[2018] UKFTT 622 (TC)

TC06773

Appeal number: TC/2013/06153

EXCISE DUTY – application to strike out – whether Tribunal has jurisdiction over the substantive appeal with grounds as amended – arguments on the points of 'consumption' and 'proportionality' after* Marcin Staniszewski *– whether reasonable prospect of success – Rule 8 of the Tribunal Rules 2009 – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES MURRAY **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Immigration Appellate Authority, North Shields on 5 May 2017

Post-hearing submissions on 21 November 2017 and 9 December 2017

Tristan Thornton, Consultant, TTTax, for the Appellant

Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Mr James Murray appeals against the assessments raised by the respondents ('HMRC') to excise duty of £1,815 dated 7 January 2013. There is also a wrongdoing penalty of £363 imposed by notice dated 25 March 2013.

2. The interlocutory hearing was for the parties to make representations for their respective applications in relation to the substantive appeal, being:

(1) The appellant's application dated 16 June 2016 to amend his grounds of appeal in relation to the points of 'consumption' and 'proportionality';

(2) The respondents' application dated 7 July 2016 to strike out the appeal;

(3) The appellant's 'supposed' application dated 24 August 2016 to stand over his appeal behind the hearing of *HMRC v Jeffrey Williams* in the Upper Tribunal.

Post-hearing submissions

3. On 12 October 2017, Mr Thornton furnished the Tribunal with two judgments from the Court of Justice of the European Union ('CJEU'): *Vakaru Baltijos* Case C-151/16 ('*Vakaru*'), and *Polihim – SS EOOD* Case C-355/14 ('*Polihim*') as being relevant to the appellant's applications but without written submissions to that effect.

4. On 24 October 2017, the respondents applied for directions for written supplemental submissions to be made in relation to the relevance of these authorities.

5. On 2 November 2017, the Tribunal issued directions for sequential submissions by the parties on the relevance of these additional authorities in these proceedings.

6. Parties have complied with their respective directions in lodging supplemental submissions in writing.

Legislative framework

EU Directive and implementation in the UK

7. Council Directive 2008/118/EC concerning the general arrangements for excise duty ('the 2008 Directive') repealed Council Directive 92/12/EEC of 25 February 1992 on the general arrangement for products subject to excise duty and on the holding, movement and monitoring of such products ('the 1992 Directive'). Article 33 of the 2008 Directive (under Section 2 *Holding in another Member State*), so far as material, states as follows:

> '1. Without prejudice to Article 36 (1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of exercise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, their person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.'

8. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 ('the HMDP Regulations') came into force in the UK on 1 April 2010 to implement the 2008 Directive. Regulation 13, so far as material, provides as follows:

> '(1) Where excise goods already released for consumption in another Member State are held for a commercial purposes in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person –
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.

Chargeability of excise duty on tobacco products

9. Tobacco products are subject to excise duty as provided by the Tobacco Products Duty Act 1979, of which s 2 in respect of 'Charge and remission or repayment of tobacco products duty' states:

> 'There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act.'

10. The Finance Act 1994 ('FA 1994') provides the Commissioners with the power to raise assessments to excise duty, and under s 12(1A) (subject to time limits provision under sub-s 12(4)), it is provided that:

> **'**(1A) Subject to subsection (4) below, where it appears to the Commissioners –
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.'

Tribunal's jurisdiction in relation to an excise duty assessment

11. The Tribunal's jurisdiction in relation to an excise duty assessment raised under s 12 FA 1994 is under s 16 FA 1994, of which sub-s 16(4) states:

'(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and …

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.'

Commendation procedure and deemed forfeiture

12. The Customs and Excise Management Act 1979 ('CEMA') consolidates predecessor enactments relating to the collection and management of the revenues of customs and excise. Section 139 of CEMA contains provisions as to detention, seizure and condemnation of goods, of which sub-ss 139(1) and (6) state:

'(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

[…]

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.'

13. Schedule 3 to CEMA contains the provisions relating to forfeiture, and para 3 provides for the procedure to challenge the legality of a seizure by lodging a 'Notice of claim' within a statutory time limit:

'**3.** Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.'

14. Where no timely challenge to the legality of seizure is brought, para 5 of Schedule 3 to CEMA provides as follows:

> **'5.** If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thin in question shall be deemed to have been duly condemned as forfeited.'

Excise wrongdoing penalty and Tribunal's jurisdiction

15. The wrongdoing penalty is levied under para 5 of Schedule 41 to the Finance Act 2008 ('FA 2008'), of which sub-para 5(4) states:

> '(4) P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is –
>
> (a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and
>
> (b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.'

16. Under para 17 of Schedule 41, an appeal can be against a decision that a penalty is payable (para 17(1)) or against the amount of a penalty (para 17(2)).

17. The Tribunal's jurisdiction on appeal of a penalty assessment is provided under para 19 of Schedule 41 as follows:

> '(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 17(2) the tribunal may--
>
> (a) affirm HMRC's decision, or
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14 –
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.'

Case law

18. The authorities referred to in this decision are listed in the alphabetical order of their short case names:

(1) *Roger Brian Arthur v HMRC* [2009] UKFTT 168 (TC) ('*Arthur*')

(2) *Barratt v Enfield LB* [1999] UKHL 25 ('*Barratt v Enfield*')

(3) *Easter Hatton Environmental (Waste Away) Ltd v HMRC* (L00026, EDN/07/9501) ('*Easter Hatton'*)

(4) *Revenue & Customs Comrs v Jones & Another* [2011] EWCA Civ 824 ('*Jones*')

(5) *Kent v Griffiths* [2001] QB 36 at 38 ('*Kent v Griffiths*')

(6) *HMRC v Lane* [2015] UKFTT 423 (TC) ('*Lane*')

(7) *Liam McKeown, Michael Duggan, Thomas McPolin* v HMRC [2016] UKUT 0479 (TCC) ('*McKeown*')

(8) *HMRC v Nicholas Race* [2014] UKUT 18 (TCC) ('*Race*')

(9) *Marcin Staniszewski v HMRC* [2016] UKFTT 0128 (TC) ('*Staniszewski*')

(10) *Technip Coflexip Offshore Ltd v HMRC* [2005] 19298 ('*Technip Coflexip*')

(11) *Jeffrey Williams v HMRC* [2015] UKFTT 330 (TC) ('*Williams*')

Judgements from CJEU or ECJ

(12) *Commission v France* Case C-434/97

(13) *EMU Tabac* Case C-296/95

(14) *Polihim – SS EOOD* Case C-355/14 ('*Polihim*')

(15) *Vakaru Baltijos* Case C-151/16 ('*Vakaru*')

(16) Opinion of Advocate General *in Van de Water* (Case C-325/99) ('*Van de Water*')

Factual background

The seizure of goods

19. On 29 September 2012, Mr Murray and his partner were stopped by the UK Border Agency ('UKBA') at Dover Ferry Port after arriving from Belgium. They were found to be in possession of 780 cigarettes and 10KG of hand rolling tobacco (henceforth 'the Goods').

