EXCISE DUTY – hydrocarbon oil – whether vehicles are digging machines – converted Land Rovers fitted with below-floor compressor, hydraulic power pack and electrical generator – whether designed and constructed for excavation – no – whether used on roads for other purposes – in one case, yes – further vehicle with compressor above the floor – decision deferred for parties to provide further evidence

LONDON TRIBUNAL CENTRE

CLIFBREAKERS LIMITED Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: DR JOHN F AVERY JONES CBE (Chairman)

PRAFUL DAVDA FCA

Sitting in public in London on 3 April 2001

Martin S Moorhead MA BAI CEng FICE FCIArb, civil engineer, for the Appellant

Hugh McKay of counsel instructed by the Solicitor for the Customs and Excise for the Respondents

DECISION

1. This is an appeal against the decision on a review made on 8 November 1999 confirming an assessment under section 13 of the Hydrocarbon Oil Duties Act 1979 against Clifbreakers Limited to recover, without any penalty, the rebate on the excise duty on hydrocarbon oils for the period 1 July 1996 to 30 June 1999. The parties have asked us to determine the assessment in principle, leaving the figures to be determined later if they cannot be agreed. The notice of appeal was completed showing Mr Frank Clifford, the shareholder and managing director of Clifbreakers Limited, as the Appellant and, by consent, we directed the name of the Appellant be changed to Clifbreakers Limited. This is necessary since, under section 16(2) of the Finance Act 1994, the appeal cannot be entertained unless the appellant is the person who required the review. The Appellant was represented by Mr Martin Moorhead, civil engineering consultant, and the Commissioners by Mr Hugh McKay.

2. The issue in the case is whether the Appellant's six vehicles are digging machines within paragraph 10 of Schedule 1 to the Hydrocarbon Oil Duties Act 1979. Five of the vehicles are Land Rover pick-up vehicles with a compressor capable of running from the vehicle's engine mounted below the floor, and a hydraulic power pack also capable of running from the engine providing hydraulic power and also operating a 110 volt 4.5 KVA electricity generator. We were greatly assisted by being able to inspect such a vehicle. The five vehicles are converted starting with a long wheel-base Series 3 truck cab Land Rover pick-up which is a vehicle with a cab and open body. The conversion is carried out by three different firms adding the compressor, hydraulic power pack, and electricity generator costing £10,000 to £15000 in total. The compressor is welded to the chassis. We were shown a picture of the chassis with the modifications written in. These comprised the following: gearbox modified to drive the compressor and hydraulic power pack when the vehicle is stationary; cooling system modified to take a larger radiator and air oil cooler for the compressor; battery moved to driver's cab; vehicle's hydraulic system modified to provide control to the engine when driving the compressor and hydraulic power pack; suspension up rated to take heavier loads; hydraulic power pack and switch gear and cooler built into vehicle's bodywork at the rear; fuel tank removed and compressor put in its place; eight heavy duty hydraulic lines built into the vehicle; exhaust system modified to clear compressor system and provide safe stationary running. All of these modifications are under the floor. The modifications that can be seen above the floor level in the rear part of the body are the hydraulic power pack, electrical generator and a 60 gallon fuel tank taking up most of the floor area leaving only about 2 feet at the rear for carrying tools, with a 5 gallon hydraulic tank on top of it. Fuel is pumped manually from the large tank to the smaller one. Finally, a steel lid is fitted which is hinged at one side of the vehicle. The type of tools carried comprise: 5 compressed air lines, a heavy road breaker, a chipping hammer, 2 light percussive chipping hammers, a rock drill, a cut off grinder, various steel chisels, points, drill rods and cut off blades, a tripod light and a rear-mounted vice. Additional tools might be added for an unusual job comprising air driven hand drills, disc cutters, electrically driven floodlights, diamond drills or hammer drills, hydraulically driven clay spades and cut off saws.
3. The sixth vehicle was bought complete with a compressor mounted above floor. Mr Moorhead was under the impression that the categorisation of this vehicle was not in dispute but Mr McKay said that it was. Apart from the compressor, no other power supplies are included.
4. We heard evidence from Mr Clifford. The Appellant's business consists of cutting and breaking hard materials such as concrete, hard brickwork or reinforced concrete. The vehicles are used in the Appellant's business by carrying hand-operated tools running from compressed air, drilling equipment running from hydraulic power or electricity all provided by the power supplies in the vehicle. Most of the work is carried out at or below ground level but some work is done above ground level so long as the equipment will reach it.
5. Since the vehicles are clearly constructed or adapted for use on roads, no rebate is allowed on heavy oil used as fuel for the vehicle (section 12(2) HODA 1979) unless the vehicle is excluded from the definition of road vehicle by being an excepted vehicle falling within Schedule 1 of HODA 1979, of which the relevant category is that of a digging machine, the definition of which is:

