[2016] UKFTT 616 (TC)

TC05352

Appeal number: TC/2015/06533

EXCISE DUTY – permission to appeal out of time against assessment of duty and penalty – permission granted.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAN MASSEY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
ALBAN HOLDEN

Sitting in public at City Exchange, Leeds on 22 August 2016

The Appellant in person

Miss R Young of the Solicitor's Office of HM Revenue & Customs for the Respondents

DECISION

1. This was a hearing as a preliminary matter of an application by Mr Alan Massey ("the appellant") to make a late appeal to the Tribunal against an assessment to excise duty (alcoholic liquor duty) of £25,266 under section 12A Finance Act ("FA") 1994 and an assessment to a penalty under paragraph 4 Schedule 41 FA 2008 of £5,053. For the reasons given below we granted permission.

Background

2. We set out below an account of the communications between the Commissioners for Her Majesty's Revenue and Customs ("HMRC") and Mr Massey which in our view are relevant to the permission application. This account is taken mostly from the bundle of documents produced to us by HMRC, including documents which were added to the bundle at the hearing. We add some comments of our own in square brackets.

3. We add that we are making no findings of fact about the truth of the statements made in the documents that we describe. We are simply setting out what the documents say or reveal and how each party reacted (or failed to react) to the other's communications.

4. On 3 July 2013 Ms Perry of HMRC (Local Compliance) wrote to Mr Massey saying that "We know" that "Officers of HM Revenue & Customs seized the following goods from you – 23945.28 litres of mixed beer". [Miss Young admitted that the officers were from the UK Border Agency as was shown in the index to the bundle].

5. The letter went on to warn the appellant that HMRC were entitled to assess him for duty and to impose penalties.

6. On 5 August 2013 HMRC wrote to Mr Massey enclosing the assessments to duty and penalties, together with an HMRC1, a factsheet explaining "What you can do if you disagree" with an HMRC decision and EX603 "Excise Assessment/Civil Penalty Explanatory Notes".

7. We were given a copy of this factsheet (though the imprint date was 02/16) which informs those who are the subject of an HMRC decision that they can carry on discussions if they don't agree with the decision. The factsheet goes on to say that "If you are not satisfied with the outcome of the discussions, you can have your case

- reviewed by a different officer from the decision maker
- heard by an independent tribunal".

8. The factsheet goes on to say about reviews that either "we will offer you a review" or "you can ask us to carry one out at any stage during our discussions".

9. The EX603 says at the start "These notes are issued without prejudice to any action HMRC may take under … Schedule 41 of [*sic*] the Finance Act 2008 (the VAT and Excise wrongdoing penalty)". If you do not agree with the assessment or penalty write to us with your reasons within 30 days and we will look at it again. If you prefer we will arrange for a review by a person not involved in the decision."

10. The notice of assessment of the penalty also contains information about what to do if the assessed person disagrees. "You need to write to us within 30 days of the date of this notice and we will look at it again. If you prefer we will arrange for a review by a person not involved in the decision."

11. On 7 August 2013 HMRC said that the appellant emailed HMRC denying the statements made by HMRC in their letter of 7 July and the basis of the assessments. [No copy of this email was in the bundle, and Miss Young admitted that she had not seen it and that it may in fact be a note of a telephone conversation. No record was included in the instructions her office had received, nor had it been requested from the instructing officer. However we note from a letter of 17 September 2014 from Mr Fisher of HMRC (Ms Perry's boss) (see §24) that he said that "Officer Perry received an email from you on 7 August 2013 which contained no new information" other than a denial that the basis of the assessments was correct.]

12. On 9 December 2013 the appellant wrote to HMRC's Debt Management & Banking Unit ("DMB") to say that he wanted no further debt letters – he didn't owe HMRC anything and he was taking legal advice.

13. On 20 March 2014 the appellant spoke to DMB saying he knew nothing about the debt and asked DMB to speak to Ms Perry.

