[2017] UKFTT 103 (TC)

TC05620

Appeal number: TC/2015/05282

TOBACCO PRODUCTS DUTY – HMRC applying to strike out appeals against assessments to duty and to a penalty under Schedule 41 FA 2008 – strike out application dismissed – order for costs for unreasonable conduct by HMRC.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SUNDAY ADEWALE **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Fox Court, London on 10 January 2017

Mr Adewale in person

S Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This hearing was of an application by the Commissioners for Her Majesty's Revenue and Customs to strike out proceedings, or part of them, in relation to two appeals by Sunday Adewale.

2. The first appeal was against an assessment to tobacco products duty made under s116 Customs and Excise Management Act 1979 ("CEMA") for £1523. The second appeal was against an assessment to a penalty for handling dutiable goods after the excise duty point, being goods on which duty had not been paid. The assessment was made under paragraph 16 of, and in accordance with paragraph 4 of, Schedule 41 Finance Act 2008 ("Schedule 41") for £533.

3. HMRC argued that the proceedings started by these appeals must be struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("FTT Rules") on the basis that this Tribunal had no jurisdiction in relation to the appeals, or possibly part. Alternatively, HMRC argued that the whole of the proceedings in relation to these appeals should be struck out under Rule 8(3)(c) on the basis that Mr Adewale had no reasonable prospect of succeeding in his appeals.

4. At the hearing, Mr Adewale appeared in person, and HMRC were represented by Ms Choudhury, counsel. A bundle of documents was produced in evidence. During the hearing I asked Mr Adewale some questions to clarify his grounds of appeal and the events at Luton Airport.

5. At the end of the hearing I announced that I had decided not to strike out either appeal and so the application was dismissed. In view of the wider issues that arise from HMRC's applications, I have issued this decision notice setting out my reasons for dismissing the application.

Evidence and Facts

6. In a strike out application the normal rule is that the Tribunal assumes the facts, where in dispute, to be those most favourable to Mr Adewale.

7. During the course of the hearing, Mr Adewale said that he was a single parent, that he was not working, and that he relied on state benefits. He used to live and work in Dubai, where the costs of tobacco were very much cheaper than in the UK, and he was used to importing tobacco into Dubai in substantial quantities without having to pay any duty on import. Because tobacco was so cheap, it was common to give packs of cigarettes to friends as gifts, and that he always bought large quantities of cigarettes so that he had some to give as gifts.

8. The matters set out below are undisputed.

9. On 11 January 2013 Mr Adewale arrived at Luton Airport on a flight from Prague in the Czech Republic.

10. After going through the baggage reclaim area he entered the blue channel, where he was stopped and questioned by a Border Force officer. His bags were searched, and a total of 6360 cigarettes were found.

11. The officer seized the cigarettes under s139 CEMA, and issued Mr Adewale with a seizure information notice, a warning letter about seized goods, as well as copies of HMRC's notices 1 and 12A. Mr Adewale left the blue channel.

12. Mr Adewale did not institute condemnation proceedings in the Magistrate's Court.

13. On 9 September 2014 an officer of HMRC, Mr Jennison, wrote to Mr Adewale in a letter headed "About the excise duty and penalty we intend to charge you". The letter explained that because he had not challenged the seizure, HMRC would now charge excise duty due in respect of the seized goods. The letter went on to say that HMRC had decided on this occasion not to take criminal proceedings for the evasion of excise duties, but instead to charge a penalty for wrongdoing because of his deliberate behaviour. An "Excise Duty Schedule" and a "Penalty Explanation Sheet" were enclosed with the letter. The purpose of the letter was said to be to allow Mr Adewale to provide any further information which he thought relevant for the purposes of determining the correct amount of duty and of the penalty.

14. He was asked to disclose any additional information (referred to in the letter as "telling, helping and giving"), an explanation of his behaviour and "any other circumstance that may lead us to reduce the penalty further".

15. He was also told in this letter that he could not appeal against it at this time. Enclosed with the letter were factsheets on "The Human Rights Act and Penalties" and "Penalties for VAT and Excise Wrongdoing".

16. The schedule to the Penalty Explanation Sheet showed that a penalty had been charged under Schedule 41. The schedule stated that Mr Adewale's behaviour was deliberate because

> You took the opportunity to purchase excise goods in Europe at a cheaper rate than available in the UK. You had more than the guideline amount. On further questioning the UK Border Force believed that the goods were for commercial purposes and the goods were seized. You elected not to stay for interview.
>
> You had travelled 2-3 months previously, you were not in employment; I consider there is no identifiable means of income to fund these trips of your purchase of cigarettes.
>
> You have also had a previous seizure against you.

