'washing' or 'laundering' process prior to its supply to the Appellant;
- over the period in issue in respect of Assessment 3, the Appellant did not keep aggregate totals of the amounts of each type of fuel supplied into the tanks of motor vehicles on each day.

- over the period in issue in respect of Assessment 3, the Appellant made supplies of MMO other than into the fuel tanks of agricultural vehicles.

194. The reasons for the findings of fact set out in the preceding paragraph are given in the following part of this Determination.

Analysis

195. It is appropriate at the outset of this part of the Determination to deal with where lies the burden of proving factual matters in dispute.

196. In *Menolly Homes v Revenue Commissioners* [2010] IEHC 49, Charleton J held at paragraph 22 that:-

> *"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."*

197. The rationale for this is apparent from the earlier judgment of Gilligan J in *T.J. v. Criminal Assets Bureau*, [2008] IEHC 168, where he held at paragraph 50:-

> *"The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period*.

198. The statement of the law at paragraph 22 of *Menolly Homes v Revenue Commissioners* has been cited on many occasions in Determinations of the Commission and the Commissioner did not understand there to be any disagreement between the parties that it was applicable, at least in so far as the appeals of Assessments 2 and 3 were concerned. The Commissioner finds as a matter of law that the burden of proving, to the standard of the balance of probabilities, factual matters at issue between the parties in these appeals lies with the Appellant.

199. However, it must be observed in relation to Assessment 1 that the position is different as regards the proving that the Appellant knew or ought to have known that, in purchasing the supplies of fuel in question from the person known as John, it was participating in transactions connected with fraud.

200. This is an appeal in which the Appellant claims entitlement to the deduction of the VAT it incurred in making supplies of this fuel. As was held in *Kittel,* the deduction of input VAT by taxable persons making supplies, allowed for under Article 168 of Council Directive 2006/112/EC ("the VAT Directive"), is fundamental to the functioning of the VAT system, as it ensures that each supply of a service or good is 'VAT neutral'. In *Mahageben,* Case C-80/11 (ECLI:EU:C:2012:373), the Court of Justice held that persons making taxable supplies have, prima facie, the right to deduct VAT incurred in the making of their supplies and it stated at paragraph 45:-

> "*In those circumstances, a taxable person can be refused the benefit of the right to deduct only on the basis of the case-law resulting from paragraphs 56 to 61 of Kittel and Recolta Recycling, according to which it must be established, on the basis of objective factors, that the taxable person to whom were supplied the goods or services which served as the basis on which to substantiate the right to deduct, knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction*."

201. The Court of Justice then proceeded to find at paragraph 49 of the same case:-

> *"Given that the refusal of the right to deduct in accordance with paragraph 45 of the present judgment is an exception to the application of the fundamental principle constituted by that right, it is for the tax authority to establish, to the requisite legal standard, the objective evidence which allows the conclusion to be drawn that the taxable person knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the supplier or by another trader acting earlier in the chain of supply*." [Emphasis added]

202. It was not clear in this appeal whether the Appellant was admitting that the transactions at issue involving the supply to it of fuel were connected to fraud, perpetrated by its supplier or suppliers. The Commissioner thus approaches the questions of (a) whether there was such fraud and (b) whether the Appellant knew or ought to have known of its existence as being ones that it must fall to the Respondent to prove on the balance of probabilities.

Assessment 1

203. In respect of this appeal, the Commissioner finds, firstly, that the evidence suggests that it is highly likely that the person or persons from whom the Appellant acquired the supplies of fuel in question were, in supplying that fuel, engaged in the perpetration of fraud. The undisputed facts are that the Appellant was approached 'cold' with the offer of

competitively priced DERV. It is not clear exactly from whom the Appellant thought it was buying this fuel. The evidence of Appellant Witness 3, one of its employees, was to the effect that he thought, though he was not certain on this point, that the vendor w[redacted]". The Appellant's own correspondence told a different story, however, in that it was stated in no uncertain terms that the source was, on the contra[redacted]Fuels Limited. Either way, the evidence of Respondent Witness 1, which was not in fact challenged in cross-examination, was that both [redacted] Logistics and [redacted] Fuels Limited had made large purchases of MMO, from [redacted] Fuels and [redacted] Fuels respectively and, at very least in respect of [redacted]uels Limited, had not made purchases of DERV sufficient to supply the Appellant with that type of fuel. In other words, what went in was MMO and what came out was, at least in appearance, unmarked DERV.