14. On 21 March 2014 DMB phoned the appellant and asked for proof of a matter which he had told them about.

15. On 20 May 2014 the appellant phoned HMRC and told them that the assessments had nothing to do with him. HMRC asked him to put his objections in writing and the officer (Ms Perry) would reconsider the case. He asked for a meeting but HMRC while agreeing in principle wished him to write first.

16. On the same day, 20 May 2014, the appellant wrote to HMRC giving information and expressing his willingness to have a meeting, accompanied by his lawyer.

17. On 10 June 2014 a different officer (Mrs Keen) asked for further information.

18. On 21 June 2014 the appellant gave Mrs Keen further information.

19. On 28 July 2014 Mrs Keen said that "it is not clear from your letter whether you wish it to be considered a request for a review or an appeal against the assessment and penalty. If you wish to appeal against the assessment and/or the penalty, please let me know within the next four weeks."

20. On 30 July 2014 the appellant wrote to Mrs Keen saying "I insist on a review or an appeal, whichever one sorts this matter out." He requested a meeting.

21. On 13 August 2014 Mrs Keen wrote to the appellant. She provided him with another copy of Factsheet HMRC1. She added that HMRC1 "states clearly that if you disagree, and wish for a review of the assessments, you should write within 30 days if you had further information, or thought HMRC had missed something which relevant which would have a bearing on Miss Perry's decision. No such letter was received from you within the 30 day parameter. Miss Perry received an email from you on 7 August 2013 but this contained no new information or a request for a review, or an appeal".

22. Further on she added "You also asked for the matter to be reviewed or appealed 'whichever one sorts this matter out'. Only you can make the decision" and later "Please advise me if you wish the matter to be reviewed by an officer not previously involved in the case."

23. On 17 August 2014 the appellant wrote to Mrs Keen admitting he had not taken the matter seriously because of the information he had already given. He added in much larger type and underlined "I request that this case is reviewed. I would also like to appeal this decision."

24. On 17 September 2014 a Mr Fisher wrote to the appellant and referred to a letter of 9 September [this was not included in the bundle and may be an erroneous reference to the letter of 17 August] where "you asked for a independent review. I have treated your letter as a request for a local reconsideration". After setting out the issues he said he "must uphold both the assessment and the penalty". But that he was "prepared to review the case against should you provide evidence …" and "Should [*you*] be unable to provide any further information you have the right for your case to be hear [*sic*] at an independent *VAT and Duties Tribunal*, details of which are available on the HMRC website."

[Tribunal's emphasis. Mr Fisher was in fact the manager of Mrs Keen and Ms Perry.]

25. On 6 October 2014 the appellant wrote to Mrs Keen and Mr Fisher simply saying that "I would like this matter to go to a Independent VAT and Duties Tribunal".

26. On 28 October 2014 DMB were told that the suspension of collection was lifted as "Tp [*taxpayer*] was unsuccessful at appeal and says he will go to Tribunal"

27. On 2 December 2014 the appellant told DMB that the Tribunal phone number was constantly engaged.

28. On 6 May 2015 the appellant wrote to Mrs Keen saying that he had not been able to find the correct independent Tribunal Service relating to his complaint and that the phone number is constantly engaged. He asked how he could contact the correct Tribunal Service.

29. On 11 May 2015 Mrs Keen gave him the website details of this Tribunal.

30. On 16 May 2015 the appellant asked for various details which he needed to complete the form. [There was no response]

31. On 28 October 2015 the appellant sent an Appeal Form to the Tribunal which was returned because it was incomplete. It was received fully completed on 5 November, and at section 6 stated that he did not know when the latest time by which the appeal ought to have been made was, but requested permission to appeal and said "I was not made aware of any time limit for a tribunal appeal. I had hoped it could be resolved without a tribunal".

32. On 11 November 2015 he gave Mrs Keen some documentary evidence about the matter HMRC were concerned with.

33. On 27 November 2015 he wrote to DMB telling them that he had provided the evidence that Mr Fisher said would allow him to review the case.