"10.—(1) A digging machine is an excepted vehicle.

2. In sub-paragraph (1) above ‘digging machine’ means a vehicle which is designed, constructed and used for the purpose of trench digging, or any kind of excavating or shovelling work, and which—
    a. is used on public roads only for that purpose or for the purpose of proceeding to and from the place where it is to be or has been used for that purpose, and
    b. when so proceeding does not carry any load except such as is necessary for its propulsion or equipment."

Contentions of the parties

1. Mr Moorhead contended that the vehicles qualified and had been accepted as qualifying by the Department of Transport’s Driver and Vehicle Licensing Centre (DVLC) for vehicle licensing purposes which until 1995 used the same definition apart from a minor grammatical change of no consequence. The previous hydrocarbon oil definition of vehicles excepted from being road vehicles was by reference to the vehicle licensing provision contained in the Vehicle Excise and Registration Act 1994. By the Finance Act 1995 the same definition as had been contained in the Vehicle Excise and Registration Act 1994 was put into a substituted Schedule 1 to the Hydrocarbon Oil Duties Act 1979. The licensing definition was also changed and this is no longer a relevant category. The Appellant approached the DVLC on 22 March 1976 before converting the first vehicle stating that it wanted the vehicle to qualify as a digging machine. After further correspondence, the Department replied on 13 September 1976 accepting that the vehicle would be a digging machine if converted in accordance with one of the proposals put forward. In 1983 the DVLC made a visit following a report from the Commissioners as a result of which the DVLC wrote to the Appellant on 10 June 1983 accepting the vehicle with the compressor above the floor and the other five vehicles were digging machines so long as they were modified in accordance with the letter of 13 September 1976. In 1986 the Commissioners again brought the matter to the attention of the DVLC who approached the Appellant by letter of 31 July 1986. Further correspondence comprising four letters by each side during which the Appellant provided a photograph of one of the vehicles and a list of the tools carried in it. Finally in their letter of 11 March 1987 the DVLC stated "I am prepared, exceptionally, to accept that Landrover YUY 259W [one of the five vehicles with the compressor below floor] now qualifies to be licensed within the Digging Machine class provided that [paragraphs (a) and (b) of the definition are then set out]." The vehicles are the same as when this ruling was given but during the past eight years, more equipment is carried due to advances in technology.
2. Mr McKay contended that the vehicles failed on all counts: that they were not designed or constructed as digging machines, but modified Land Rovers; that they were not used solely for the purpose of trench digging, or any kind of excavating or shovelling work, because they were also used above ground for cutting holes in a wall; that they were not used on public roads only for digging purposes or for the purpose of proceeding to and from the place where it is to be used or has been used for digging purposes, because there was nothing to prevent the driver and another person in the cab to drive it anywhere (indeed the dispute started with an employee of the Appellant being stopped by the police while driving one of the vehicles on his return home from a family funeral); and that tools were carried in the vehicles which were not capable of being used with a power supply on the vehicle. He said that, although the legislation was the same as that used previously for vehicle licensing, the purpose of the legislation was different and was intended to implement article 8(3)(c) of

Council Directive 92/81/EEC which permits reduced duty of fuel "for vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public highway."

3. Mr McKay referred us to the decision of Dyson J in Nationwide Access Ltd and PTP Aerial Platforms Ltd v Customs and Excise Comrs concerning another paragraph of Schedule 1 relating to mobile cranes, drawing our attention to the court's use of a dictionary definition of crane. Dyson J said that "The categories of vehicles excepted by Schedule 1 are narrowly defined. They share the feature that they make use of public roads for limited purposes." He approached the question as a pure matter of construction giving the words their ordinary English meaning, uninfluenced by whether the provision is penal in nature.
4. The only other previous case in these Tribunals on digging machines is J P Charles v Customs and Excise Comrs. (1995) Decision E00002 in which the compressor and digging equipment was not attached in any way to a Land Rover, which was not surprisingly held not to qualify as a digging machine.

