EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-000053
[2019] NZDC 11168

UNDER THE	ROAD USER CHARGES ACT 2012
IN THE MATTER OF	AN APPEAL FROM A NOTICE ISSUED BY THE RUC COLLECTOR UNDER SECTION 55(5)(a) OF THE ROAD USER CHARGES ACT 2012
BETWEEN	STAN SEMENOFF LOGGING LIMITED Appellant
AND	NEW ZEALAND TRANSPORT AGENCY Respondent

Hearing: 12 June 2019

Appearances: D Neutze for the Appellant
R McCoubrey and B Thompson for the Respondent

Judgment: 17 June 2019

RESERVED JUDGMENT OF JUDGE G M HARRISON

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[1] Stan Semenoff Logging Limited (SSL) appeals against an assessment of road user charges due pursuant to s 55(5)(a) of the Road User Charges Act 2012 (the Act). The amount claimed as due is $532,878.96 and payment was due by 10 January 2019.

[2] The appeal is brought pursuant to s 68 of the Act which provides that a person may appeal an assessment made pursuant to s 55(5)(a). Subsection (2) provides:

> If an appeal is made under subsection (1), the District Court must determine whether the notice issued by the RUC Collector is appropriate.

[3] In his affidavit of 29 April 2019, Mr Daron Turner, the General Manager of SSL, accepts that additional Road User Charges (RUC) are payable by SSL in the sum of $135,365.14.

[4] The basic issue between the parties is, what is the proper basis of assessment.

The road user charges regime

[5] This has been described in an earlier decision on a similar issue as labyrinthine. I have been greatly assisted by excellent submissions prepared by counsel for both parties. Relying on their submissions I will endeavour to outline the relevant statutory and regulatory provisions.

[6] Section 7 of the Act provides that road user charges are payable in respect of the operation of a RUC vehicle. Section 9 provides that:

> (a) A person must not operate a RUC vehicle on a road unless a distance license has been issued for the vehicle; and
>
> (b) The distance licence must specify
>
> …
>
> (d) The RUC vehicle type of the RUC vehicle.

[7] Section 89 of the Act provides for the promulgation of regulations "prescribing RUC vehicle types for the purposes of this Act and bands of RUC weight for each RUC vehicle type".

[8] By reg 4 of the Road User Charges Regulations 2012 (the regulations), the RUC vehicle types and RUC weight bands for a RUC vehicle except Type H vehicles, are the types and weight bands specified in Part 1 of the Schedule, and Part 2 makes the same specifications for Type H vehicles.

[9] RUC weight in relation to a RUC vehicle means the lesser of:

> (a) Gross vehicle mass for the RUC vehicle; or

(b) Maximum allowable mass for the RUC vehicle under r 4.5(1) of Part 1 of the VDAM Rule 2002.

[10] The current VDAM rule is the Land Transport Rule: Vehicle Dimensions and Mass 2016. It sets out the size and weight limits for heavy vehicles operating on New Zealand roads. The VDAM Rule 2016 replaced the VDAM Rule 2002 from 1 February 2017. Under the 2002 Rule, the maximum weight for a vehicle combination with eight axles was 44 tonnes. This increased under the 2016 Rule as from 1 February 2017 to 46 tonnes. That means that every distance licence has a maximum weight that it covers.

[11] In this case, it is uncontested that the appellant had distance licences allowing it to carry a maximum of 44 tonnes before 1 February 2017 and 46 tonnes thereafter. The agency's case is that vehicle trips were significantly over that licensed weight on numerous occasions.

[12] It seems that police became concerned at the number of overweight infringement offences being committed by SSL and referred their concern to the agency for further investigation.

[13] At a meeting on 22 November 2016, personnel from the agency met with personnel from SSL at which [the specialist RUC assessor] employed by the agency, handed Mr Turner a formal request pursuant to s 66 of the Act for records for all vehicles operated by SSL for the period 1 November 2015 through to 31 October 2016.

[14] There was some delay but on 12 June 2017 [the assessor] collected 17 file boxes from SSL's office in Whangarei. Those records covered the period 1 July 2016 to 4 May 2017, despite which [the assessor] carried out the assessment.

[15] The core business of SSL is the transportation of felled trees from forest locations to the port.

[16] Of particular interest to [the assessor] were weigh bridge dockets. At para 21 of his affidavit of 13 May 2019, he said:

> I was aware that logging trucks and trailers are frequently weighed in the course of carrying out their day to day work by driving on to weigh bridges. Logging carriers tend to charge by weight and each time that a truck and trailer combination is weighed, the driver is given a docket showing the weight of the truck and trailer unit so that the weight of the load can be accurately calculated. The weigh bridge dockets list the date and time of the weighing, the vehicle, its product being logs, the customer being the owner of the logs, SSL as the carrier, the weight in, which is the vehicle and its trailer, and the weight out, which is the loaded vehicle weight and consequently the weight net is the difference between the weight in and the weight out readings.

[17] [The assessor] then undertook an extraordinary exercise whereby he prepared spreadsheets produced as exhibits BRC-1 and BRC-2 comprising 363 pages of all of the vehicle movements from the records supplied. He assessed 17,200 loads.

[18] The aim of this exercise was to ascertain how many of these vehicle trips complied with the weight limit then applicable to SSL of either 44 tonnes before 1 February 2017 or 46 tonnes from that date.