20. Mr Murray and his partner were interviewed separately by officers of the UKBA. The notebook record of Officer Minetti, who interviewed Mr Murray, is 11

pages long, and Mr Murray signed at the end of those pages to indicate his agreement to the interview record, dating his signature as at 21:21 on 29 September 2012.

21. After Mr Murray's signature entry, the notebook recorded the 'Reasons for seizure'. Seven reasons were noted, including: 'Mr Murray originally stated that he purchased his tobacco and his girlfriend purchased her tobacco, later said that he purchased all the tobacco.' Other inconsistencies were noted when Mr Murray's evidence was compared with his partner's evidence.

22. The standard notices were given to Mr Murray upon seizure of the Goods, including Notice 12A which gives information about challenging a seizure by sending a Notice of Claim to request condemnation proceedings to be commenced. Notice 12A also states that a Notice of Claim must be received within one calendar month of the date shown on the Seizure Information Notice and warns that if the time limit is not observed 'you will not be able to challenge the legality of the seizure'. Notice 12A (at para 3.13) also states that if a person is not successful at condemnation proceedings, the court may order that person to pay the costs of HMRC or the UKBA.

Assessments to excise duty and wrongdoing penalty

23. Mr Murray did not send a Notice of Claim to request condemnation proceedings to be commenced.

24. On 7 January 2013, HMRC Officer Taylor raised an assessment to excise duty of £1,815 under s 12(1A) of FA 1994. A schedule was attached showing the excise duty calculation. The letter also informed Mr Murray of HMRC's intention to raise an assessment to excise wrongdoing penalty.

25. On 1 March 2013, HMRC Officer Taylor wrote to Mr Murray, attaching a schedule of 'Penalty Explanation' for the Schedule 41 FA 2008 penalty, whereby:

> (1) The penalty range was set at 10% to 30% for 'non-deliberate' behavior and 'prompted' disclosure.
>
> (2) For reduction for quality of disclosure, the maximum reduction was given for each category, namely: 30% for 'Telling', 40% for 'Helping' and 30% for 'Giving access to records', a total of 100%.
>
> (3) The penalty percentage was set at 20%, after applying 100% reduction to the difference between the maximum penalty of 30% and the minimum penalty of 20% within the penalty range.
>
> (4) The quantum of penalty is £363, being 20% of the excise duty £1,815.

26. The letter of 1 March 2013 invited Mr Murray to provide 'any additional relevant information' that could affect the penalty as per the explanation schedule before the issue of a notice of penalty assessment. The letter also stated:

> 'If we send you a penalty assessment notice, you will be able to appeal or ask for a review then.'

27. On 25 March 2013, a notice of penalty assessment was issued to impose a wrongdoing penalty of £363 under Schedule 41 FA 2008. Under the heading of 'Appeals' (in bold type), it is stated:

> 'If you do not agree with this assessment you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an officer not previously involved in the matter. You will then have the right to appeal to an independent tax tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice.'

Request for review and the review conclusion

28. On 26 April 2013, Mr Murray wrote to Officer Taylor as follows:

> '… I received a letter from Debt Management asking for payment of £1815.00…. After speaking to a representative on the phone, I was advised again to write to you to appeal the decision to charge me the sum of £1815.00.
>
> Therefore I am appealing the decision that was made against me. This is due to the tobacco being for my own use….'

29. On 9 May 2013, Officer Dunn wrote to Mr Murray to advise that he had been asked to carry out a review of the decision. On 14 June 2013, the review conclusion decision was issued, and the excise duty assessment of £1,815 was upheld. (No review was carried out on the penalty of £363.)

Appeal lodged against excise duty assessment only

30. On 22 August 2013, Mr Murray notified his appeal to the Tribunal. Although the appeal was late, HMRC raised no objection and allowed a hardship application.

31. On the Notice of appeal, the 'Type of Tax' is marked as 'Indirect'. To the question whether the appeal is against a penalty or surcharge, it was stated in the affirmative. 'The amount of tax or penalty or surcharge' was stated as £1,815.

32. The grounds of appeal as stated on the Notice of Appeal are as follows:

> 'The reason for my appeal is that the good seized were for my own use, as I had a driving job at the time of the good (sic) being seized the cigarettes were for when I was driving and as one carton was open as I had use (sic) them on the return journey normally I would roll my own cigarettes.'

Procedural history

33. On 17 October 2013, HMRC applied to strike the appeal on the basis that the Tribunal has no jurisdiction to hear the appeal following *Jones*, and that there is no reasonable prospect of the appeal succeeding.

34. On 7 January 2014, the strike-out application was amended by including an application for the appeal to be stood over pending the decision in *Race*.

35. On 14 July 2014, the Upper Tribunal decision of *Race* was released.

36. On 22 August 2014, HMRC renewed the strike-out application.

37. On 21 July 2015 the application was heard by Judge Walters QC, who refused the strike-out application and gave permission for the appellant to amend his grounds of appeal by 18 September 2015 in relation to what Judge Walters referred to as 'the Consumption point' and 'the Proportionality point'.

38. On 10 September 2015, the appellant wrote to the Tribunal to amend the grounds of his appeal to include the points of 'consumption' and 'proportionality'.

39. On 19 November 2015, HMRC served their Statement of Case.

40. On 10 December 2015, the Tribunal, of its own motion, stayed the appeal for a period of 6 months pending the outcome of the determination of the 'consumption and proportionality' points in the case of *Staniszewski*.

41. On 12 February 2016, the FTT decision in *Staniszewski* was released.

42. On 17 May 2016, the Tribunal notified Mr Murray that the stay on his appeal was lifted following the release of the First-tier Tribunal decision of *Staniszewski*, which was not appealed. Mr Murray was invited to submit any amendments to his grounds of appeal within the next 28 days.

43. On 16 June 2016, Mr Murray confirmed to the Tribunal that he wished to continue with the appeal, and submitted amended grounds as detailed below.

44. On 4 July 2016, the respondents applied for the appeal to be struck out.

45. On 24 August 2016, Mr Murray notified the Tribunal that: (a) he has appointed Mr Thornton to represent him in relation to his appeal, and (b) and that he would like to apply for his appeal to be stood over behind the appeal of *Jeffrey Williams* in the Upper Tribunal.

The Appellant's case

Mr Murray's amended grounds

46. In compliance with Judge Walters' Directions of 24 July 2015, Mr Murray amended his grounds of appeal on 10 September 2015, to include:

> 'Consumption: The directive makes it clear that excise duty is a duty on consumption and should not be charged where the goods have been destroyed or irrevocably lost.
>
> Proportionality: … the assessment to excise duty was bad in that to raise it in addition to seizing the goods was a disproportionate response

> and a duplicated remedy for a perceived wrong (*viz*: the evasion of duty) as the cigarettes and tobacco were for my own consumption.'

47. In response to the Tribunal's notification dated 17 May 2016 that the stay of his appeal was lifted following the decision of *Staniszewski*, Mr Murray confirmed to the Tribunal on 16 June 2016 of his wish to continue with his appeal, stating also that:

> 'I did not know that my appeal was stood over behind the appeal of *Marcin Staniszewski.* I had understood that my appeal was being stood over behind the appeal of *Jeffrey Williams* in the Upper Tribunal.'