34. On 23 December 2015 a Complaints Officer wrote to the appellant about his complaint, made on the advice of his MP to the Independent Police Complaints Commission. Although the Complaints Officer said he could not comment on the dispute he did say "I am sorry that an independent reviewer did not consider your case" and "we have made some errors in conducting our investigation".

35. The appeal was stayed behind another case on Excise Duty and when the stay was lifted (the case was *Staniszewski v HMRC* [2016] UKFTT 128 (TC)) HMRC were asked to produce a Statement of Case. Their response was to file a "Notice of Objection" to permission being given to the appellant to make the appeals.

The law

36. The time limit for appealing to the Tribunal against an assessment to excise duty is given in s 16 FA 1994. That and the review provisions before it (ss 15A and 15E) provide relevantly:

> "**15A**(1) If HMRC notify a person (P) of a relevant decision [*which the assessment is – s 13A(2)(b) FA 1994*] by HMRC, HMRC must at the same time, by notice to P, offer P a review of the decision.
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> **15E**(1) This section applies if--
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> (a) HMRC have offered a review of a decision under section 15A and P does not accept the offer within the time allowed under section 15C(1) or 15D(1);
>
> …
>
> (2) HMRC must review the decision if--
>
> (a) after the time allowed, P, or the other person, notifies HMRC in writing requesting a review out of time,

(b) HMRC are satisfied that P, or the other person, had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and

(c) HMRC are satisfied that P, or the other person, made the request without unreasonable delay after the excuse had ceased to apply.

16…

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision … may be made to an appeal tribunal within the period of 30 days beginning with--

(a) … the date of the document notifying P of the decision to which the appeal relates, or

…

(c) if later, the end of the relevant period (within the meaning of section 15D).

(1C) In a case where HMRC are required to undertake a review under section 15C--

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(1D) In a case where HMRC are requested to undertake a review in accordance with section 15E--

(a) an appeal may not be made to an appeal tribunal--

(i) unless HMRC have notified P … as to whether or not a review will be undertaken, and

(ii) if HMRC have notified P …. that a review will be undertaken, until the conclusion date;

(b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;

…

(1F) An appeal may be made after the end of the period specified in subsection … (1B), (1C)(b), (1D)(b) … if the appeal tribunal gives permission to do so.

(1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review.

37. A penalty assessment made under paragraph 4 Schedule 41 is subject to the appeal provisions in paragraph 18:

"(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal.

(2) Sub-paragraph (1) does not apply—

> (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
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> (b) in respect of any other matter expressly provided for by this Act."

Thus the same provisions apply as apply to appeals against an excise duty assessment (as there is nothing in FA 2008 to the contrary).

38. Rule 20(4) of the [FTT Rules] provides that:

> "(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal--
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> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

39. The only case law referred to by HMRC in its Notice of Objection was *BPP Holdings* [sic] *v HMRC* [2016] EWCA Civ 121 ("*BPP*") for the passage where Sir Ernest Ryder SPT makes it clear that the stricter approach in the current version of CPR 3.9 applies to the Tribunals as well as the Courts.

Discussion

40. In considering this case we have applied the five questions that Morgan J says that a Tribunal must ask in considering a request for an appeal to be admitted later than the statutory time limit in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*"). In so doing we have not ignored *BPP*. *BPP* was in a narrow sense about the imposition of sanctions imposed in the course of litigation, whereas here the question is whether the appellant can pass the gateway to start litigation. That was also the question in *Data Select*. Sir Ernest Ryder refers to Data Select at [44] but to note that were HMRC to pray that case in aid it would be a two-edged sword as Morgan J applied the rules in the previous version of CPR 3.9 by analogy, and he implied that HMRC would not like the result if he did the same.

41. What *BPP* implies is that in a late appeal case we should apply the current CPR 3.9 by analogy. It seems to us that Morgan J's five questions did not slavishly follow the previous CPR 3.9 but only raised those CPR 3.9 issues which were relevant to a late appeal case. And the five questions seem to us to be just as relevant to the current CPR 3.9. Nevertheless in the course of considering the five questions, and subsequently, we look at the current CPR 3.9 to see if there is anything that might make our conclusion different.