204. It is, of course, a fact already established in the High Court in *Criminal Assets Bureau v Base Garage Supplies* that [redacted]Fuels Limited was a company involved in the laundering of fuel at around the time at issue in this appeal. In her judgment in that case, Stewart J explained in some detail the typical "missing trader" fraud relating to the sale of fuel, in existence in the early part of the last decade, whereby a person or entity would acquire MMO, remove the dye, sell it as DERV at a substantial profit, keep the VAT charged and thereafter disappear or dissolve itself. It is impossible in the Commissioner's view to avoid the conclusion based on the available facts that this is precisely the scheme that the person or persons who supplied the Appellant with the fuel in question were carrying out.

205. It is therefore found as a fact material to the Determination of the appeal of Assessment 1 that the fuel purchased by way of 22 cheques, which ended up lodged into two bank accounts, one in the name of [redacted] Fuels Limited and the other in the name of [redacted] Logistics, was originally MMO which, following a laundering process, was sold to the Appellant as DERV. It is further found, though this is a fact that would not appear to be in dispute, that the evidence of Respondent Witness 3 proves that as part of the sale of this fuel to the Appellant, the person or persons controlling [redacted] Fuels and the business known as [redacted] Logisitics, a trading name of a person whose identity had been stolen, charged VAT but did not return it to the Respondent. This too was part of a fraud connected with the transactions at issue involving the supply to the Appellant of the fuel in question.

206. Having made this finding, the question that arises is whether the Appellant knew or ought to have known that by buying the fuel in question it was entering into transactions connected with fraud. For the reasons set out hereunder, the Commissioner finds that it is clear that they ought to have been so aware.

207. The evidence given in this appeal by the Appellant's own witnesses was that it had an 'on-boarding' procedure that involved establishing by use of the VIES website whether any prospective supplier had a valid VAT number. It did this in respect of the number attributable to [redacted] Logistics. This was the sum total of what was described elsewhere as its "due diligence".

208. The circumstances in which the Appellant came to acquire the fuel giving rise to its VAT deduction claims could not but have raised serious suspicions about its provenance and true nature. Appellant Witnesses 1 and 3 accepted in their evidence that they were well aware of reports of MMO laundering around this time (though both were slow to concede that it was more prevalent locally than nationally). It would appear from the evidence of Appellant Witness 3 that when he was approached without invitation with the offer of fuel at a price better than that available from the Appellant's existing supplier, the Appellant took up the offer. This occurred without, it would seem, anybody involved in the Appellant caring to find out the identity of the person who would proceed to supply it with large amounts of what was described as DERV. Conduct of this nature in such circumstances was on its own a major failing on the part of the Appellant and one that is difficult to explain, especially when one recalls that the supplies were made by un-liveried trucks.

209. The Commissioner heard extensive evidence in the course of the hearing from Appellant Witness 3 on the subjects of the first contact by the supplier, the fuel delivery arrangements and the method of payment. In respect of the last of these, the Appellant, was prepared to make out cheques to whoever the person known as John suggested. This varied from time to time and was not always [redacted] (whose trading name was [redacted] Logistics). Sometimes it was [redacted] Limited, sometimes cash and, for reasons that were never explained, [redacted]. These cheques would be pre-signed by a person, [redacted], who may or may not then have been a Director of the Appellant and left for a staff member, often it would seem a student or schoolchild or other type of student, to give to the person making the delivery on behalf of the person known as John. All of this was done, according to the evidence of Appellant Witness 3, at the behest of this person whose second name remained a mystery to all.