48. In respect of the FTT proceedings of *Staniszewski*, Mr Murray made the point:

> 'Had I known that the First Tier was considering this issue, I would have wanted the opportunity to contribute myself. I do not accept the decision in *Marcin Staniszewski* is correct or should apply to my appeal. It did not address all of the relevant issues, and I believe there are reasons why the issues it did address were not correct.'

49. Mr Murray requested amendment to his grounds of appeal as follows:

> 'I believe that the decision [*Staniszewski*] was wrong in law because HMRC should not collect the excise duty on goods they seize and destroy. I believe that this is not compliant with the excise directive, and that to take my goods, assess the duty and impose a penalty all together is not a proportionate response.
>
> I also believe that HMRC made an unreasonable decision and failed to properly exercise their discretion not to assess despite knowing that the goods could not be consumed and one of the primary purposes of excise duty could not be achieved.'

Mr Thornton's submissions on the amended grounds

50. Although Mr Thornton's submissions on the points of 'consumption' and 'proportionality' were made to resist the strike-out application, his submissions followed from the appellant's amended grounds of appeal and are included under this heading for the sake of clarity.

51. Mr Thornton asserted that *Staniszewski* does not apply to this appeal because:

> (1) The decision of *Staniszewski* is only persuasive but not binding on other appeals at the First-tier Tribunal. The respondents ought to argue afresh whether the 'consumption and proportionality' points are arguable and whether the tribunal has jurisdiction.
>
> (2) The weight to be given by this Tribunal to Judge Brooks' decision in *Staniszewski* needs to be countered by the persuasive remarks of Judge Walters in *Williams*. Judge Brooks did not have the benefit of detail arguments from a professionally represented appellant, while Judge Walters did.
>
> (3) As a result, the only time that the Tribunal had heard the arguments in full from a professionally represented appellant was in *Williams* and that

it was satisfied that these points were arguable and good reason should be set out why that position was wrong.

(4) If the appellant had been so informed, Mr Thornton 'may have availed himself of the opportunity to work with Mr Staniszewski to contribute towards the argument'. As it was, HMRC were represented by very senior counsel in *Staniszewski* while the appellant was represented by 'an employment specialist with no taxation experience and for whom English was not his first language'.

(5) The arguments on the consumption point have developed further since Judge Walters and Judge Brooks last considered it, and the appellant should be allowed to stand over his appeal behind the hearing of *Williams* at the Upper Tribunal, in which the points of 'consumption' and 'proportionality' are renewed by Mr Williams.

Objection to 'Staniszewski' being held against the appellant

52. Mr Thornton submitted that Judge Brooks' decision in *Staniszewski* cannot be held against the appellant under the following headings:

(a) The issues were not conclusively determined;

(b) Contradiction as to the effect of the consumption point;

(c) Point of destruction and chargeability.

(a) The issues were not 'conclusively' decided in Staniszewski:

53. Mr Thornton submitted that *Staniszewski* demonstrates a close mind to all the challenges to the correctness of the assessment itself which the hearing was called to consider, and made detailed criticisms as follows:

(1) At [26] of the decision, Judge Brooks outlined that the only way Mr Staniszewski could be free of his liability to excise duty was by claiming that the goods were for personal use. It ignored that *Race* at [34] expressly left points of this nature open to be considered. Without the assistance from the appellant, Judge Brooks was led to mis-characterise the challenges.

(2) At [27] of *Staniszewski* the conclusion that the consumption point was an issue of chargeability is incorrect on a number of grounds:

(a) Firstly, 'there is no extant Schedule 3 to that Act', namely FA 1994, (see 'typographical error' in HMRC's submissions).

(b) Secondly, the deeming provision is found within para 5 of Schedule 3 to CEMA, which contains only clear words that after the expiry of time the goods are deemed forfeit.

(c) No other issue is determined by Schedule 3 CEMA therefore chargeability issues and the person who ought to be properly held liable will always fall to be determined after deemed condemnation.

(d) Regulation 13 of HMDP lists a number of persons who might be liable for duty which might be chargeable.

(e) Regulation 6 HMDP holds different persons liable for the duty due.

(f) It ought to be clear that issues of chargeability and liability to excise duty are not conclusively determined by CEMA and therefore do not fall foul of the *Jones* decision.

(3) The decision of *Staniszewski* was made without citing any authority such as *Brian Arthur* in which Judge Wallace at [30] was clear that the deeming provision establishes nothing more than that the goods in question are liable to forfeiture.

(4) Judge Walters was aware of *Brian Arthur* as Mr Thornton relied on it before him in *Williams*, and echoed the position at [99] of *Williams* when he considered the FTT's jurisdiction.

(5) *Jones* and *Race* did nothing to limit the Tribunal's ability to consider who was holding the goods and so could be held liable for the duty.

(b) Contradiction as to the effect of the consumption point

54. Mr Thornton submitted that at [39] of *Staniszewski*, the Judge appears to have been swayed by the respondents' arguments that the consumption point would lead to a paradox, and that if the excise duty could not be charged, it would mean that the goods should not have been seized. This contradicts the Judge's observation at [27] that the issue was just one of chargeability, not one of liability.

55. Mr Thornton further submitted that just because it is not right for the state to collect excise duties that might have technically become due does not mean that the goods were not liable to forfeiture because:

(1) If the goods were not duty paid but should have been, the goods would ordinarily be considered liable to forfeiture;

(2) If, having seized and destroyed those goods, the state should not also collect the taxes which were unpaid, the position is unchanged that at the point of seizure they were goods which should have been but were not duty paid.

(c) Point of destruction and chargeability

56. It is submitted that Judge Brooks is incorrect in his statement at [38] that Article 37 of the Excise Directive can only apply to goods which are destroyed prior to the excise duty becoming chargeable.

57. It is submitted that when goods move correctly between Member States after the release for consumption, the excise duty which will become chargeable is to be declared and paid prior to the movement. This is made clear by Article 34(2) of the Directive but not apparently considered by Judge Brooks.

58. The first point of chargeability under Article 33 (1) and made clear by Regulation 13(1) is when the goods are *first* held for commercial purpose in the UK. In the following scenario:

> (1) When a commercial delivery is sent properly from another member state to the UK, the excise duty is normally declared and paid in advance.
>
> (2) When the delivery driver crosses the border, that duty declared and paid belongs to the UK.
>
> (3) If somewhere between the port and the place of delivery the vehicle is involved in an accident and all stock is irretrievable, it would be shocking to suggest that the excise duty which was due could not be cancelled.
>
> (4) Those goods have not reached the destination of the transporter.
>
> (5) Those goods are irretrievably destroyed and so the duty should not be chargeable any longer and the advance declarations and payments refunded.

59. Article 37 includes the total destruction as a consequence of authorisation by the competent authorities. This is what happens when the authorities order the destruction of goods seized in the queen's warehouse. This was the argument set out before Judge Walters in *Williams* in which he found considerable merit, and made clear at [115] that the consumption point was one which required a full hearing with both sides able to present detailed argument.