42. The five questions are:

(1) what is the purpose of the time limit?

(2) how long was the delay?

(3) is there a good explanation for the delay?

(4) what will be the consequences for the parties of an extension of time?

(5) what will be the consequences for the parties of a refusal to extend time.

Mr Massey was only able to help us on questions (3) and (5).

43. We agree with HMRC's submission that the purpose of the time limit in this case was to give finality to (primarily) HMRC. HMRC should be able to close their files and move on to other matters after the time limit has passed without a potential appellant becoming an actual one. This, while not being directly reflected in current CPR 3.9 is consistent with Rule 1.1(2)(e) of the CPR that:

> "Dealing with a case justly and at proportionate cost includes, so far as is practicable-
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"

44. On the second question ("How long was the delay") we have in the background section of this decision given a chronology of communications that started on 3 July 2013 and it was implicit in HMRC's Objection Notice and their submissions to us that the delay started 30 days after the assessments were issued, that is 3 September 2013. On that basis the delay was 26 months.

45. In our view the clock started running on 16 October 2014, a delay of just over 12 months. This is because we consider that Mr Fisher's "local reconsideration" was, despite what he said, a review within s 15E FA 1994, ie a late review. The fact that Mr Fisher was not "independent", in the sense that he had obviously been involved in the case as Mrs Keen's manager, does not invalidate the review as there is nothing in FA 1994 or any other review legislation that requires such independence. It is HMRC's practice.

46. The current CPR 3.9 (as explained in *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906) ("*Denton*") asks us to gauge the seriousness and significance of the delay. 12 months is a serious delay by comparison with the 30 day time limit. Significance is more difficult to ascertain: where a delay in complying with rules or directions in ongoing litigation causes a trial date to be vacated or merely causes a minor inconvenience can be judged as significant or insignificant. Where the litigation gateway has still to be entered it is more difficult to judge the significance.

47. The third question is whether there is a good reason for the delay. This of course is for the appellant to show. Mr Massey told us that when he received Mr Fisher's letter he immediately informed him by letter that he was appealing to a Tribunal. In that letter he echoed Mr Fisher's reference to the VAT and Duties Tribunal (VDT).

48. Mr Massey told us, and we accepted his evidence on this, that he tried on many occasions to contact the appropriate Tribunal but the number was constantly engaged.

If it was a number that had been the number for the VDT this is not at all surprising as the VDT was abolished in 2009.

49. When he was given the right number or website address by Mrs Keen in May 2015 after he had asked her in April 2015, he had obviously immediately looked at the website and downloaded the form, because he wrote to her by return asking for help in filling in some of the boxes on the form. This letter was ignored by HMRC.

50. HMRC argued that the appellant's stated reason on the appeal form for the delay, that he did not know the time limits for appealing, was one that was not convincing as he could have easily have looked at the information he was given when the assessments to duty and a penalty were issued and when he was given a further copy of the Factsheet HMRC1. We note merely that the information given to the appellant as set out at §§6 to 10 and in subsequent correspondence is inconsistent and difficult to follow, and does not actually cover the position of the time limit from the conclusion of a review (whether or not a late review).

51. Where we would have expected that information was in Mr Fisher's letter of 17 September which referred, of course, to the VDT with no mention of any time limit. In fact HMRC seemed to be in denial about Mr Fisher's error in referring to the VDT five years after its abolition. When we asked Miss Young to read the final paragraph of Mr Fisher's letter after she had read the previous one and was about to go on to the next item of correspondence, she said "you have the right for your case to heard at an independent Tribunal, details of which are available on the HMRC website". We pointed out that she had omitted three words. She asked us which three, to which we replied "VAT and Duties".

52. This third question in *Data Select* is also the second stage in *Denton* and current CPR 3.9.

53. The fourth question considers the consequences of granting permission. For the appellant this is simply that his appeal is allowed and he has his "day in court". For HMRC it puts them to the cost of contesting the appeal.