210. In order to establish whether a person ought to have known that they were taking part in a transaction connected with fraud, the Court of Justice held in *Kittel* that it is necessary to ask whether that person *"*[took] *every precaution which could reasonably* [have been] *required of them to ensure that their transactions* [were] *not connected with fraud* […]". It could not be clearer to the Commissioner that the measures taken by the Appellant were far short of what could reasonably have been expected of it. Indeed, the evidence

suggests that persons involved in the Appellant's business were unclear as to who they were purchasing the fuel in question from. As counsel for the Respondent submitted, with which submission the Commissioner agrees, performing the VIES check told the Appellant nothing whatever except that [redacted] Logistics had been issued a VAT number. Counsel for the Appellant, in his submission, sought to suggest that the Appellant was being made liable by the Respondent for its own shortcomings. The Commissioner does not believe that it follows from the issuing of VAT numbers to [redacted] Fuels Limited and [redacted] Logistics that there was a failing on the part of the Respondent. However, the question is in any event irrelevant to the test the Court of Justice put forward in *Kittel,* which is to establish what the person in the position of *the Appellant* could reasonably have been expected to have done and to establish whether they did it. The Commissioner finds that in this instance it is clear that the Appellant did not. Consequently, the Appellant is not entitled to the deductions of €39,699.00 claimed in respect of VAT incurred on the supply to it of fuel in transactions connected with fraud.

Assessment 2

211. The Commissioner now turns to Assessment 2 concerning VAT owed in respect of the period May – August 2015.

212. It is worth emphasising that, unlike in the appeal of Assessment 1, it is the Appellant who bears the burden in this appeal of proving factual matters in dispute, in accordance with the law as expressed in *Menolly Homes v Revenue Commissioners.*

213. The manner in which this appeal proceeded was somewhat out of the ordinary. The parties were in agreement that the basis for the assessment, namely that the Appellant had charged, but did not return, VAT on supplies made to [redacted] Haulage Limited, was correct. They were further agreed that the sum originally assessed of €19,807.19 was incorrect and should be adjusted downwards to €16,103. In addition, however, the Respondent contended that there was a further VAT liability for this period arising in the amount of €7,933. This, it said, arose from the Appellant's failure in calculating the amount of VAT charged on supplies made to take account of (a) the effect of the opening and closing balances at the beginning and end of each month and falling within the period in question and (b) wages and supplies paid for out of un-lodged cash receipts, which were therefore excluded from the Appellant's calculation of its taxable income.

214. Respondent Witness 1 gave evidence that he formed this view in the course of examining the accounts of the Appellant so as to reach a conclusion as to the merits of its argument, expressed in its notice of appeal of Assessment 2, that VAT received on foot of the aforementioned supplies to [redacted] Haulage had already been returned to the Respondent

and was being 'double counted' by the Respondent. According to the evidence of Respondent Witness 1, based on the content of the Appellant's own accounts, the sum of VAT not returned to the Respondent in respect of the period in question for the reasons set out in the latter part of the preceding paragraph of this Determination was €4,724.

215. However, it is clear that Respondent Witness 1 had a lack of faith in the accuracy of the Appellant's accounts, including in relation to its sales of fuel, which derived from the gulf of €797,326.10 for the year 2012 between receipts and lodgements discernible from its nominal ledger. Due to this, Respondent Witness 1 decided to use till meter readings and an AA computed price for fuels over the period in question to, in his view, better estimate fuel sales of a 'non-invoice' kind. This led Respondent Witness 1 to conclude that there had been such sales to the value of €521,111, rather than €478,687, with that the effect that VAT of €7,933 should be assessed.

216. The Appellant did not in the course of the appeal hearing proffer any coherent rebuttal of the factual analysis of Respondent Witness 1 that its method of calculating its VAT was flawed in the manner already outlined. This was so despite it having had ample notice of the position that the Respondent intended to take in the appeal of Assessment 3. Bearing in mind where lies the burden of proof, the Commissioner finds that it follows that an additional VAT stands to be charged.