17. The schedule stated that Mr Adewale's behaviour was prompted because

> … you did not tell us about the wrongdoing before you had reason to believe we had discovered it, or were about to discover it.

18. His disclosure was characterised as deliberate and prompted, and the penalty range was therefore from 35% to 70%. A reduction of:

(1) The maximum amount was given for "telling"; and

(2) The maximum amount was also given for both "helping" and "giving" because Mr Adewale was not required to provide assistance with these elements.

19. As the maximum reduction was allowed, the penalty percentage was calculated as being 35%

20. The schedule stated that, based on the information that they had, HMRC did not consider there were special circumstances. The penalty shown on the schedule was £533, which represented 35% of the duty assessed, being the potential lost revenue.

21. Notices of assessment were issued on 29 October 2014. The notice of the excise duty assessment stated that the assessment was made under s116 CEMA. This was a mistake, it should have said that the assessment was made under s12(1A) Finance Act 1994 ("FA 1994"). The covering letter sent with the notices of assessment stated that "The notice of penalty assessment and the Officer's Assessment tell you what to do if you do not agree with them." However neither of the notices of assessment set out Mr Adewale's rights to an appeal to this Tribunal nor his entitlement to a review, contrary to s15A FA 1994.

22. HMRC wrote to Mr Adewale on 27 January 2015, 28 April 2015 and 12 May 2015 reminding him of the amount he owed in respect of duty and penalties. The letter of 12 May 2015 stated that if he did not pay, HMRC could enforce the debt by visiting his premises in order to arrange to sell his assets at public auction.

23. On 21 May 2015, HMRC received two letters from Mr Adewale. The first stated that he wished to have the decision reviewed, and, if needed, for it to go to this Tribunal. The letter explained that he was a single parent who was no longer working. He had received a tax refund, and used it to buy cigarettes when he was in the Czech Republic. These were seized as he was told he had too many. He had lost the money he had spent on the cigarettes and was now being fined, but he had no income other than family tax credits/income support. The second letter repeated the points that he had lost the money he had spent and was now being fined, but had no money to spare.

24. On 15 June 2015, Mr Jennison wrote to Mr Adewale asking him to clarify what he required of HMRC, and enclosing factsheet HMRC 1 which set out Mr Adewale's right of appeal. On 24 June 2015, Mr Adewale wrote to HMRC requesting a review.

25. On 31 July 2015 Ms Clydesdale sent a letter saying she had completed her review and concluded that the assessments for duties and penalties should be upheld.

The letter set out Mr Adewale's right to require HMRC to review its decision and of his right of appeal to this Tribunal.

26. Mr Adewale's notice of appeal was dated 2 September 2015 and was received by the Tribunal on 3 September 2015. HMRC allowed Mr Adewale's hardship application in relation to the excise duty charged by the assessment.

27. On 27 November 2015, the Tribunal directed that this appeal be stayed for 6 months pending the outcome of the appeal in *Staniszewski v HMRC* [2016] UKFTT 128 (TC). On 17 May 2016 the stay was lifted when the Tribunal's decision in *Staniszewski* became final. On 20 July 2016, HMRC applied for the appeal to be struck out, and for the Tribunal to suspend the requirement for HMRC to prepare a Statement of Case until 60 days after their application had been dealt with.

Striking out and the Tribunal's approach to applications

28. 42. Rule 8 of the FTT Rules provides:

> 8 Striking out a party's case
>
> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
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> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

> (5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
>
> …"

29. From this it can be seen that a strike out under Rule 8(2)(a) (lack of jurisdiction) is mandatory, but a strike out under Rule 8(3)(c) (no reasonable prospect of success) is discretionary.

30. It is also the case that in the two types of strike out sought in this case, Mr Adewale must be given an opportunity to make representations. This was done in this case by giving Mr Adewale the opportunity to address the Tribunal.

31. In this case HMRC cite three decisions as demonstrating that this tribunal has no jurisdiction to hear an appeal against the assessment to excise duty, and that the Tribunal must therefore (mandatorily) strike out the appeal under Rule 8(2)(a). They are: *HMRC v Jones and Jones* [2011] EWCA Civ 824; *HMRC v Race* [2014] UKUT 331 (TCC); and *Staniszewski*.