Reasons for our decision

The five vehicles with the compressor fitted below floor level

5. We shall first consider the five vehicles where the compressor is fitted below the floor. The Tribunal's jurisdiction on an appeal against an assessment under section 13 of the Hydrocarbon Oil Duties Act 1979 is an appellate one as it is not an ancillary matter since it is not contained in Schedule 5 to the Finance Act 1994 (and in any event it is a decision made under section 14(1)(c), see section 16(8)). The Tribunal has power to quash or vary any decisions and has power to substitute its own decision for any decision quashed on appeal (section 16(5) Finance Act 1994).
6. The first question is whether in carrying out the Appellant's work the vehicles were "used for the purpose of trench digging, or any kind of excavating or shovelling work." Mr McKay said that excavating was an ordinary word and showed us a dictionary definition from the Shorter Oxford Dictionary that it meant "1a. make (a hole or channel) by digging. b dig out material from (the ground). 2 reveal or extract by digging." This was work at or below ground level whereas the Appellant could in some cases, if the lines was long enough, work above the ground floor and could make horizontal holes in walls. Mr Moorhead showed us the Civil Engineering Standard Method of Measurement CESMM3 3rd edition breaking down various types of excavation for payment purposes as including breaking up artificial hard material (which includes concrete). He also referred us to Standard Method of Measurement of Building Works SMM7 in which there is a section headed Groundwork that includes breaking out five materials: rock, concrete, reinforced concrete, brickwork, blockwork or stonework, and coated macadam or asphalt. Mr Moorhead submitted that the construction industry would consider that breaking up concrete was excavation. Mr McKay objected to the use of such material as we had to construe words of ordinary English, drawing attention to the use of dictionary definitions by Dyson J in the Nationwide Access case. We think it is helpful to know how the construction industry views such work, particularly so when the technicalities of trench digging, excavation and shovelling are not the subject of the everyday use of ordinary English in the same way as whether something is a crane. On Mr McKay's point that excavation was limited to work at or below ground level, Mr Moorhead said that the horizontal digging of a tunnel was clearly excavation. On this

point, we agree with Mr Moorhead. The work carried out by the Appellant amounts to trench digging or any kind of excavating or shovelling work, whether or not it is at ground level.

7. The second question is whether the vehicles are designed and constructed for the purpose of such work. Mr Moorhead contended that from dictionary definitions (the Concise Oxford Dictionary) design included "conceive mental plan for". The vehicles had been conceived as digging machines. Construct was defined to include "fit together, frame, build" which he said was satisfied as the vehicles were fitted together as digging machines. Mr McKay showed us the context of the definition that in HODA the primary definition is that of road vehicle:

   "'road vehicle' means a vehicle constructed or adapted for use on roads, but does not include any vehicle which is an excepted vehicle within the meaning given by Schedule 1 of this Act." (section 31(1))

   This definition makes a distinction between constructed and adapted. The Schedule containing the exceptions to that definition was carefully drafted and the definition of digging machine required that it should be "designed and constructed and used" for the specified purpose and used on public roads only for certain purposes. Another reference in the Schedule to "designed, constructed and used" is:

   Light agricultural vehicle: "…a vehicle which…(b) is designed and constructed so as to seat only one driver, (c) is designed and constructed primarily for use otherwise than on roads, and (d) is used solely for purposes relating to agriculture, horticulture or forestry." (para.3)

   There are also references to "designed and constructed" without reference to use:

   Off-road tractor: "…designed and constructed primarily for use otherwise than on roads…". (para.2(4))

   Mobile crane: "…designed and constructed as a mobile crane…". (para.9)

   In contrast, there are references to "constructed or adapted and used":

   Gritters: "…constructed or adapted and used solely for the conveyance of machinery for spreading material on roads to deal with frost, ice or snow…".(para.8)

   Road construction vehicles: "…a vehicle (a) constructed or adapted of use for the conveyance of built-in road construction machinery, and (b) which is not constructed or adapted for the conveyance of any other load" which is an excepted vehicle if it is "used or kept solely for the conveyance of built-in road construction machinery…".(para.12)