54. We observe that on the day we heard this case a decision of the Tribunal was published which contains some wise remarks about the approach of HMRC to preliminary issues of this sort. In *Garland v HMRC* [2016] UKFTT 573 (TC) Judge Staker said, in relation to a strikeout application:

> "16. Default paper cases and simple basic cases in particular may involve an unrepresented appellant who wishes to exercise the right of appeal to the Tribunal against a decision that the appellant considers to be harsh and unfair, even though the appellant has no knowledge of the law and is incapable of articulating a legally arguable ground of appeal. It is possible for the Tribunal in such a case to hear the appellant's account of the facts and to consider this together with all of the evidence presented by the parties, and for the Tribunal to satisfy itself as to the facts, and to determine for itself whether the HMRC decision is in accordance with the facts and the law. In such a case,

> even if it should turn out that the appeal was hopeless, the unrepresented appellant at least has the satisfaction of knowing that his or her case has been considered by an independent judicial body. Furthermore, the appeal may not turn out to be hopeless, and it may ultimately be allowed in whole or in part. In the case of an unrepresented appellant, failure of a notice of appeal to state an arguable ground of appeal should therefore not in every case necessarily lead automatically to a strike out application being granted.
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> 17. That is not to say that the Tribunal should allow every case to proceed, no matter how hopeless it appears, merely because the appellant is unrepresented. Apart from anything else, the Tribunal will always have to have regard to the overriding objective in rule 2 of the Tribunal's Rules. In a case of any complexity, hearing and determining a strike out application may involve less time and fewer resources than the hearing of the substantive appeal. In such a case, if no viable grounds of appeal are set out in the notice of appeal, it may therefore be proportionate and efficient initially to determine at a strike out hearing whether there is any justification for the appeal to proceed to a substantive hearing, and for a strike out application to be granted if no ground of appeal with a reasonable prospect of succeeding has been identified at the strike out hearing. On the other hand, in a default paper case or a simple basic case, the time and resources required for a strike out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike out application may not be granted, the most efficient way of disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court.
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> 18. The Tribunal is satisfied that the present case is such a case. It has been allocated to the standard category, but it appears to be no more complex than a simple basic case. The Appellant indicated that she anticipated presenting no evidence other than her own oral evidence (and possibly that of her mother). For the strike out application hearing, HMRC produced a bundle of documents which appears to contain nearly all of the documents that would be expected in the bundle at a substantive hearing. For the strike out application hearing, HMRC also prepared a skeleton argument. The hearing of the strike out application was listed for half a day. It is difficult to imagine that the substantive hearing of this appeal could take more than half a day. Had the hearing on 9 August 2016 been a hearing of the substantive appeal rather than of a strike out application, this appeal might have been dealt with to finality by now. The Tribunal doubts that the strike out application would have been made in a case such as the present but for the fact that HMRC considered the point of principle in *Jones* and *Race* to be in issue (which for the reasons above, it is not)."

55. We respectfully agree with everything Judge Staker says here. This case took about two hours. In that time (or at least in half a day) we may well have been able to determine the substantive appeals and given finality to everyone.

56. The fifth and final *Data Select* question is what the consequences are of our refusing to give permission by extending the time. For HMRC it is indeed finality. For the appellant it is the inevitable exposure to a liability of £30,000 or so which the appellant told us he cannot afford. The question whether we should take into account the merits of the appellant's appeals is one that has attracted attention in recent years. In *Rowledge v HMRC* [2016] UKFTT 556 (TC) Judge Thomas Scott said:

> "31. I have also considered the consequences of a refusal to extend time. For HMRC, the consequences are positive. For Ms Rowledge, however, the consequences of a refusal to extend time would be highly prejudicial.
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> 32. The appeal which Ms Rowledge seeks to make out of time effectively raises only one issue. The CGT arising on the sale of the Property by Ms Rowledge to Peter Rowledge in 2008 is, according to HMRC's estimate in the Assessment, £34,377. The associated failure to notify penalty is £10,313. However, the CGT calculation takes no account of the substantial repair and renovation work undertaken following the purchase of the property, and assumes that none of the associated expenditure could add to the base cost and thereby reduce the gain.
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> 33. Ms Rowledge engaged a professional firm to calculate what she maintains should have been the CGT due in view of the alleged allowable expenditure of approximately £80,000. The calculation showed CGT of £3,573, with an associated penalty of £1,072.
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> 34. In considering whether to grant Ms Rowledge's application, I have not given any detailed consideration to the merits of the substantial appeal. As Moore-Bick LJ said in the Court of Appeal decision in *R (Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (at [46]):
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> > "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered…".
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> 35. However, while not permitting or engaging in what has been termed a "mini-trial" of the merits, I have considered whether a refusal to extend time would be likely to cause what Judge Berner in *O'Flaherty* called "demonstrable injustice". While the agreement of allowable expenditure between the parties might result in some claimed expenditure not being allowable, or not being evidenced to the satisfaction of HMRC, a refusal would result in Ms Rowledge having a tax liability some £40,000 greater than that which she contends is properly due.

36. Ms Rowledge gave evidence, which HMRC did not challenge, that she had been told on the telephone by HMRC's debt recovery unit that HMRC would take all necessary steps to recover the CGT and penalty assessed, even if bankruptcy ensued.

57. Thus without conducting a mini-trial we have considered whether a refusal would cause demonstrable injustice. To do so we have to flesh out the issues that we have alluded to in the background section.

58. The notebook of a UK Border Agency ("UKBA") officer was exhibited by HMRC. It showed that on 5 February 2013 three UKBA officers intercepted a Renault tractor unit at a site in West Thurrock which was in the process of hitching up to a trailer. The officers had seen another tractor unit uncouple from the trailer and leave the site. They questioned the lorry driver, a Mr Champion, who told them he was working for AM Transport. When asked the name of his boss he said "Alan". The officer is recorded as saying "Is that Alan Massey?" to which the driver replied "yes". No paperwork for the load was found by the officers. The tractor unit and trailer along with the contents of the trailer were seized under s 139 of the Customs and Excise Management Act 1979. The seizure information notice referred to pallets of alcohol.

59. On a date in early April 2013 a Mr John Moore of Pro Logistic Freight Ltd ("PLF") complained to HMRC about the seizure of "my vehicle". He said that he understood from Alan Massey (the appellant) that Massey's driver was assisting another vehicle when customs officers intercepted it but made no attempt to follow the departing tractor unit which had the paperwork. He added that the vehicle is on hire to Mr Massey but is owned and registered by PLF. He enclosed the logbook (V5C) and hire agreement. The V5C shows that PLF was the registered keeper of SF54TSU and is dated 13 January 2013. The rental agreement was on page 1 headed "Truck Rental Agreement" but on page 2 is referred to as a Car Rental Agreement. It is for five months at a rent of £250 pw plus a deposit of £1000. The hirer (Mr Massey) is responsible for insurance. A signature which appears to be Mr Massey's is on the second page.

60. On 20 May 2013 HMRC Criminal Investigations wrote to Mr Moore refusing to restore the vehicle. They stated "SF54TSU is supposedly on hire to Mr Massey" and "Mr Massey is a previous keeper of this vehicle and has been using it regularly during 2012".

61. The seizure of the contents of the trailer were clearly relayed to HMRC Local Compliance and was the reason why they wrote to Mr Massey on 3 July 2013 (see §4). That letter refers to a seizure of goods "from you", and that "you were informed that the seizure was without prejudice to further action" and that by virtue of "your actions" an Excise Duty Point was "created" [*sic*].

62. In his phone call of 20 May 2014 Mr Massey is recorded as saying that the assessment and penalty were nothing to do with him and that in law the person holding the goods at the time of seizure is the responsible person (sc for paying the duty) and that was not him. Mr Massey recorded his disagreement with Ms Perry's

statement that the driver was working for him. He also added that if DVLA checks had been conducted HMRC would see that he had sold the vehicle.