[19] The spreadsheets recorded in horizontal strips, in white, trips that complied with the weight requirement. Trips recorded in yellow were trips that were overweight but within the applicable tolerances and trips coloured red were those that exceeded the permitted weight and tolerance.

[20] Sixty eight percent of the 17,200 trips assessed were overweight. That is approximately 11,690 trips.

[21] [The assessor] then calculated the difference between the RUC paid for the particular trips and the charge properly payable which totalled $532,878.96.

Is the assessment appropriate

[22] Section 55 of the Act provides that an owner or operator issued with an assessment may apply to the RUC Collector for a review of the assessment on the grounds that:

(i) The assessment is incorrect in a material particular; or
(ii) The owner or operator of the RUC vehicle was not the person responsible for incurring the unpaid road user charges.

[23] SSL sought a review which was referred to a barrister, Wendy Aldred who reported on 10 December 2018 and concluded that SSL had not established any basis for disturbing the agency's assessment and that it should be confirmed.

[24] In reaching this conclusion, Ms Aldred considered the relevant background, the methodology employed, the relevant statutory provisions and relevant case authority and in particular, a decision of Judge M-E Sharp of this Court in *Freight Lines Limited v New Zealand Transport Agency.*[1]

[25] SSL submitted that the review was limited to a consideration of whether the assessment was incorrect in a material particular or the person charged was not responsible for incurring the unpaid charges. On the other hand, the agency submitted that in reality the reviewer considered the same question now posed for this Court, namely whether the assessment was appropriate based on the law and the evidence.

[26] As noted in [2] it is for the Court to determine whether the notice issued by the RUC collector, is appropriate, which is a broader discretion than was available to the reviewer.

Was the assessment appropriate?

[27] The fundamental submission of SSL was that s 3(a) of the Act dictated that additional RUC should only have to be paid in respect of the actual trips that were overweight.

[28] Section 3(a) provides:

The purpose of this Act is to –
(a) Continue the road user charges system by imposing charges on RUC vehicles for the use of the roads that are in proportion to the costs that the vehicles generate.

[1] *Freight Lines Limited v New Zealand Transport Agency* [2015] NZDC 20601

[29] Mr Neutze for the appellant submitted that the methodology adopted by the agency is totally arbitrary and bears no relation to the actual distance travelled overweight. He submitted that it is based on the period of the licence which the operator happens to have purchased and bears no or insufficient relationship to the cost which an operator's vehicles generate on the respondent's roading network.

[30] The agency's response is that SSL's proposed alternative methodology would be to treat it differently to other operators, giving it a benefit that compliant operators do not receive. Mr McCoubrey explained this by saying that a compliant operator does not have the luxury of purchasing a less expensive licence and then, at the end of that licence, paying a small amount of additional RUC for those particular journeys that were overweight.

[31] Mr Neutze has invited me to distinguish the *Freight Lines* case or decline to follow it. I decline to do either. I agree with Judge Sharp's determination. At [43] of her decision, the Judge said

> "Given that a licence must cover every journey undertaken under it, an operator has to buy a licence to cover the heaviest load it will cover under the licence". That is what Mr Flannagan said at para 7.8 of his submission and that is where the answer to this particular appeal lies.
>
> [44] If an operator has to buy a licence to cover the heaviest load it will carry under the licence, surely it follows, as night must follow day, that the entire load that should have been purchased has to be assessed for RUC.

[32] There was reference also to earlier decisions of Judge Wolfe and Stevens J on appeal, in *T D Haulage v Director of Land Transport Safety*, which were decided under the earlier Road User Charges Act 1977, which are no longer of direct assistance.[2] But it is notable that in the High Court Stevens J answered in the affirmative, the question, whether the Act then in force required an operator to have a distance licence for the relevant motor vehicle, specifying a maximum gross weight not less than the gross weight of each individual load, carried at all times during the currency of that licence.

[33] That supports the conclusion of Judge Sharp.

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[2] *T D Haulage v Director of Land Transport Safety* High Court Hamilton CIV-2006-419-001312

[34] I accept the submission of Mr McCoubrey that it is appropriate for the agency to assess SSL's unpaid RUC by comparing what a compliant operator would have paid in the same circumstances. He further submitted that it would not be fair if SSL was to be treated differently from other operators.

[35] It seems to be to be illogical and inappropriate for SSL to submit that it is appropriate for it to acquire licences for lesser weights than are carried on individual trips and then to maintain that all that is required to meet their obligations under the statute is to pay the difference between the weight permitted by the licence obtained and the actual weight. 11,690 instances of operating at an excessive weight is a clear indication of the inappropriateness of the method of calculation advanced on behalf of SSL.

[36] The charge it should have paid is $532,878.96 whereas, under its methodology, an extra payment of $135,365.14 is all that is required to be paid. That is a difference of just less than $400,000 which compliant operators would have paid to ensure that every load carried was within the maximum weight permitted.

[37] I am mindful of further arguments advanced on behalf of SSL in respect of distances travelled off the state highway in respect of which the agency has already requested details so that appropriate credits can be passed.

[38] It was also suggested that fines paid for overweight vehicles should be taken into account in arriving at an appropriate assessment, but I do not accept that. Fines cannot form part of an appropriate assessment of RUC.

Conclusion

[39] For these reasons, the appeal is dismissed.

[40] Costs assessed on a category 2B basis are clearly payable to the agency, on which I invite the parties to agree. In the absence of agreement, I will receive memoranda.

G M Harrison
District Court Judge