32. In circumstances where HMRC seize goods or a vehicle, the owner has a right to start condemnation proceedings in the Magistrates Court. These proceedings will decide whether HMRC's seizure was unlawful – for example because the owner had committed no offence which would justify the seizure – which would be the case if the owner could demonstrate that the goods were imported for personal use. If the owner is successful before the magistrates, the goods and the vehicle (or money to their value) will be restored. If they are unsuccessful then the goods are duly condemned as forfeit and pass to the Crown who may sell them or destroy them. Where a person does not begin condemnation proceedings or withdraws from them then by virtue of paragraph 5, Schedule 3 CEMA the goods concerned are deemed to have been duly condemned forfeit.

33. Where goods or a vehicle have been condemned as forfeit, it is possible for the owner to apply for restoration of the goods and the vehicle, notwithstanding that they have been condemned. There is a right of appeal to this Tribunal in respect of HMRC's decision on restoration.

34. *Jones* was not a case where an assessment to excise duty was in consideration. It was a case where the appellants were seeking the restoration of their tobacco and of the car in which it had been carried. The car and the goods had been seized by HMRC because HMRC considered that the goods were being imported for a commercial purpose without duty being paid and because the car was used to carry the goods. The appellants started condemnation proceedings in the Magistrates Court, but subsequently withdrew those proceedings. Accordingly the car and the goods were therefore deemed to be condemned pursuant to paragraph 5, Schedule 3, CEMA. The Jones's then applied to HMRC for restoration, and appealed against HMRC's decision

35. The Court of Appeal held that it was not open to the Jones's when seeking restoration to argue that the goods were in fact for their personal use, and they could

not say they had committed no offence which would justify the seizure. This was the result of the deemed condemnation under Schedule 3 CEMA, Mummery LJ said at [71] and [73]:

> 71. […]
>
> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
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> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
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> […]
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> 73. To sum up: the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the respondents' personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the respondents' own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol: there is no judge-made exception to the application of paragraph 5 according to its terms; the respondents had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in

> it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation.

36. In summary, condemnation and restoration involve two jurisdictions, that of the Magistrates Court and that of this Tribunal. It would amount to an abuse of process if the Tribunal were in effect to set aside or overturn the effect of an order of the Magistrates Court or even a deemed order. So the Tribunal's jurisdiction does not extend to querying the Magistrates Court's order in the condemnation proceedings (or the deemed condemnation).

37. In *Race* the situation was different. Mr Race had had tobacco in his possession at home in the UK seized and duly condemned as forfeit. He had subsequently been assessed to duty and a penalty. In his decision in the Upper Tribunal, which is binding on me for what it decides, Warren J said at [33]:

> I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT*. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.

38. It is worth noting that in the First-tier Tribunal HMRC had put their case on the alternative bases of Rule 8(2)(a) and Rule 8(3)(c) (as they have done here). In the Upper Tribunal Warren J records them as arguing only that "even assuming the facts to be as Mr Race had stated them, Mr Race could not succeed in his appeal against the Assessment". At [48] Warren J said:

> HMRC applied, after all, to strike out Mr Race's appeal against the Assessment which, as it stood at the time of the application and as it stands today, raises only one ground of appeal namely that the goods were acquired for personal use. For reasons which I have given, and assuming that Mr Race did not serve a valid Notice of Claim, Mr Race cannot succeed on that ground whichever factual scenario is adopted and none of the reasons given by the Judge justified his refusal to strike out the claim. In my judgment, under the scenario where there was no Notice of Claim, the approach adopted by the Judge was not correct. It is open to me, as an appellate judge, to revisit the exercise of the discretion whether or not to strike out the appeal. I would without hesitation strike out the appeal.

39. The reference to "discretion" here and other references to the appeal succeeding or not suggest to me that Warren J was re-exercising the FTT's discretion under Rule 8(3)(c). When the case returned to the FTT to deal with one issue which the Upper Tribunal had indicated it would not, on the basis of the facts as known, strike out, Judge Cannan said at [25] of *Race v HMRC* [2014] UKFTT 1085 (TC):

> In all the circumstances I am satisfied that Mr Race has no reasonable prospect of establishing that he did give HMRC a notice of claim challenging the legality of the seizure of the Goods. The Goods are

> therefore deemed to have been imported otherwise than for personal use and Mr Race's sole ground of appeal against the assessment to excise duty must fail. I therefore strike out the appeal in so far as it relates to the excise duty assessment.

40. That also appears to be an application of Rule 8(3)(c) (no reasonable prospect). This is entirely understandable. If it was correct that Mr Race had acquired excise goods on which the duty was unpaid (after their importation from "a man in a pub" - as HMRC allege he told them) a "personal use" argument could not succeed.

41. Warren J expressly mentioned at [34] in the Upper Tribunal that in an appeal against an assessment to duty:

> In any event, it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person or is otherwise deficient ...