New argument on the 'consumption' point

60. As to the 'new' argument for the consumption point, Mr Thornton has referred to the following judgments from CJEU and its predecessor:

> (1) In *Commission v France* (Case C-434/97), it was recognized that excise duties have a non-budgetary aspect to it.
>
> (2) The opinions of the Attorney General in *EMU Tabac* (Case C-296/95) and *Van de Water* (Case C-325/99) explicitly advised that excise duty has a duality of purpose which includes the discouragement of consumption of certain products.
>
> (3) *Polihim-SS EOOD* (Case C-355/14) supports the principle that the purpose of excise duties is to tax the *actual* consumption of excise goods. Any deterrence, revenue gathering, or other permitted secondary purpose is therefore fixed to the actual consumption of goods.

61. The 'new' argument in relation to the point of consumption is to do with the *purpose* of excise duty. That is to say, if part of the core purpose of excise duty is not just a budgetary revenue gathering exercise but also the deterrence of consumption of excise goods, then a core purpose of the tax cannot be fulfilled when HMRC seize and destroy the goods:

> 'You cannot levy a tax to deter the consumption on goods you have yourself made impossible to consume.'

62. For the 'purpose' argument, Mr Thornton refers to two cases in domestic law:

> (1) In *Technip Coflexip Offshore Ltd v HMRC* [2005] 19298, the Tribunal presided by Judge Coutts considered it unconscionable to assess for VAT where it was technically due but it would not be reasonable to collect.
>
> (2) In *Easter Hatton Environmental (Waste Away) Ltd v HMRC* (L00026, EDN/07/9501), Judge Coutts considered the dual purpose of the landfill tax was to control landfill sites and to gather revenue. Where that purpose could not be applied (because control was already achieved) that should have been taken into account when exercising the discretion to levy tax. Applying his reasoning in *Technip* to the landfill tax assessment, which lacked a basic element of its purpose, the assessment should not be made even whilst the tax point may be passed.

New argument on the 'proportionality' point

63. In terms of proportionality, Mr Thornton stated that the appellant had not initially realised that Judge Walters had obtained confirmation that the wrongdoing penalty has not and will not be applied.

64. The proportionality arguments apply in relation to imposing three sanctions for the one event: (a) the seizure, (b) the duty assessment and (c) the penalty.

65. There is a proportionality aspect to what Mr Thornton refers to as 'the duality of the excise duty': that it is disproportionate to any wrong committed to deprive the appellant of its property *and* to impose a tax designed to regulate the use of the goods whilst preventing its use entirely.

66. In his analysis of proportionality, Judge Brooks was invited to consider each of the seizure, the tax assessment and the penalty in turn, but has not considered the 'cumulative effect of imposing the three for the same event which was said to be disproportionate'.

Supplemental submissions on 'Polihim' and 'Vakaru'

67. Mr Thornton's written submissions on *Polihim* are the following (paragraph referencing his):

> '2. During the hearing of May 2017, the Appellant … made detailed argument based on the actual consumption of goods; it had not yet been applied or followed anywhere…. Whilst it is now clear that UK domestic rules such as Regulation 20(3) of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 is not compliant with the Excise Directive; …
>
> 3. The Court in *Polihim*… considered two questions (§38) … restated as … asking whether the sale within a warehouse could be considered to be a release for consumption under Article 7(2) of Direction 2008/118/EC … the court's answer … espouses the principle that actual consumption is important, such that *where actual consumption*

is impossible there cannot be a release for consumption even if the rules as read literally would have established that (§45-55).

4. In its answer, the court re-emphasised that the Member States, when exercising their powers, must comply with the general principles of law set down by the EU Treaty, including … the principle of proportionality (§59). The court re-confirmed that excise duty is a tax on consumption (§50) and that since excise duty is a tax on consumption not sale the incidence of tax must be closely linked with the consumer (§51). It was and is still submitted that *excise duty is also not a tax on holding*, although that will *sometimes be a moment which it is convenient to appoint as a chargeable event*. The convenience of that time still depends on it being possible for there to be *actual consumption of the goods soon thereafter*. Goods which cannot be traced will often be assumed to have been consumed or treated as available for consumption. But goods which have been seized and destroyed by the state are known to be unavailable for consumption.

5. Both Articles 7(4) and 37(1) outline that goods which are destroyed with the involvement of the Member State authorities … shall not be charged with excise duty in the member state of arrival. This exemplifies the central aim of the directive that exercise duty shall be a tax on consumption within particular member states. …' (emphasis added)

68. The decision of *Polihim* was considered and applied in *Vakaru*, with the Advocate General's Opinion being delivered on 2 March 2017 and the Court's judgment issued on 13 July 2017. The case considered the use of fuels by a shipbuilder to test and deliver a ship, together with fuel, to his customer.

69. The shipbuilder did not have the necessary licences to supply the fuel as exempt; all fuel supplied had borne excise duty. The shipbuilder applied for a rebate of the duty on the fuel it sold with the ship because the fuel was sold for exempt use. His claim was rejected by the national authorities on the basis that the shipbuilder did not have the right paperwork and had not complied with the requirements for the claim.

70. Mr Thornton's submissions in relation to the Advocate General's Opinion in *Vakaru* are as follows:

(1) that there had been a release for consumption and that the excise duty was charged. However, unlike VAT, excise duty is not recharged at each level of trade, only at the release for consumption (§25, 31-32).

(2) that the principle is well settled in VAT law that a supplier is only a tax collector for the state. Therefore, where a taxable person has failed to comply with some procedural rules, but has met all substantive requirements, he should not lose the right to reclaim input tax or otherwise be placed in a position where he bears the burden of tax personally because the final incidence of tax ought to rest on the consumer in VAT (§§ 45-48).

(3) that the same principles applied in excise duties as notwithstanding the times at which excise duty is chargeable, and the persons liable to

meet that debt; the financial incidence of tax is to be paid by the consumer (§49).

(4) The Advocate General went on to exclude from this principle indirect exemptions which are a concession by the state where there is a consumption of the goods and the supplier acts for his own benefit, and not a mere tax collector (§50-51 & 53).

(5) That to reject the shipbuilder's claim of relief from the incidence of tax was a breach of the principle of proportionality.

71. Mr Thornton's submissions on the CJEU judgment in *Vakaru* are the following:

(1) The Court agreed with the Advocate General that energy products are taxed on their actual use, but did not agree with the limits placed (§42).

(2) At §45-46 the Court gave guidance for a Member State, and that to refuse a reimbursement without paying attention to the circumstances of its later actual use breaches the principle of proportionality. This is true whether the claimant acts as a mere tax collector or for his own benefit, contrary to the Advocate General's Opinion.

72. Mr Thornton's application of *Polihim* and *Vakaru* to the present appeal is to say:

(1) It can be seen in the Excise Directive under provisions such as Article 33(6) that reimbursement or remittance of a debt are seen as two sides of the same coin.

(2) Even if the Tribunal were to consider that the excise debt in the present appeal did technically arise at the time of the first holding in the UK, the question of whether it is reasonable to then collect the debt remains important.

(3) The later destruction by the authorities may have rendered the chargeable event null such that there was never any debt.

(4) Even if it does not nullify the debt, it would be disproportionate not to remit that debt as a result of the State's destruction of the goods.

(5) Tax ought not to be applied as a penalty; that is why penalty regimes exist.