   Also to "designed and used":

   Works truck: "…designed for use in private premises and is used on public roads only…".(para.11)

   Or to "used" only:

Snow clearing vehicles: "…used…for the purpose of clearing show from public roads…".(para.7)

Vehicles used between different parts of land: "(a) if it is used only for purposes relating to agriculture, horticulture or forestry, (b) it is used on public roads only in passing between different areas of land occupied by the same person…".(para.5)

8. Clearly the words used in relation to each type of vehicle are chosen carefully and should be given their full effect. We approach this point of construction of the legislation by asking whether the vehicles in their present form are designed and constructed for a particular purpose. In our view, the vehicles were originally designed and constructed as general purpose Land Rovers and then substantially adapted by the Appellant. They are not designed and constructed for the purpose of trench digging, or any kind of excavating or shovelling work. Rather they have been designed and constructed as a general-purpose vehicle and then modified so as to be suitable for such work. The purpose of the Appellant in making the modifications was no doubt to use them for the purpose of trench digging and excavation, but that does not mean that this is the purpose for which the vehicles were designed and constructed.
9. Even if the vehicles were designed and constructed in their present form, rather than adapted, we do not consider that the purpose of such design and construction (as opposed to the purpose of their adaptation by the Appellant) is that of trench digging or any kind of excavating or shovelling work. It seems to us that the vehicles are essentially mobile sources of compressed air, hydraulic power and electricity for use with hand tools, which could be used for powering tools of other types on a site not necessarily involving digging. Even if the normal use of compressed air is for digging equipment, the vehicle can operate both hydraulic and electrical tools the uses of which we assume can go far beyond digging. The fact of the variety of sources of power that are available makes it more difficult to show that the vehicles were designed and constructed for a particular purpose. For all these reasons we therefore agree with Mr McKay that the vehicles do not qualify as being designed and constructed for the specified purpose.
10. The third requirement is that contained in paragraph (a) of the definition that it must be a vehicle which "is used on public roads only for that purpose or for the purpose of proceeding to and from the place where it is to be or has been used for that purpose." This is similar to the equivalent part of the definition of mobile crane in paragraph 9 of the Schedule. It is part of the definition of digging machine; it is not merely a requirement that it is so used on a particular day, or when running on red diesel. It follows that if this requirement is breached the vehicle ceases to qualify for all time. It is an extremely strict requirement and it seems odd that this used to be part of the definition for vehicle licensing purposes. The vehicle is a Land Rover seating two persons in the cab and could clearly be driven for any purpose. Because of the heavy equipment installed, it would have a maximum speed of about 50 mph but otherwise it is a normal road vehicle. Mr Clifford told us that employees would keep the vehicle overnight while using it for a job and would return it to the depot at the end of the job which seems to satisfy the provision as the vehicle would be proceeding to and from the place of use. In addition, one vehicle (BNP 807S) was stopped by the police in Abbey Road, Barrow-in-Furness while being driven by Mr Frank Knight, an employee of the Appellant, on his return home from a family funeral, which is clearly in breach of paragraph (a). Mr Clifford said that this was against company policy and employees

were told clearly that private use was not permitted. Mr McKay did not take the point that when one of the vehicles was driven to the Tribunal for our inspection, which was extremely helpful to us, it was not being used solely for the permitted purpose, but that is an example of how easy it is to use such a vehicle outside the permitted purpose (fortunately the vehicle was BNP 807S which had already been disqualified, and we understand that it was not running on red diesel). Apart from BNP 807S there is no evidence that the vehicles have been used in contravention of paragraph (a) and we find that paragraph (a) is satisfied in relation to the other vehicles.

11. The fourth requirement is that contained in Paragraph (b) of the definition, that the vehicle "when so proceeding does not carry any load except such as is necessary for its propulsion or equipment." The Commissioners contended that one of the vehicles (BCD 446M: the sixth vehicle with the compressor above floor) when stopped was carrying electrical tools which were not capable of being connected to any fuel source on the vehicle and had to be connected to an electricity supply at the site. We shall deal with this vehicle separately but, in relation to the five vehicles which have 4.5 KVA electricity generators, Mr Clifford said, and we accept, that this was capable of running any of the electrical tools which they carried. He said that the tools would be used on a separate supply only if leads on the vehicle could not reach the place the work is to be done, which does not offend this requirement. Accordingly, we find that this requirement is satisfied in relation to the five vehicles.
12. For all these reasons we consider that the five vehicles do not qualify as digging machines, and dismiss the appeal in respect of them. If the figures cannot be agreed, the parties are at liberty to restore the appeal.