42. I agree with the Tribunal in *Hill v HMRC* [2017] UKFTT 018 (TC):

> 62. […] Suppose a person appeals against an assessment to duty on the grounds that (a) the tobacco seized at an airport or port was for personal use and (b) the assessment is defective for some other reason, eg one of the reasons identified by Warren J in *Race* at [34]. In that case it seems to me to be a more difficult argument to say that "part of the proceedings" should be struck out because of lack of jurisdiction than to say that a part of the proceedings should be struck out because there is part of the appellant's case (and I note that the word "case" is used in heading to Rule 8) about which there is no reasonable prospect of success.
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> 63. As a result I am not convinced that applications to strike out an appeal against an assessment to excise duty are appropriately to be made under Rule 8(2)(a) rather than Rule 8(3)(c). The relevance is of course that the if Rule 8(2)(a) applies, then strike out is mandatory: if Rule 8(3)(c) applies strike out is discretionary.
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> 64. It might well be said by HMRC in riposte to this point (and it was said in this case) that the appellant's only expressed ground of appeal is "personal use", so therefore this is a lack of jurisdiction case. But the appellant here is a litigant in person. In *Jamie Garland v HMRC* [2016] UKFTT 573 (TC), this Tribunal (Judge Christopher Staker QC) said:
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> > 14. As regards HMRC's reliance on rule 8(3)(c), the Tribunal accepts that if the notice of appeal sets out no grounds of appeal with any reasonable prospect of succeeding, the appellant risks a successful strike out application being made by HMRC. However, in cases involving unrepresented appellants, it can occur that the notice of appeal fails to disclose any arguable grounds of appeal, even though there is potential merit in the appeal.
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> > In *Aleena Electronics Limited v Revenue and Customs* [2011] UKFTT 608 (TC), it was said at [60]:

> "It is the ethos of the Tribunal system and certainly that of the Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not. Where the appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask."
>
> 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 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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> 65. I agree with everything that Judge Staker says here and I consider below what arguments the appellant might be able to deploy should the case go to appeal.

43. Judge Thomas in *Hill* also refers to the decision of Judge Mosedale in *Glen Lyn Generations Ltd v HMRC* [2016] UKFTT 795 (TC) when she considered the power in Rule 8(3)(c):

> Test for no reasonable prospect of success
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> 6. I agree with Mr Voice [counsel for HMRC] that this test is the same test as applies to summary judgment in the Courts and that is whether there is 'a real prospect of success.' In *Swain v Adewaleman* [2001] CP Rep 16 this was described as follows:
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> > 'The word "real" distinguishes fanciful prospects of success or, ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success…'
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> 7. And in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) Colman J further defined the test:
>
> > "For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty…"

> 8. Mr Voice accepted that it was for HMRC to satisfy me that the appeal (or a party of it) had only a fanciful prospect of prospect of success and unless they did so it could not be struck out (or partly struck out).

44. Like Judge Thomas, I follow the approach set out in paragraph 8 of *Glen Lyn Generations.*

HMRC Submissions on the application to strike out the duty assessment

45. Ms Choudhury argued that the effect of the Court of Appeal decision in *Jones* was that the FTT did not have jurisdiction to decide whether or not goods seized and deemed forfeit were really being imported for other than commercial use.

46. She submitted that it followed from *Race* in the Upper Tribunal that in an appeal against a duty assessment my jurisdiction is limited to considering whether HMRC had correctly identified Mr Adewale and whether the assessment met the statutory requirements. As Mr Adewale had only argued in his grounds of appeal that the goods were for his personal use, the Tribunal should grant the application to strike out under Rule 8(2)(a).

47. Ms Choudhury also referred to this Tribunal's decision in *Staniszewski* where Judge John Brooks held that the Tribunal does not have jurisdiction to hear the so-called "consumption" and "proportionality" points in relation to the assessment to duty.

48. In relation to the penalty Ms Choudhury argued that the conditions for imposing the penalty had been met and that it was not in dispute that Mr Adewale's conduct was deliberate and his disclosure was unprompted; it could not be argued by Mr Adewale that the goods were for personal use in view of *Race*. The reviewing officer had given the maximum reduction for the quality of his disclosure. Both the officer making the assessment and the reviewing officer had considered whether a special reduction should be made and had concluded there were no special circumstances.

49. The Tribunal should therefore hold that there was no reasonable prospect of success for Mr Adewale and should exercise its discretion to strike out the appeal against the penalty.