(6) Any arguments that the imposition of a tax debt will not be disproportionate would only be true where it was a true debt in accordance with the purpose of the tax, and not imposed to penalise or deter behavior considered wrongful.

(7) The purpose of excise duty is now well established as a tax on consumption with the dual function of collecting revenue and deterring action which causes social ills.

(8) If the punitive action of seizing and destroying goods is followed, then the state had ended any possibility of that consumption occurring.

(9) Consumption which is prevented cannot be deterred by the high price that consumption incurs.

(10) THE CJEU has now made its opinion clear that without actual consumption by a consumer in non-exempt circumstances then there should be no excise duty retained or collected by the Member States.

73. Submissions on the implications of *Polihim* and *Vakaru* on UK law:

(1) The Tribunal has raised concerns at the hearing that cancelling the debt for excise duty might render the initial seizure invalid.

(2) The appellant has set out arguments why that need not be so, and the Tribunal is not prevented from ruling that there be no excise debt due under the principles in *Jones*.

(3) The analysis by the Advocate General makes this clearer. It is the incidence and collection of tax which are harmonized by the VAT and Excise Directives. It is the tax debt which should not rest on the shoulders of a taxpayer where the aims of those taxes would not be met.

(4) There is nothing in that rule or analysis which prevents the Member States from seizing goods where they consider that the proper requirements for movement have not been met.

(5) The Goods were not travelling under cover of an SAAD and that factor alone was sufficient to render them liable to forfeiture under Regulation 88 of the HMDP Regulations.

74. The appellant therefore maintains its objection to the respondents' application to strike out the appeal on the basis that it is arguable that no excise duty debt ought to apply or be maintained.

The application to stay the appeal behind 'Williams'

75. Mr Thornton acted for Mr Williams in his appeal against HMRC, which was heard by Judge Walters at the First-tier Tribunal. Mr Williams' appeal was allowed, and HMRC have appealed to the Upper Tribunal.

76. In his written submissions, Mr Thornton divulged, albeit to a limited extent, the grounds of appeal put forward to the Upper Tribunal by the respondents on appeal of the FTT decision in *Williams*. I do not consider that it is proper for Mr Thornton to have done so, and it is unnecessary to relate HMRC's grounds of appeal in *Williams*.

77. For present purposes, it is sufficient to relate that Mr Thornton asserted that 'it was clear by the comments of Judge Walters, that [HMRC's appeal] would not be possible without consideration of the consumption and proportionality points', and as such Mr Williams has renewed his reliance on those grounds for that appeal.

78. For Mr Murray, Mr Thornton submitted that the sum of tax at stake, 'the complexity of the arguments and the disparity of resources between the parties', coupled with the fact that the Upper Tribunal ought to consider and rule on the points in a way in which their decision would be binding on the First-tier Tribunal, it makes sense to allow the Upper Tribunal to hear the considered arguments from both sides.

79. Mr Murray could not address the points of consumption and proportionality without the costs of the appeal exceeding the tax at stake. This would not allow the parties and the Tribunal to comply with the overriding objective under Rule 2(2)(a). Proper compliance with the overriding objective would be to stand this appeal over pending the consideration of cases in the Upper Tribunal such as *Williams*.

80. The prejudice to HMRC is minor given the sum of tax at stake is 'a tiny sum to the respondents which in relation to which they would only experience modest delays'.

The Respondents' case

The grounds for the strike-out application

81. Firstly, the Tribunal has no jurisdiction following the authorities of *Jones* and *Race*, which establish conclusively that:

> (1) Where an appellant has failed to challenge the seizure of goods, the deeming provision of paragraph 5 of Schedule 3 to the CEMA applies.
>
> (2) In these circumstances, the goods are deemed to have been duly condemned as forfeited.
>
> (3) Accordingly, commerciality is proven for those goods.
>
> (4) Consequently, the Commissioners may asses for duty under s 12 of FA 1994, and impose penalties under s 13 thereof.
>
> (5) The First-tier Tribunal has no jurisdiction to go behind the deemed decision on commerciality and consequential forfeiture.

82. Secondly, the decision of *Staniszewski* establishes that the deeming provision also means that the appellant can no more raise a challenge to a duty assessment on the amended grounds of 'consumption' and 'proportionality'.

83. The appeal cannot succeed therefore and should be brought to an end as per Lord Woolf MR in *Kent v Griffiths* at [38]:

> 'Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take the issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense… Defendants as well as Claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding the case on a preliminary point of law.'

Submissions in relation to the appellant's amended grounds of appeal

84. Ms Vicary made clear and thorough submissions in reply to the appellant's grounds for opposing the strike-out application. The criticisms of the FTT decision in *Staniszewski* were dealt with in turn, of which the less substantive ones include:

(1) *Not being a binding authority*: the substantive issues have been addressed in *Staniszewski* are of the same as contended in this appeal. Whilst not of a higher and binding authority, there is no reasonable basis upon which to contend that the case was incorrectly decided or can otherwise be distinguished.

(2) *Typographical error*: at [27] of *Staniszewski* wherein the text cites the 'Finance Act 1994' when plainly it intends to cite CEMA. The appellant seeks to take advantage of the error which is devoid of merit.

The 'Arthur' decision

85. Turning to the criticism that *Stanizewski* did not address the *'Arthur'* decision, whose relevance as asserted by Mr Thornton is that the 'deeming provision establishes nothing more than that the goods in question are liable to forfeiture'. In rebuttal, Ms Vicary averred that:

(1) *Arthur* pre-dated *Jones* and *Race*, which are now clear and binding authority for the proposition that the Tribunal has no jurisdiction to consider such matters 'beyond the fact that [the Goods] were liable to forfeiture' where the forfeiture itself has not been duly or successfully challenged.

(2) When para [30] of *Arthur* is considered in full, it is apparent that the argument advanced by the appellant in *Arthur* would be outside the Tribunal's jurisdiction for an appellant who had failed to contest forfeiture:

> '[**30**] The deemed forfeiture does not however determine the facts beyond the fact that the vehicle was liable to forfeiture. In particular, it does not decide what proportion of the goods were for the Appellant's own use, what proportion were for those who contributed or were to contribute to the expense, whether a further payment would be received for goods "ordered" and how far the goods for his brothers were a *quid pro quo* for work done.'

(3) Mr Arthur plainly had a 'second bite' at arguing the question of commerciality, and the appeal was dismissed on the basis that 'the Appellant has provided no satisfactory evidence on which to decide how much was for his personal use.'

(4) The cross reference in *Williams* at [99] is misplaced; there Judge Walters is *not* considering the operation of the deeming provision within CEMA itself but the *identity* of the person against whom an assessment has been raised.

(5) There is no argument before the Tribunal to say that Mr Murray can escape the liability because he was not 'holding' the goods at the relevant time, which was the question in *Williams*.

(6) Paragraphs 3 and 5 of CEMA deal with the deemed forfeiture of *the thing* that has been seized. As Judge Walters found, these paragraphs are silent in relation to the question of the who holds that *thing*.

(7) No reasonable criticism can be made of *Stanizewski* for not considering the question of 'holding', since it was not an issue relevant to that appeal. Nor does it arise in this.