The sixth vehicle with the compressor mounted above floor level

13. Different considerations may apply to the sixth vehicle (PCD 446M) where the compressor is above the floor and takes up the whole space in the rear truck section. We were shown a copy of a leaflet for "AirDrive Land Rover AD125M Mobile Air Compressor" which contains the statement that it qualifies as a digging machine for rebated fuel. The leaflet says that "Wherever compressed air to operate two heavy breakers is required, the Airdrive AD 125M Mobile Compressor solves all the problems." In the J P Charles case an extract from guidance notes of unknown origin, but presumably from the vehicle licensing authority since in the course of the passage quoted there is statement about how certain vehicles must be licensed, stated that "It must be noted that in certain other models of "Air Drive" Land Rover mobile compressors eg "Air Drive 125, the compressor and connected machinery are mounted on the floor of the Land Rover and therefore this type of vehicle comes with the definition of ‘digging machine’." As already mentioned the DVLC in their letter of 10 June 1983 stated: "Vehicle registration mark PCD 446M, fitted with an over floor compressor would appear to comply with the above [the definition of digging machine]…". Because Mr Moorhead was under the impression that the Commissioners did not dispute that this vehicle qualified, we did not have any evidence about it. We are not clear whether this vehicle is actually an Air Drive 125. We are reluctant to make a decision on this basis which will have much wider application than in relation to the specific modifications made by the Appellant to the other five vehicles, especially if the vehicle has been advertised with a statement that it qualifies and the licensing authority has previously so stated in published guidance. We express the preliminary view that such a vehicle is designed and constructed, rather than adapted, for a particular purpose which appears

to us to be for digging only, and accordingly it qualifies as a digging machine, subject to its being so used, and to showing that its use complies with paragraphs (a) and (b) of the definition. It appears from the statement of case that this was the vehicle which was stopped while carrying electrical tools which may mean that paragraph (b) has been breached. The Tribunal did not realise until after the hearing that the vehicle was this one (in particular, although this vehicle is referred to in paragraph 4 of the Commissioners' statement of case, in paragraph 11.3, vehicle BNP 807S, which is one of the five with the compressor below the floor, is referred to as the one carrying the electrical tools, which may be an error). We thought at the hearing that the Commissioners had not appreciated that the vehicles other than this one were fitted with an electrical generator. We even suggested at the hearing that Mr McKay might withdraw that contention. It is therefore possible that, if the matter had been pursued at the hearing, a valid reason for the carrying of electrical tools on that occasion might have been given. As we discussed above, it appears that carrying tools which are not necessary to its equipment disqualifies the vehicle itself for all time because that is part of the definition of digging machine. We give either party liberty to provide further evidence about the nature of this vehicle, its use on roads, and the carrying of electrical tools in writing to the Tribunal Centre within 30 days from the date of release of this decision, and to restore the case for further hearing, in default of which we shall dismiss the appeal in respect of this vehicle on the ground solely of the breach of paragraph (b). We should not be taken to be making any decision in relation to its design and construction which has wider application to the Air Drive 125 in other cases.