The assessment to excise duty

50. I agree with HMRC that in an appeal against the assessment to duty it is not open to the Tribunal to accept an argument from Mr Adewale that any tobacco which has been duly condemned on the basis that it was being held for commercial purposes was not in fact held for those purposes, with the hoped for result that the assessment cannot stand. This is because of the decision in *Race* in the Upper Tribunal which is binding on me,

51. I consider however that there are arguments that could be deployed at a hearing of the appeal which would not need to rely on the status of the goods as not having

been held for commercial purposes. These were discussed by this Tribunal in its decision in *Hill.* Of the reasons discussed in *Hill* the following are most relevant to Mr Adewale's appeal:

(1) The different consumption argument

(2) The invalid assessment argument

The different consumption argument

52. In *Staniszewski* Judge Brooks dismissed an argument based on a provision of the EU Excise Duty Directive (2008/118/EC) which allowed a relief from duty for goods totally destroyed or irretrievably lost (Article 37 of the Directive). The argument was based on the proposition that excise duty is a duty on consumption and if the tobacco is seized and destroyed it cannot be consumed by anyone.

53. Being a decision of this, the First-tier, Tribunal, Judge Brooks' decision is not binding in other cases before this Tribunal. The argument with which I am concerned was not in any case put to Judge Brooks (although there are similarities).

54. The argument was raised by Judge Thomas in *Hill* and relies on inferences that might be drawn from the judgment of 29 April 2010 of the Court of Justice of the European Union, Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* [2010] ECR I-03799. The argument would be based on points raised in paragraphs 86 to 94 of *Hill* (which I do not propose to set out in full here). In my view it is not a fanciful argument to say that the Excise Duty Directive must be interpreted as extinguishing the arriving member state excise duty debt (or not imposing it in the first place).

The invalid assessment argument

55. In *NT-ADA Ltd (formerly NT Jersey Ltd) v HMRC* [2016] UKFTT 642 (TC) this Tribunal (also Judge Brooks) considered what the effect on the validity of an assessment was if HMRC had not followed the law relating to reviews and appeals. At paragraph 24 onwards he said (omitting irrelevant passages):

> Section 67 VATA Penalty
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> 24. The s 67 VATA Penalty of £234,833 was imposed, by HMRC, on 4 April 2016, on the grounds that NTJ [ie NT-ADA Ltd] had failed to notify its liability to register for VAT "at the proper time." The letter containing notice of the penalty, like the VAT registration certificate, was not sent to NTJ's address in Jersey but to where HMRC considered it had a fixed establishment in the UK. It was subsequently sent to NTJ which, as noted above, on 29 April 2016 notified the Tribunal of its appeal.
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> 25. Under a sub-heading 'What to do if you disagree with this notice" the letter stated:
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> 'If you disagree with this decision you can ask for a review by an independent HMRC Officer by writing to the address above within

> 30 days of the date of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished.'
>
> 26. As with the registration certificate Mr Gordon argues that the penalty notice is ineffective as it was notified to the wrong address contrary to s 98 VATA and did not offer a review contrary to s 83A VATA (see above). He says that the use of "ask" in the letter is, in the language of contract law, more akin to an invitation to treat than an offer as it does not provide any assurance that a request for a review would be granted. However, Mr Jones contends that the letter is plainly an offer and that it is "splitting hairs" to say otherwise.
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> 29. I accept Mr Gordon's submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant "can ask for a review" without any assurance that it will be granted. Rather it should have been stated, as it was in the 29 October 2012 letter, that an appellant has "a statutory right to a review". In my judgment the failure to make it clear to NTJ that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it.

56. In this case it is not apparent from the evidence I have seen that anything at all was said to Mr Adewale about his rights to an appeal against the excise duty assessment and his right to a review of the decision until a very late stage, long after the assessments were originally issued. The letter from Mr Jennison of 29 October 2015 suggested that details about what to do if he disagreed with the duty assessment would be found in the assessment notices, but there is nothing in those notices about appeals and reviews.

57. The first time Mr Adewale's entitlement to a review or an appeal was mentioned was in Mr Jennison's letter of 15 June 2015, when he was referred to an enclosed factsheet HMRC 1.

58. It is therefore arguable that if HMRC cannot put forward evidence that Mr Adewale was clearly told of his rights to a review of the assessment pursuant to s15A FA 1994, the assessment would be invalid as held by Judge Brooks in *NT-ADA*.