217. However, Appellant Witnesses 1 and 3 both cast doubt on the reliability of the conclusions drawn from the Respondent's 'business economics' exercise, on the grounds that the AA's price per litre calculation was an inaccurate guide to its own prices. It appears to the Commissioner that at the heart of the Respondent's assessment is the view that the Appellant's income was more likely to be accurately reflected in its business economics exercise, than in the accounts available. However, the Commissioner does not agree with this. The Respondent's main assertion at hearing was that there was a gulf between income and lodgements for the year 2012. That, however, was several years prior to the period in question. The truth is that the business economics exercise did not reveal a major difference between the income thus estimated and what was disclosed in the Appellant's own accounts and returns. The Commissioner is satisfied, therefore, that income of €478,687 is more likely than that of €521,111 to represent the Appellant's income from non-invoice sales. Accordingly, the VAT that should stand owing, over and above the VAT of €16,103 that it agreed was due and owing on foot of the two supplies to [redacted] Haulage Limited, is €4,724 rather than €7,933.

218. Lastly, early in the hearing of the appeal the Respondent indicated that it held the view that a further sum of €6,045 of VAT should be assessed on the grounds that there were

supplies of non-fuel goods such as confectionary, cigarettes, drinks and sports equipment made on which the Appellant owed VAT. At submission stage the Respondent conceded that this sum could be reduced to €1,998 because it accepted that the sports equipment element was unlikely to have constituted a supply acquired by the Respondent for the purpose of resale. As noted already, the Respondent's argument that additional VAT of €7,933 was owed was well-flagged and the Appellant thus had the opportunity to prepare for it. This was not the case for the argument in relation to the supposedly unreturned VAT on non-fuel supplies. In every tax appeal it is incumbent on both parties to set out their case in advance, where this is possible. For example, an Appellant is held, pursuant to 949I of the TCA 1997, to the grounds of appeal specified in their notice of appeal unless new grounds emerge that could not have been raised initially. In comparable terms, provision is made under section 949Q of the TCA 1997 for parties to set out the facts on which they intend to rely in their appeal by means of the Statement of Case and, pursuant to section 949S, their legal arguments in the Outline of Arguments.

219. While the Commissioner does not make criticism of the Respondent regarding the raising of this argument concerning additional taxable supplies, he is not willing in the circumstances to exercise discretion to allow the admission of this aspect of the appeal in circumstances where there appeared to be little if any opportunity of the Appellant to consider and respond to the factual matters arising. To do so would create a risk of unfairness that must be avoided. Accordingly, none of the additional sum of €6,045, which the Respondent argued orally should be accounted for in the Commissioner's Determination is allowed.

Assessment 3

220. The final appeal to address is that relating to excise duty arising in respect of the period May – December 2014.

221. The evidence of Respondent Witness 1 was that he raised Assessment 3 on the grounds that (a) he believed that the Appellant failed to meet record keeping requirements prescribed under the 2012 Regulations and (b) the Appellant having so failed he was unsatisfied that the 439,004 litres of MMO acquired over the period in question was used for specific purposes allowed under law (in this case for filling the fuel tanks of agricultural vehicles, as claimed by the Appellant).

222. It is important to bear this in mind given that counsel for the Appellant asked Respondent Witness 1 in cross-examination how it was that he had managed to 'transform' green diesel to white. This, it was contended in the Appellant's written submissions, was the Respondent's own version of Jesus' miracle at Cana. What actually happened though

was more prosaic. The Respondent, being unsatisfied in the manner set out above, applied the standard rate of excise applicable to diesel in the form of DERV, rather than the reduced rate permitted for diesel in the form of MMO. This was, as Respondent Witness 1 saw it, in accordance with the requirements of section 99(10) of the Finance Act 2001.

223. To the Commissioner's mind, the first thing to establish is whether the Respondent was correct to conclude that the Appellant had failed to meet the requirements of excise law regarding the holding or delivery of the fuel that it acquired and then later supplied to others.