Additional comment

14. We must add that in relation to the five converted vehicles, we are extremely perturbed by the fact that another Government Department which has responsibility for the same definition of digging machine has after lengthy correspondence and an inspection classified them as digging machines for vehicle licensing purposes on no less than three occasions: their letters of 13 September 1976 before the vehicles were converted, and 10 June 1983 and 11 March 1987 after investigations following their conversion, the last two investigations being instigated by a report from the Commissioners. Paragraph 12 of the Commissioners' statement of case appears to misread the ruling by the DVLC when it says that "the letter [of 11 March 1987, quoted in paragraph 6 above] clearly indicated that the vehicle could not constitute a 'digging machine' while the compressor remained mounted below the vehicle". The letter in fact states that the Commissioners had confirmed that the compressor was underneath the vehicle when stopped by the Commissioners, and goes on to give a ruling that one of the five vehicles qualified as a digging machine. The Commissioners' statement of case goes on to say that the ruling applies to the sixth vehicle where the compressor was mounted above the vehicle. The letter in fact says nothing about vehicles with the compressor above floor level, about which a ruling was given by the DVLC in their letter of 10 June 1983. The statement of case also states that the letter relates to one vehicle alone. This is true of the letter of 11 March 1987 but the letter of 10 June 1983 covers all five vehicles of that type. It seems to the Tribunal that the Commissioners have not addressed their mind to the fact that the DVLC has given unequivocal rulings in relation to all of the vehicles.

15. If, instead of being an assessment to recover the rebate, this case had been an appeal against the terms for restoration of the vehicles following forfeiture, as was the case in J P Charles, we would have been operating a supervisory jurisdiction (the decision falling within paragraph 2(1)(r) of Schedule 5 to the Finance Act 1994) where we would be considering whether any reasonable body of Commissioners could charge the Appellant the amount of the rebate in circumstances where the Appellant had put all his cards on the table face up with the DVLC who gave a ruling that the vehicles qualified, if adapted in a certain way, and subsequently confirmed that ruling following the conversion work after investigations on two further occasions. We do not think that the Commissioners would have succeeded in that case, except in relation to the vehicle stopped when the employee was returning from the family funeral while in breach of paragraph (a) of the definition, and possibly the sixth vehicle in relation to paragraph (b). Such a case would fall within the principle in R v IRC ex p. MFK Underwriting Agencies Limited [1989] STC 873. We also note that the Tribunal in the J P Charles case criticised the appellant in that case for not checking with the Driver and Vehicle Licensing Agency whether the vehicle qualified as a digging machine, which is precisely what the Appellant has done correctly here. It is also the case that if this had been a VAT case and a Customs officer with the full facts before him had given a clear and unequivocal ruling on VAT in writing, any assessment of VAT due is, by extra-statutory concession 2.5, based on the correct ruling from the date the error was brought to the registered person's attention.
16. We understand the point that the Commissioners consider that the purpose of the legislation is different from the previous vehicle licensing legislation. But if legislation in the same words applies to rebated oil before and after a change in licensing legislation, it is reasonable to suppose that its meaning remains the same. At the least, the Commissioners should inform people who have rulings from DVLC that they do not intend to honour them in the future. The Commissioners are also free to disagree with rulings made by DVLC, and we have decided that they were right in doing so here, but such a disagreement can be made without issuing assessments for three years in the past.
17. We express the hope that the Commissioners will reconsider their decision in the light of the fact that they have misread the ruling of the DVLC in their statement of case, and that they will apply an extra-statutory concession by analogy with the VAT concession despite the facts that this case does not concern VAT, and that the rulings was given by the DVLC whose legislation was incorporated by reference into hydrocarbon oil duty at the time, rather than by the Commissioners. The Appellant has priced its work on the basis that rebated fuel could properly be used and it seems to us to be wholly unreasonable to charge duty retrospectively in these circumstances. This is not the first occasion that these Tribunals have criticised the heavy-handed approach of the Commissioners in relation to excepted vehicles, see Tawm Limited v Customs and Excise Comrs. (1998) Decision No. E00088A.
18. There were no submissions about costs at the hearing. Both parties are at liberty to make an application in principle for costs by notice to the Tribunal Centre within 30 days of the date of release of our decision relating to the sixth vehicle (or decision in default of further evidence in accordance with paragraph 18). In view of the existence of the DVLC rulings the Appellant should not feel inhibited from making such an application.
19. We should like to say in conclusion how helpful we found the way the case was presented by Mr Moorhead and Mr McKay, and in particular how useful it was for the Appellant to be represented so ably by a civil engineer when

the case essentially involved engineering matters. We are sure that a combination of lawyer and expert witness would not have been anything like as helpful in explaining the nature of the vehicles and their equipment.

20. Our decision is to dismiss the appeal in relation to the five vehicles and to defer it in relation to the sixth to allow the parties the opportunity to provide further evidence.

J F AVERY JONES

CHAIRMAN

Released 26th April 2001

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