59. In addition, I would note that the excise duty assessment states on its face that the duty was payable under s116 CEMA. In fact it was payable under s12(1A) FA 1994 (I note that the correct legislative reference was given in HMRC's letter of 9 September 2014 and in the review decision letter of 31 July 2015). The error was drawn to my attention by Ms Choudhury in her skeleton argument and in her submissions, and a letter was sent to Mr Adewale on 9 January 2016 correcting the error and apologising for the mistake (Mr Adewale told me that he had not received the letter at the time of the hearing). Ms Choudhury submits that this error is not fatal to the assessment, in the light of the decision of the High Court in *House (trading as P & J Autos) v HMCE* [1994] STC (as approved by the Court of Appeal – [1996] STC 154). In that case, May J accepted the submissions made on behalf of the taxpayer

that the minimum requirements for a valid notification of an assessment were that it should state the name of the taxpayer, the amount due, the reason for the assessment, and the period of time to which it relates. The difficulty (as is acknowledged in Ms Choudhury's skeleton) is that the incorrect legislative reference goes to the reason for the assessment.

The assessment to a penalty

60. I note that if I did not strike out the appeals, and Mr Adewale were to be successful at the substantive hearing in dismissing the assessment to the excise duty, the penalty would fall automatically, as there would be no duty on which to base a penalty.

61. But assuming Mr Adewale were not successful in his appeal against the underlying excise duties, the question arises as to whether the decision of the Upper Tribunal in *Race* has any application to the penalty assessment. In his decision, Warren J makes it clear that the question of an appeal against penalties was not before him, but at paragraph 39 he says:

> It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming.

62. This Tribunal considered whether *Race* applied to penalty appeals in the decision in *van Driessche v HMRC* [2016] UKFTT 441 (TC). Paragraphs 140 to 187 give a thorough analysis of the application of deemed condemnation to penalty appeals. These are summarised as follows:

> Overall conclusions on matters other than honesty
>
> 196. We pause at this point to summarise the position so far:
>
> (1) HMRC have failed to show that Mrs Van Driessche engaged "in any conduct for the purpose of evading" customs duty, excise duty or import VAT.
>
> (2) It is arguable that CEMA Schedule 3 applies to penalty appeals generally, so as to deem a person who has failed to challenge the seizure of the goods at the magistrate's court to have engaged in the conduct which underlies the penalty, although we are inclined to the view that deeming does not apply to penalty appeals.
>
> (3) Even if deeming does apply to penalty appeals generally, it cannot operate so as to deem part of Euroairport to be outside the EU. That would be both absurd and a breach of EU law.
>
> (4) However, goods bought at Euroairport could be deemed to have been purchased duty free.

> 197. Because it is arguable that deeming could apply so as to treat the goods as having been purchased duty free, and because we can decide this case without expressing a final view on that point, we moved on to considering whether Mrs Van Driessche was dishonest.

63. If the Tribunal was correct in *van Driessche*, then Mr Adewale could argue that his conduct was outside the scope of paragraph 4 of Schedule 41, that he had a reasonable excuse for his conduct, or that there were special circumstances that applied (but which HMRC ignored). My preliminary view is that even if deemed condemnation does apply to penalties, what actually happened at Luton Airport may be taken into account in considering the liability to penalties (or their amount), providing the appellant's argument is not based upon the goods having been imported solely for personal use.

64. Judge Thomas in *Hill* considered potential arguments that would be available to the appellant, and many are equally (or similarly) applicable in this case. They are:

(1) The *Jacobson* argument

(2) The invalid penalty argument

(3) Deliberate and prompted disclosure argument

(4) Reasonable excuse argument

(5) Special circumstances argument.

65. I also consider in relation to each whether they still have force if in fact deeming does apply to penalties.

The "Jacobson" argument

66. In *Jacobson v HMRC* [2016] UKFTT 570 (TC) the Tribunal held that a penalty under paragraph 4 Schedule 41 did not apply at an airport. The arguments are set out at paragraphs [32] to [75] of that decision. Depending on the layout of the Luton Airport, the case may be even be stronger. I have in mind here paragraph [16] of the Tribunal decision in *JP Lewis v HMRC* [2015] UKFTT 640 (TC) which was about the arrangements at Coquelles just before the Channel Tunnel.

67. In *Jacobson* the appellant was stopped in the green channel, whereas Mr Adewale was stopped in the blue channel – and this has potentially significant ramifications. We were provided with a copy of HMRC's Notice 1. We had no evidence as to whether this was available to the public before passing through customs controls at Luton Airport, or whether equivalent information was available on posters in the baggage collection area. The leaflet states as follows:

> Going through Customs
>
> Most UK ports and airports have three exits or 'channels': the red, green and blue channel. Some ports and airports only have one exit and a red point phone where you declare goods.

If you let a coach, ferry or aircraft store your goods while travelling to the UK, you must make sure you collect the exact goods obtained by you and go through the correct channel.