The alleged contradictions in Staniszewski

86. On the 'alleged contradictions' between [27] and [39] in *Staniszewski*, Ms Vicary averred that no contradiction appears:

(1) At [27], Judge Brooks does not say that 'the issue [of consumption] was just one of chargeability' as Mr Thornton submitted. On a proper construction of [27], the Judge is asserting that the in fact liability and chargeability stand or fall together.

(2) The fact that liability and chargeability are to be consistently determined is then emphasised at [39].

(3) The appellant's bold submission that there can be liability without chargeability takes the position no further.

(4) As held in *Staniszewski*, liability and chargeability stand to be determined together for reasons stated therein.

(5) It is through the consistent treatment of the concepts of liability and chargeability that a deterrent value is most effectively achieved.

Point of destruction and chargeability

87. On the 'point of destruction and chargeability', Ms Vicary's submissions are:

(1) The point simply has no application to the appeal at hand because no factual argument arises to assert that the goods were destroyed prior to being first held for a commercial purpose in the UK.

(2) Judge Brooks was correct to find that Article 37 of the Excise Directive applies only to goods that have been 'totally destroyed' or 'irretrievably lost' in specific circumstances at a point *prior to* that at which a liability to excise duty would otherwise arise.

(3) The fact that excise duty may have been paid (or guaranteed as required by the Excise Directive) for bureaucratic ease prior to the point at which a duty point in fact arose (namely at the commencement of a movement) does not assist the argument.

(4) If, following such a payment (guarantee), it were the case that the goods came to be subsequently destroyed prior to their being released for consumption, then the sums would simply be refunded (guarantee released), as stated in the final sentence of Article 37(1).

(5) The appellant contends that Judge Walters found favour in this point in the appeal of *Williams*; the respondents take issue with this.

Deterrence

88. The submission that excise duty has a 'duality of purpose' which includes 'discouragement of consumption of certain products', is based on a misunderstanding of deterrence in this context.

89. The purpose of raising an assessment on excise goods which have been seized is not to deter their consumption, but to deter the evasion of excise duty itself.

Proportionality

90. The question of proportionality was dealt with at [42] to [52] of *Staniszewski*. The appellant appears to contend that Judge Brooks' reasoning was flawed as he did not consider the cumulative effect of a penalty (in addition to seizure and charge to excise duty). This assertion belies the fact that a wrongdoing penalty will only arise where the goods have both been seized and the excise duty charged. Accordingly, such consideration is implicit.

91. The appellant advances no factual case to demonstrate a basis upon which it is averred that the penalty in this instance is disproportionate. It is averred that no such facts arise, as mooted by Judge Brooks in *Staniszewski* at [52] that in a case where wrongdoing penalty was charged in addition to the seizure and forfeiture of a vehicle which was not restored.

The 'persuasive remarks of Judge Walters'

92. The repeated references to the 'persuasive remarks of Judge Walters' are a reference to [106] to [120] of the *Williams* decision. Mr Thornton and Ms Vicary appeared respectively for the appellant and the respondents in *Williams* as in the present case.

93. Ms Vicary averred that on a proper reading of [106] to [120] of *Williams*, Judge Walters was simply recounting the submissions of Mr Thornton. The paragraphs are not the expression of Judge Walters' opinion.

94. Judge Walters did not reach any conclusion in relation to the points of consumption and proportionality, as *Williams* was decided without having consider these issues (see [115] and [120] of *Williams*).

Imbalanced argument

95. The issues raised by the appellant in this respect are: (a) that the appellant had no opportunity to contribute to the hearing of *Staniszewski*; and (b) that HMRC were represented by very senior counsel Mr Mcnab, whilst Mr Staninszewsk was represented by Mr Krause, an employment specialist with no taxation experience.

96. Ms Vicary highlighted that although Mr Thornton did not appear for Mr Staninszewski at the hearing, he had drafted the written applications submitted by Mr

Krause, and also the initial application of 26 January 2016 for the case to be stood over behind *Williams*.

97. The issue of 'imbalanced' representation was clearly addressed by Judge Brooks at [13] and [14] of *Staniszewski*:

> '… Mr Mcnab is experienced counsel and as such is well aware of his duty to draw to the attention of the Tribunal to any decision or provision which may be adverse to the interests of his client (see paragraph gC5 Bar Standards Board Handbook). I say that not in any way as a criticism of Mr Macnab but to emphasise that by instructing counsel, especially experienced counsel such as Mr Macnab, HMRC are obviously complying with the obligation to assist the Tribunal.'

Supplemental submissions on 'Polihim' and 'Vakaru'

98. The appellant's submissions fail singularly to address how it can be said that this Tribunal has any jurisdiction to go behind the deeming provision under para 5 of Schedule 3 to CEMA, see [27] and [28] of *Staniszewski*.

99. The consumption point in the literal sense is misconceived for reasons already set out in *Staniszewski* especially with reference to [38] to [41].

In relation to 'Polihim'

100. Mr Thornton boldly asserts that §45-55 of *Polihim* as authority for the principle:

> '… where actual consumption is impossible there cannot be a release of consumption even if the rules as read literally would have established it.'

101. Ms Vicary avers that *Polihim* says no such thing. By paragraph [46] *Polihim* sets out the provisions of Article 7(1) of the Excise Directive which defines the time at which excise duty becomes chargeable as the time of release for consumption of the excise goods. Paragrph [55] puts this in the context of the given physical situation.

102. In *Polihim*, the release for consumption occurs when the goods are physically removed from the tax warehouse. It does *not* go on to lay down any further requirement that the goods must be actually consumed.

103. For this reason, if the goods were destroyed after release from the warehouse in *Polihim*, it is plain that this would not affect the determination of the fact that a release for consumption had taken place.

In relation to 'Vakaru'

104. The appellant's submission appears to focus on the assertion that the purpose of excise duty is 'collecting revenue and deterring action which causes social ills'. The presumption of this assertion is seemingly at the heart of the appellant's misunderstanding of the relevant legislative framework containing the deeming provision within CEMA.

105. The appellant seems to contend that the objective of the regime will be achieved if consumption is prevented, without the need to charge the duty that would ordinarily be due. The argument is without merit once it is understood that the objective of the regime is not achieved by preventing actual consumption.

106. Ms Vicary avers that the purpose of raising an assessment on excise goods which have been seized is not to deter their actual consumption, but to deter the evasion of excise duty itself. This is a point emphasised in *Polihim* and *Vakaru*. Both cases consider whether the application of the relevant exemption is necessary: '*to prevent any evasion, avoidance and abuse*.'

Respondents' objection to the application to stay behind 'Williams'

107. Ms Vicary has made no specific submission on the appellant's application for a stay, as the respondents are not aware of any such application having been made to the Tribunal for these proceedings. There is no formal notice of application to that effect, though Mr Murray's email communication to the Tribunal on 24 August 2016 purported to make such an application to stay behind *Williams*.