224. Much was made in the appeal hearing of the propensity, or otherwise, of farmers to fill the fuel tanks of their tractors at forecourt pumps. This question, or rather the question of whether the Appellant has proved to the requisite standard that this was what accounted for the supplies of its MMO over the period in question, is something which is addressed hereunder. However, from the point of view of deciding what the Appellant was and was not obliged to keep by way of records under excise law, it must be recognised that by the admission of Appellant Witness 3, not all of the Appellant's supplies of MMO were into the fuel tanks of tractors. Some instead were into the 'bowsers' owned by construction companies operating in the area. These, he confirmed, were trailed behind vehicles. The fact that supplies of MMO went elsewhere than into the fuel tanks of tractors was in keeping with what Respondent Witness 2 said [redacted] stated to him on his site visit in February 2016, though of course this statement was to the effect that customers also filled fuel drums at the forecourt.

225. It is important also to repeat that Appellant Witness 3's own evidence was that he was not normally present at the filling station premises throughout the day. By and large he took care of opening and closing and left the running of the premises during the day in the hands of [redacted] and various schoolchildren/students. It follows from this that Appellant Witness 3 cannot himself say in specific terms how sales were made over the period in question.

226. The net effect of the evidence that is available to the Commissioner is that, in all likelihood, some portion of the fuel supplied by the Respondent over the eight months covering the period in question was into bowsers and/or drums. As a result, the record keeping requirements under Regulation 18(2) of the 2012 Regulations in respect of supplies of fuel, *inter alia,* that the names and addresses of the purchasers be taken and kept, were not fulfilled.

227. Moreover, it would appear to the Commissioner that Regulation 24 of the 2012 Regulations, dealing specifically with the *"Direct supply of marked gas oil and kerosene",* provides at (1) that where a mineral oil trader supplies MMO at their own premises:-

> *"[…]*
>
> > *(b) to a person other than a mineral oil trader, in a quantity not exceeding 2,000 litres and not for delivery to any other person*
>
> *The supplying mineral oil trader shall keep a record, showing all the information relevant to that supply that is required under Regulation 23(4)*."

228. The information required under Regulation 23(4) includes, at (c), the names and addresses of the persons to whom the fuel in question is supplied. In the context of Regulation 23, which concerns the information that must be set out on delivery dockets, this means supply by way of "delivery". However, in so far as Regulation 24(1) transposes the information requirements set out in Regulations 23(4) to supplies made by a mineral oil trader at their own premises that are "*not for delivery to any other person",* this, as far as the Commissioner can establish, must mean that the names and addresses of those who purchase MMO directly from fuel pumps, even if that purchase of MMO is supplied directly into the fuel tanks of agricultural vehicles, must be kept.

229. Lastly in this regard, even if the Commissioner is wrong in finding that the Appellant was obliged as a matter of law to keep the names and addresses of the persons to whom it supplied MMO, however carried out, the Commissioner finds that the Appellant was, in any event, not keeping the information mandated by the 2012 Regulations. This is so because, under Regulation 18(3)(b) of this legislation, a mineral oil trader such as the Appellant must keep a record of:-

> "*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*."

230. In the course of his cross-examination, counsel for the Appellant put three stapled together pages to Respondent Witness 1. The first of these had at its top the handwritten words "*May 2014 ROM example*" and set out "*Product Balances*" and "*Inward Movements Per Supplier*" in relation to various types of fuel, including MMO. The product balance of MMO was stated to be 75,109. The second page contained an 'Excel' type table with the heading *"Fuel intakes – May 2014"* and specified, *inter alia*, the date, source, invoice reference, quantities and fuel types of various fuel deliveries received. At the bottom of the page was, *inter alia,* the opening balance for petrol, DERV and MMO and, beside

that, the "*Forecourt Sales Closing Balance"* which, in respect of MMO, was 75,109. At the bottom of the third page was handwritten "*Daily Report Kept By Company May 2014 Sample".* Above that were four columns purporting to show the amount of DERV, MMO and petrol sold by the Appellant on dates in May 2014. Again, the aggregate of the daily totals in respect of MMO came to 75,109.