Blue Channel

Use the blue channel if you are travelling from a country within the European Union (EU) with no banned or restricted goods (see pages 12 – 15).

Green Channel

Use the green channel if you are travelling from a country outside the European Union (EU) with goods that:

- do not go over your allowances

(see pages 7 – 9 for further information)

- are not banned or restricted

(see pages 12 – 15 for further information).

Red Channel or Red Point Phone

You must use the red channel or the red point phone if you:

- have goods or cash (pages 10 and 11) to declare;
- have commercial goods, see 'Notice 6 – Merchandise in baggage' available from the advice service (page 19) for more information;
- are not sure about what you need to declare.

68. The banned and restricted goods listed on pages 12 to 15 relate to goods which are prohibited from import, or for which a licence or similar is required and clearly does not apply to the import of tobacco. Bringing tobacco into the UK for personal or commercial purposes from the EU is discussed on page 5.

69. It is certainly arguable that the leaflet requires a traveller to use the blue channel if arriving in the UK from an EU country, even if the traveller is importing tobacco commercially, or otherwise than for personal consumption. Mr Adewale and a Border Force officer would be able to give evidence about the layout of the blue channel, and the opportunity in the channel to make an unprompted declaration of liability.

70. The *Jacobson* argument would be relevant whether or not deeming applies to penalties. I am aware that *Jacobson* has been appealed to the Upper Tribunal.

The invalid penalty argument

71. This argument is also based on *NT-ADA* discussed above. In the case of the penalty the notice of assessment did refer to a review, but in the same terms as in *NT-ADA*. This argument would be relevant whether or not deeming applies to penalties.

Deliberate and prompted disclosure argument

72. The penalty range is determined by whether the behaviour of the appellant was careless or deliberate, and whether the disclosure of the wrongdoing was prompted or not. It is open to Mr Adewale to argue that a lower penalty range should apply on the basis that his disclosure was careless, or unprompted or both. This would be particularly relevant if the procedures at Luton Airport require him to exit the baggage reclaim area through the blue channel, and if there is no facility for him to make an unprompted disclosure in the blue channel. The penalty range for a careless unprompted disclosure is 0% to 30%, and the range for a deliberate unprompted disclosure is 20% to 70%. This argument would be relevant whether or not deeming applies to penalties

Reasonable excuse argument

73. Paragraph 20 Schedule 41 provides (in the context of paragraph 4) that if Mr Adewale has a reasonable excuse for handling goods which are chargeable with duty at a time when the duty is outstanding, liability to a penalty does not arise, so that the penalty assessment if made must be quashed.

74. The overriding condition is that the act is not deliberate; this seems to me to carry the implication that Mr Adewale genuinely thought that he was entitled to import all the tobacco without paying duty. The question then would be whether that genuine intention is enough to qualify as a reasonable excuse, and whether any other reason might so qualify. It cannot be the case that there is no reasonable prospect of establishing a reasonable excuse, and this may be done whether or not deeming applies in penalty cases.

75. A reasonable excuse argument would seem to be available irrespective of whether deeming applies to penalties.

Special circumstances argument

76. HMRC may, if they think it right, reduce a penalty under paragraph 4 because there are special circumstances. This clearly means something other than that Mr Adewale has a reasonable excuse, and so is available where the behaviour is deliberate. It must also go beyond the "telling, helping and giving" that informs the reduction made under paragraph 13, Schedule 41.

77. HMRC said in their letter of 9 September 2014 that:

> You should let us know if there is any relevant information that we have not already taken into account which may affect our view of the following:
>
> - type of penalty
> - quality of disclosure (also referred to as "telling, helping and giving")
> - behaviour

- any other circumstance that may lead us to reduce the penalty further
- amount of penalty.

78. The penalty explanation schedule said that, based on the information they had, they considered there were no special circumstances which would lead HMRC to reduce the penalty further.

79. HMRC's decision on whether to give a special reduction is is not open to challenge in the Tribunal generally, but can be challenged on appeal if that decision is flawed in judicial review terms, ie if HMRC failed to take something into account that they should have, or took something into account they should not have, or that there was an error of law.

80. Mr Adewale may, at a hearing, be able to show that the decision was flawed. Although "ablity to pay" cannot be a "special circumstance", the reasons underlying his inability to pay might be (see *C&E Commrs v Steptoe* [1992] STC 757). He might also point out that the statements made by HMRC in various letters and factsheets sent to him are so inconsistent, confusing and uninformative (nowhere do they say what might amount to special circumstances even when they say they are doing that) that he could not give proper consideration to what special circumstances might be.