108. The respondents' position to this matter is reflected in Officer Riley's letter to the Tribunal dated 8 September 2016, which was in relation to the proceedings of the strike-out application heard by Judge Walters. In response to Mr Murray's email of 24 August 2016, which was referred to HMRC by the Tribunal, Officer Riley's submissions are as follows:

> (1) The facts and issues at stake in *Williams* and in this appeal are entirely different and relate to different points of law and circumstances. To suggest that this appeal should stay behind the *Williams* appeal is illogical.
>
> (2) Mr Thornton made a similar application dated 26 January 2016 to stay the appeal of *Staniszewski* behind *Williams*, and was dismissed by Judge Brooks, whose refusal decision was attached.
>
> (3) HMRC reject the appellant's suggestion that the consumption and proportionality points can only be properly argued by a representative with specialist experience.

Discussion

The three applications in these proceedings

109. The first application concerns the appellant's amendments to his grounds of appeal. From the procedural history, it is clear that leave had been given by Judge Walters for grounds to be amended if Mr Murray so wished, and the grounds were indeed amended to include the points of 'consumption' and 'proportionality'.

110. The application, as Ms Vicary submitted, appears to be otiose. There is no outstanding application in this respect for the Tribunal to consider.

111. The second application by HMRC to strike out the appeal is the most significant application of the three. In opposing the strike-out application, the appellant's amended grounds of appeal are developed into some substantive arguments by Mr Thornton, whose skeleton argument in dense print runs on for 8 pages (plus 3 further pages of supplemental submissions).

112. The detailed submissions from Mr Thornton in turn necessitated a detailed response from Ms Vicary. In view of the parties' lengthy submissions, I have considered whether this is a case in which the strike-out application has raised issues of law that renders it inappropriate to determine those issues without a full investigation of the facts (*Barratt v Enfield).*

113. For the following reasons, I have concluded that it is appropriate to consider the issues of law raised in the strike-out application:

(1) The guidance from Lord Woolf MR in *Kent v Griffiths* refers to a strike-out decision by the courts as 'in fact indistinguishable from deciding a case on a preliminary point of law'.

(2) In *Race*, the Upper Tribunal considered HMRC's appeal against the FTT decision which refused the strike-out application of Mr Race's appeal against an excise duty assessment raised following deemed forfeiture. To that extent, the material facts in *Race* were similar to Mr Murray's appeal. Justice Warren concluded at [42] that 'the application to strike out was dealt with on the basis that Mr Race's factual contentions could be established'.

(3) The present strike-out application concerns a matter of law that requires no further factual determination: the facts that gave rise to the application of deemed forfeiture under paras 3 and 5 of CEMA are not disputed in the absence of a Notice of claim being filed in time.

114. The strike-out application should therefore be considered as a matter of law. Before turning to consider the strike-out application, the appellant's application to stay behind HMRC's appeal in *Williams* should be considered first, for the obvious reason that if a stay is granted, then the refusal of the strike-out application is implicit.

The application to stay behind 'Williams' appeal

115. Whilst the points of 'consumption' and 'proportionality' were first advanced in *Williams*, Judge Walters allowed the appeal on the ground that Mr Williams was 'an innocent agent' without having reached any conclusion on the points of 'consumption' and 'proportionality'.

116. The substantive issues in HMRC's appeal against the *Williams* decision are unlikely to concern the points of 'consumption' and 'proportionality', since the FTT decision has made no determination in this respect for these points to form a subject matter of HMRC's appeal.

117. Procedurally, HMRC's appeal against the FTT decision in *Williams* is in the Upper Tribunal but is stayed behind *Martyn Perfect* in the Court of Appeal. *Perfect* is listed to be heard by the Court of Appeal in February 2019.

118. To stay the present appeal behind *Williams*, which is itself stayed, is unjustifiable in the light of the overriding objective of the Tribunal Rules, nor is it likely to achieve expedition in disposition since the substantive issues in the *Williams* appeal do not appear to address the 'consumption' and 'proportionality' points.

119. I also have regard to the similar application Mr Thornton drafted for Mr Staniszewski on 26 January 2016 to stay Mr Staniszewski's appeal behind *Williams*. The application also asked to vacate the hearing listed on 4 February 2016 to hear the 'consumption' and 'proportionality' points. Judge Brooks refused the application to stay, and proceeded to hear the appeal as he considered the points of 'consumption' and 'proportionality' were 'clearly of real importance not only to Mr Staniszewski and the industry in general but also to HMRC and the many other cases in which issues may arise and which have been stayed pending the outcome of this case'.

120. Mr Murray's appeal was one of those that had been previously stayed behind *Staniszewski*. Notwithstanding Mr Thornton's criticisms of the FTT decision in *Staniszewski*, the substantive issues concerning the consumption and proportionality points were heard in *Staniszewski*. I disagree with Mr Thornton's submissions that these points have not been addressed properly in *Staniszewski* to justify another stay of Mr Murray's appeal behind *Williams*.

121. In any event, by refusing the application to stay, Mr Murray's appeal will have its own course of progression and the prospect of ventilating any arguments on the points of 'consumption' and 'proportionality' in the appellate courts.

122. For all these reasons, the application for Mr Murray's appeal to be stood over behind *Williams* is refused.

The strike-out application in relation to the penalty assessment

123. The matters under HMRC's instant strike-out application pertain to the excise duty assessment of £1,815, and the penalty assessment of £363.

124. I find as a fact that no appeal has ever been lodged against the notice of penalty assessment of £363. The following sequence of events establishes that the Notice of Appeal is lodged against the excise duty assessment only:

> (1) On 25 March 2013, the notice of penalty assessment was issued which carried the right to request a review or the right to appeal direct to the Tribunal, both to be exercised within 30 days of the date of the notice.
>
> (2) On 26 April 2013, Mr Murray wrote to Officer Taylor, but the letter concerned only the excise duty assessment. This letter was taken by HMRC as a request for review.

(3) On 14 June 2013, the review conclusion by Officer Dunn was issued, and this became the appealable decision. The review decision covered the excise duty assessment *only*; the penalty assessment was not reviewed.

(4) On 22 August 2013, Mr Murray lodged the Notice of Appeal against the review conclusion decision; the sum of tax in dispute was stated at £1,815 and did not include the penalty of £363.

125. For this reason, on 22 August 2014 when HMRC renewed the strike-out application after the release of the Upper Tribunal decision in *Race*, the strike-out application was only in relation to the excise duty assessment.

126. When Judge Walters heard the strike-out application of Mr Murray's appeal on 21 July 2015, his decision in *James Murray v HMRC* [2015] UKFTT 371 made the following comment at [16]:

> '… We are also aware that penalties have been raised in other similar cases where assessments to excise duty have been raised and do not know *why no penalty has been charged in this case*. We make these points because we are uneasy about the apparent position being that different individuals in relevantly similar positions are being treated differently by HMRC, not to encourage HMRC to raise a penalty in Mr Murray's case.' (emphasis added)

127. It would appear that Judge Walters had inferred that 'no penalty has been charged in this case' from the fact that the strike-out application was only against the excise duty assessment.

128. Judge Walters' comment in relation to penalty would seem to be the basis for Mr Thornton's claim that 'Mr Murray had not initially realised that Judge Walters had obtained confirmation that the wrongdoing penalty has not and will not be applied'.