63. The letter of 20 May 2014 from the appellant gave details about the sale. The HMRC letter of 10 June 2014 sought "documentary evidence" of the sale. This resulted in what was effectively a stalemate with Mr Massey giving information but not what HMRC sought by way of documentary evidence and Mr Massey explaining why there was no "documentary evidence".

64. In the letter of 13 August 2014 HMRC explained to Mr Massey that they had "documentary evidence" of the rental agreement between PLF and him, but they did not give a copy to the appellant. They also told him that Mr Champion, the driver, had identified his boss as "Alan Massey".

65. The final request by HMRC was in Mr Fisher's letter of 17 September where he said he would be prepared to review the case again if the appellant could provide "evidence" that the vehicle was sold.

66. On 11 and 25 November Mr Massey provided bank statements showing, he said, receipt of the sale proceeds of the vehicle from PLF and a copy of an enquiry response from DVLA showing the date of disposal of SF54TSU by him on 1 January 2013.

67. Throughout the period when HMRC were asking Mr Massey for "documentary evidence" or "evidence" that he had as he said sold the lorry to PLF in January 2013 (before the seizure) HMRC were in possession of a copy of the vehicle's log book showing that PLF was registered as the keeper no later than 13 January 2013. They did not reveal this to Mr Massey until the listing of this case for a permission hearing.

68. Mr Massey has steadfastly maintained that the rental agreement is (in our words) a sham or a forgery and that he was unaware of the agreement and did not sign it. He admits that Champion used to work for him.

69. We do not seek to say whether there is truth in what Mr Massey says. What we do say is that there is clearly a major dispute and that if Mr Massey is correct there must be at the very least an arguable case that he is not liable to the duty. It must be recalled that HMRC's first communication on this matter with the appellant told him that 23945 litres of beer were seized "from you" and "you were informed" and "your actions" led to the duty assessment.

70. And liability for duty assumes that there was a duty point when the goods were seized (see eg *Boyle v HMRC* [2016] UKFTT 566 (TC) for doubts on this).

71. As to the penalty the doubts about its validity must be more arguable than those about the assessment to duty.

72. From all this we find that should we deny Mr Massey permission to appeal there is a substantial risk that the consequences would be a grave injustice to him. For

HMRC the consequences would be that they would need to conduct an appeal and produce witnesses from UKBA and HMRC with the resource cost that would entail.

73. It falls to us now to make our decision in the light of the answers to those questions (as said in *Data Select*).

74. In our view the delay of just over a year is serious, but not significant. We also find that there is a good explanation for the delay of just over a year. Mr Massey could not be expected to realise the error made by Mr Fisher in referring to the VAT and Duties Tribunal. He could though have expected to get a response from HMRC in answer to his reasonable questions about a number of the entries he needed to put on the Notice of Appeal to the Tribunal. And he was not told that he had 30 days to appeal after the review conclusions letter.

75. We also consider that the very real prejudice to Mr Massey if we deny permission outweighs by some distance the prejudice to HMRC if we grant permission.

76. On the basis of *Data Select* we have no hesitation in stating that we grant permission to allow the appeals to be admitted. Is there anything in the current CPR 3.9 that would lead to a different view? We do not think so. The change in CPR 3.9 is that the two factors in paragraphs (a) and (b) are given more weight than they were under the old. The (a) factor is for litigation to be conducted efficiently and at proportionate cost. If that is applied by analogy to the HMRC investigation and conduct of the case leading to the late appeal, HMRC would not be flattered by our analysis of their conduct. Factor (b) is to enforce compliance with rules, practice directions and orders. This again is not really an issue in this case and has to be applied by analogy. It is a statutory time limit which expressly allows for late compliance with the permission of the Tribunal. The Tribunal can do little else but consider the *Data Select* questions (and the *Denton* stages) and come to a decision taking account of all the circumstances. This we say we have done.

Decision

77. Thus we are not shaken from our view that permission should be granted and we so grant it.

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

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 26 AUGUST 2016