81. A special circumstances argument would seem to be available irrespective of whether deeming applies to penalties. It is difficult to see how the deeming would affect such an argument.

Unreasonable conduct of HMRC

82. At the end of his decision in *Garland*, Judge Staker said this:

> 17. That [what was said in [16]] 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.
>
> 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)."

83. These remarks apply to this case just as they did to *Garland*. It is difficult to think of much that would have been needed for this hearing to have been an appeal hearing. Witness statements would have been needed from Border Force and HMRC officers which would put in summary form some of the contents of the Border Force officer's notebook and the HMRC correspondence. There would have been some additional cost to HMRC in producing the officers for cross-examination, but against that is that for this strike out hearing counsel has been employed and that person will then repeat their role, and much of their material, at the appeal. A strike out and an appeal also involves the Tribunal in incurring double the costs, and it very likely inconveniences Mr Adewale and costs Mr Adewale money.

84. It is also my experience, and that of other Tribunal judges, that excise duty appeals of this sort do not go beyond half a day, the minimum period for which a case of this type is listed.

85. I indicated at the hearing that I was not happy with the HMRC's application. That is an understatement. Not only do I consider that it was inappropriate for HMRC to apply to strike out Mr Adewade's appeal, but the list of authorities given by HMRC was woefully inadequate.

86. Only five authorities were cited in HMRC's skeleton and in their bundle: *Jones, Race, Staniszewiski, Lane* and *House*. On receiving the bundle on the day before the hearing, it was immediately apparent to me that *Jacobson* was missing – and I gave instructions to the Tribunal office to notify HMRC to bring copies of *Jacobson* to the hearing and be prepared to make submissions on it. On further reflection, other authorities, such as *Garland, Glen Lyn Generations Ltd, Hill, Dansk Transport og Logistik,* and *NT-ADA* came to my mind. I referred Ms Choudhury to *Garland* and to *Hill* during the course of the hearing. The other cases to which I have referred are mentioned in the decision in *Hill*.

87. HMRC were legally represented, and legal representatives are under a professional duty to draw to the attention of the Tribunal all relevant decisions and legislative provisions. This duty is particularly important in cases where the taxpayer is not represented. At the hearing I told Ms Choudhury that I was minded to make an order for costs under Rule 10(1)(b) of the FTT Rules. These permit me to make an order for costs if the Tribunal considers that a party or their representative has acted unreasonably in conducting the proceedings. I gave Ms Choudhury an opportunity to make representations to me in accordance with the requirement of Rule 10(5)(a).

88. Ms Choudhury apologised to the Tribunal for the failure to cite all relevant authorities, and noted that *Jacobson* was a decision of the First Tier Tribunal, and therefore of persuasive authority only. She also noted that she had already drawn my attention to the possible defect in the excise duty assessment as it had referenced the incorrect statutory provision.

89. In the circumstances I have decided to make an order in respect of costs under Rule 10(1)(b). I find that it was unreasonable for HMRC to have made an application to strike out Mr Adewade's appeal. The facts in this case are almost on all fours with the facts in *Jacobson* (the principal difference is that Mr Adewade was stopped in the blue channel, whereas in *Jacobson* the appellant was stopped in the green channel). *Jacobson* is being appealed to the Upper Tribunal, and the eventual decision in that case must be relevant to Mr Adewade's appeal. In the light of *Jacobson*, the application was bound to fail.

90. Further, and no less important, the authorities cited to me in HMRC's skeleton argument and included in their bundle were only those that were favourable to HMRC's case. They did not include a number of cases that were antithical to their case. Even though many of those cases would be of persuasive authority only, it is unacceptable for these to be omitted from the bundle. It is doubly so where the appellant is unrepresented.

91. Accordingly I order HMRC to pay the costs of the Appellant (on the standard basis) incurred in connection with the hearing of HMRC's application on 10 January 2017. Mr Adewade is to submit to the Tribunal centre, with a copy to HMRC, a detailed schedule setting out the costs he has incurred by 30 January 2017. HMRC may file with the Tribunal (with a copy to Mr Adewade) any submissions they may wish to make in relation to Mr Adewade's costs by 10 February 2017. The Tribunal will then make a summary assessment of the costs.

Decision

92. My decision is, as already indicated, that HMRC strike out application in relation to the duty assessment and the penalty assessment is dismissed.

93. In view of the fact that *Jacobson* is being appealed to the Upper Tribunal, I also direct that this appeal be stayed behind *Jacobson*, but that either party can apply at any time for the stay to be lifted.

94. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 24 January 2017