231. Counsel for the Appellant asserted in closing submission that the daily report on the third page had been drawn up by [redacted] and constituted compliance with the requirement arising pursuant to section 18(3) of the 2012 Regulations that daily measurements and aggregate quantities of fuel supplied into the tanks of vehicles be kept, at least in respect of May 2014. The documents were thereafter characterised in the submissions of counsel for the Appellant as evidence that the Appellant had met its record keeping requirements.

232. The first thing to observe about this document is that it was referred to for the first time at hearing in the course of counsel for the Appellant's cross-examination of Respondent Witness 1. This was unsatisfactory as the Commissioner cannot be satisfied as to its authenticity without evidence from the person who it was suggested composed it, [redacted], whose absence from the hearing went unexplained. The Commissioner thus rules the document purporting to be handwritten totals of fuel held and supplied over the month of May 2014 to be inadmissible. Based on the absence of admissible evidence, the Commissioner finds as a fact that the Appellant was not keeping the records required of it under Regulation 18(3)(b) of the 2012 Regulations, namely daily aggregate quantities of each type of fuel held by it and supplied into the tanks of motor vehicles.

233. However, were Commissioner to be in error in so ruling, such error would be would be of no effect. This is so because, even if taken as admissible evidence, the height of what the document might indicate is that 'daily totals' were recorded for the month of May 2014. Where then were the equivalent documents for the remaining months in question? From their absence the Commissioner draws the inference that that they were not taken and as a consequence, for this reason also it would follow as a matter of law that the Appellant did not meet the record keeping requirements required of it by Regulation 18(3) of the 2012 Regulations for the whole period at issue.

234. As noted already, in making Assessment 3, Respondent Witness 1 decided that he was not satisfied that all of the 439,004 litres of MMO supplied by the Appellant over the period in question was supplied for use in circumstances permitted under legislation, in particular for agricultural purposes. Rather, the Respondent Witness 1 gave evidence that he feared that it was sold for use as propellant by motor vehicles. He did, however, allow that

140,000 of the “non-invoice” MMO sales were made for agricultural purposes. This was done on what he said was a “concessionary basis”.

235. Once again, it is necessary to repeat in the context of the appeal of Assessment 3 that it is the Appellant that bears the onus of proving that the Respondent’s assessment was in error. In other words, if the Appellant is to succeed in its case that the sum assessed should be reduced to nil, it must show on the balance of probabilities that all of its supplies of MMO were to be used by non-road going machinery.

236. The factual assertion underpinning the Appellant’s appeal was a straightforward one: the great bulk of its MMO supplies were for agricultural purposes, specifically for fuelling the tanks of tractors. This was carried out at its forecourt pumps. It would seem from the evidence of Appellant Witness 3 that little if any MMO was supplied to those involved in farming in the locality in any other manner. Farmers did not, according to Appellant Witness 3, arrive with vessels such as jerry cans, intermediate bulk containers or trailed fuel tanks, for the purpose of fuelling them.

237. The Commissioner does not accept this evidence as true. Whether or not there was a problem in the locality with the theft of fuel, it must surely have been a matter of some significant inconvenience for a farmer to have to make a journey by tractor from their farm to the Appellant’s station on every occasion that they needed to replenish their tank with MMO. That nobody would have considered the convenience of storing fuel on their farm a risk worth taking strikes the Commissioner as being inherently improbable.

238. The only person called by the Appellant to give evidence at the appeal hearing who could say anything about the manner of the supplies of MMO made by it was Appellant Witness 3. Even at that, he was by his own account only an irregular attender at the forecourt during the day. The Appellant could have called at least one person engaged in farming in the locality who could have attested to the fact that their habitual method of acquiring MMO was as claimed by the Appellant, thus offering a degree of corroboration. It did not do so. Equally, the Appellant did not see fit to bring forward as a witness anyone who worked on a regular basis at the filling station premises during the day. Mostly notably absent in this respect was any explanation as to why [redacted] was not heard from, though of course other employees could have been called as witnesses.