129. If there had been such a confirmation obtained, it would have been based on incorrect information, since a penalty assessment was raised in March 2013, some four years prior to the strike-out application being heard by Judge Walters.

130. The facts in front of me are that there was a valid penalty notice issued on 25 March 2013 for £363, and that Mr Murray did not request a review of the penalty, nor included the penalty in the appeal he lodged with the Tribunal.

131. On the basis that there is no appeal against the penalty in front of the Tribunal, the application to strike out in relation to the penalty is otiose. Whether HMRC will consider cancelling the penalty by taking into account what might have been represented at the hearing in front of Judge Walters is a matter between the parties.

The strike-out application in relation to the excise duty assessment

132. By its own motion, the Tribunal stayed Mr Murray's appeal behind *Staniszewski* to enable the points concerning 'consumption' and 'proportionality' in Mr Murray's amended grounds of appeal to be decided substantively by reference to *Staniszewski*. However, instead of being able to settle these points, Mr Thornton has raised all kinds

of objections as to why *Staniszewski* has not determined on these points conclusively. The thrust of his argument would seem to be that Mr Thornton, being the author of the points of 'consumption' and 'proportionality', is the (only) person who can fully present these arguments to the Tribunal and its appellate courts.

133. I have considered Mr Thornton's criticism of *Staniszewski* and his substantive arguments on 'consumption' and 'proportionality' points carefully. I am in broad agreement with Ms Vicary's submissions in response, which I find to be helpful, clear and succinct. Conscious of the fact that Mr Thornton has indicated time and again that a higher court needs to rule on the points of 'consumption' and 'proportionality' to allow that judgment to be binding, I have set out the arguments from both sides in some detail in view of the likely prospect that this decision will be appealed.

134. In accordance with Rule 8 of the Tribunal Rules 2009, I have considered the strike-out application of the excise duty assessment by asking the following:

> (1) With reference to the law as it currently stands, does the Tribunal have jurisdiction to consider the appeal against the duty assessment?
>
> (2) In view of the submissions made on the points of 'consumption' and 'proportionality', is there a reasonable prospect of the appeal succeeding?

The law on Tribunal's jurisdiction

135. Mr Thornton has not raised any objection as to the factual determination for deemed forfeiture to apply, (his objection is raised as a point of law).

136. The statutory deeming under Schedule 3 to CEMA is that in the absence of a notice of claim under para 3, complying with the requirements of para 4, the seized goods 'shall be deemed to be duly condemned as forfeited' under para 5.

137. The authority of *Jones* is conclusive in respect of this statutory deeming:

> '(4) The stipulated statutory effect of the owners' 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 t have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods.' (at [71])

138. Whether it is by withdrawal of the notice of claim as in *Jones*, or in the absence of a notice of claim as in Mr Murray's case, the statutory deeming takes effect. It follows that, as stated in *Jones* at [71]:

> '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.'

139. This appeal is not against the seizure of goods as in *Jones* but against the assessment to excise duty on the condemned tobacco. However, once the statutory deeming takes effect, *Race* is the authority that the Tribunal lacks jurisdiction to re-consider the duty assessment for the same reasons as for goods restoration.

> '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' (at [33])

140. Since the Tribunal must give effect to the clear deeming provisions in CEMA, in accordance with Rule 8(2)(a) of the Tribunal Rules:

> '(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 time …'

141. In relation to the consumption point, I agree with Judge Brooks' reasoning and the conclusions reached in *Staniszewski*, whereby the question of jurisdiction is clearly stated at [27]:

> 'The consumption point is in essence an argument in relation to the chargeability to excise duty … The proportionality point relates to a challenge to the assessment for that duty. These issues, as is clear from *Jones* and *Race*, like that of liability to seizure and forfeiture have been conclusively determined by reason of the deeming provision in paragraph 5 of schedule 3 to the Finance Act 1994 (sic [CEMA]) and, as such, the Tribunal does not have the jurisdiction to determine them. …'

142. Accordingly, the strike-out application against the excise duty assessment is to be granted, unless there is a reasonable prospect of the appellant's case succeeding on the amended grounds of appeal; that is to say, in displacing the settled law as it stands.

The prospect of the appeal succeeding

143. Under Rule 8(3)(c) of the Tribunal Rules, the Tribunal may strike out the whole or a part of the proceedings if –

> '(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.'

144. As indicated earlier, I am in broad agreement with the main submissions of HMRC, and as such I do not consider that the appeal has a reasonable prospect of succeeding based on the points of 'consumption' and 'proportionality'. Ms Vicary has addressed Mr Thornton's submissions point by point and it is unnecessary for any repetition here. I will, however, make some observations of Mr Thornton's arguments.

145. Having considered Mr Thornton's arguments in the round, the overall impression is that the arguments have the appearance of cogency but not the substance. The various formulations of the 'consumption' point, when taken to their logical conclusions, seem to result in absurdity as illustrated by one such formulation in *Staniszewski* at [39]:

> '… any argument to the effect that seizure of the goods could constitute "the total destruction or irretrievable loss of the excise goods

> during their transport … as a consequence of authorisation by the competent authorities of that Member State" would lead to excise goods being seized and forfeited because they were liable to unpaid excise duty ceasing to be liable to that duty by reason of their seizure and forfeiture and, in the absence of liability to excise duty, the goods would no longer be liable to seizure and forfeiture. It this were the case it would lead to the absurd position that goods could never be seized and subject to forfeiture as the very act of seizure and forfeiture would render the goods not liable to seizure and forfeiture in the first place.'

146. The various formulations of the 'consumption' point would seem to be derived by confusing, conjoining or conflating the following issues:

(1) *Release for consumptio*n with the literal meaning of 'consumption';

(2) *Holding of goods* with the 'consuming of goods';

(3) *Chargeability* of excise duty with the 'liability' of excise duty;

(4) *Evasion of duties* with the 'prevention of consumption';

(5) *Revenue collection measures* with 'the purpose of the excise regime';

(6) *Exemption and relief* with the destruction of goods for consumption;

(7) *Legality of imports* with illegality scenarios.

147. As to the point of 'proportionality', the thrust of the argument is in the 'cumulative effect' of the 'sanctions' imposable, in terms of the seizure of the goods, the assessment of the excise duty, and the imposition of a wrongdoing penalty.

148. The Tribunal's jurisdiction is a creature of the statute. 'The doctrine of proportionality is relevant to the penalties but not to the duty itself' (*Lane* at [66]), which is a reference to the extent that this Tribunal can consider matters in relation to proportionality as provided under para 19 of Schedule 41 to FA 2008. Insofar as the point of 'proportionality' is advanced in relation to the cumulative effect of the possible sanctions, this Tribunal has no jurisdiction to consider such a claim, which is a claim that can only be properly considered by way of judicial review.

Decision

149. The disposition of the applications in these proceedings is as follows:

(1) The application to amend the grounds of appeal has been granted.

(2) The application to strike out the appeal against the excise duty assessment is hereby granted.

(3) The application to strike out the appeal against the penalty assessment is vacated as there is no appeal so lodged against the assessment.

(4) The application to stay the appeal behind *Williams* is refused.

150. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 19 October 2018

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 18 October 2018