239. Had the Appellant adduced any corroborating evidence of the kind outlined above, the Appellant might have dispelled some or all of the doubt about whether the MMO supplied over the period in question was to customers who intended to use it for purposes other than as propellant on the road. The Appellant came to this appeal on full notice that it had failed to satisfy the Respondent that its MMO had been supplied for legitimate purposes.

In particular, it was aware that Respondent Witness 1 feared it had been supplied into the tanks of motor vehicles. Indeed, in his evidence Respondent Witness 1 said that in the performance of his function in other cases, he had come across such activity.

240. In effect, the Appellant's counter to these fears was to say that this could not have happened because cars to which it would have supplied MMO would, as a matter of near inevitability, have been identified in roadside checks conducted by the Garda Síochána. This would, with equal inevitability, have led them to identify the Appellant's filling station as the source of the unlawfully used MMO. The Commissioner however does not believe that either of these propositions would necessarily follow from the Appellant's supply of MMO to motorist customers.

241. Section 99(10) of the Finance Act 2001 requires that where there has been non-compliance with the law regarding the holding or delivery of an excisable product taxed at a reduced rate, and "*it is not shown to the satisfaction of the* [Revenue] *Commissioners"* that the excisable product has been used for a specific purpose or in a specific manner prescribed by law, the person who holds or receives the product for sale or delivery is liable to pay the standard rate of excise applicable. In this appeal, it is the Commissioner who must be satisfied by reason of evidence proffered that the MMO in question that was held by the Appellant was, on the balance of probabilities, sold to customers to be used for legitimate purposes. The Commissioner is not so satisfied. All that is available to him is an explanation by the Appellant about the manner of the supply of the MMO that is lacking in credibility and is given by a person who was not present on a regular basis to oversee the actual supplies of fuel being made. The inference that the Commissioner draws from the provision of this explanation is not just that the manner of the supply is suspect, but so too is the actual use to which it was put. Having had the benefit of hearing evidence of the witnesses called by the parties, the Commissioner shares the concerns held and expressed by Respondent Witness 1.

242. In cross-examination and at hearing counsel for the Appellant called into question the basis on which Respondent Witness 1 arrived at the conclusion that the sale of 140,000 of the 439,004 litres of MMO acquired over the period in question was for legitimate purposes. Counsel for the Appellant suggested that this was a figure lacking any rational basis. This submission is something of a double edged sword from the Appellant's point of view, as assessments may on appeal to the Commission go up as well as down. However, the Commissioner considers that there is logic to the assessment in that it is probable that some portion of the Appellant's MMO sales were made for farming purposes and other permissible purposes and not, as is impermissible, as propellant in road

vehicles. It bears repetition that it is the Appellant that bears the burden of proving in this inquiry that Assessment 3 was wrongly decided and this is something that it has failed to do. The Commissioner therefore confirms the assessment arrived at by the Respondent to the effect that 299,004 litres of MMO acquired by the Appellant over the period in question stands to be taxed at the standard rate of excise duty in the form of mineral oil tax.

Determination

243. The Appellant's appeals are determined in the following manner for the reasons set out in the preceding part of this Determination:-

(i) the assessment of the Respondent of 25 April 2016, whereby it assessed the Appellant as owing VAT in the amount of €39,699.00 for the period 1 March 2012 – 30 April 2012 is found to be correct and stands affirmed;

(ii) the assessment of the Respondent of 19 February 2018, whereby it assessed the Appellant as owing VAT in the amount of €19,807 for the period 1 May - 31 August 2015, is increased such that the Appellant is held to have a liability in the amount of €20,827 (this being the sum of VAT in the amount of €16,103 and €4,724);

(iii) the assessment of the Respondent of 16 March 2018, whereby it assessed the Appellant as owing excise duty in the form of mineral oil tax in the amount of €112,647 for the period 1 May – 31 December 2014 is held to be correct and stands affirmed.

244. This Appeal is determined in accordance with Part 40A of the TCA 1997, in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

245. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

246. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
2 January 2025

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997