Neutral Citation: [2023] UKFTT 00854 (TC)

Case Number: TC08955

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/00143

PROCEDURE – respondents' application to strike out appeal – assessment to excise duty after seizure event – original pleadings as 'innocent agent' – appeal stayed behind Perfect *– appellant's objection to strike out in substance an application to amend pleadings – principles applicable to permission to amend grounds of appeal – version of facts raised inherently implausible, self-contradictory, and unsupported by contemporaneous documentation – proposed amendment refused; strike-out granted*

Heard on: 31 March 2023
Judgment date: 27 September 2023

Before

TRIBUNAL JUDGE HEIDI POON

Between

MCGEOWN TRANSPORT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Danny McNamee, of McNamee McDonnell Solicitors

For the Respondents: Connor Fallon, Senior litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The interlocutory hearing was to consider the respondents' application of 22 August 2022 to strike out the proceedings in relation to the appeal by McGeown Transport Limited ('the appellant') against the decision by the respondents ('HMRC') in relation to an excise duty assessment in the sum of £1,640,936 (the 'Assessment').

2. The Assessment was raised on 11 September 2017 in respect of a consignment of 6,800,400 cigarettes being brought into the UK without excise duty having been paid on them.

3. The ground for the strike-out application is that the appellant's case, as stated in its original pleadings, has no prospect of success. Separately, in the appellant's notice of objection to the strike-out application, the appellant seeks to amend its grounds of appeal.

LEGISLATIVE FRAMEWORK

Tribunal Rules 2009

4. Pursuant to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules'), the respondents apply for the appeal to be struck out on the basis that the Tribunal does not have jurisdiction to hear the appeal under Rule 8(2)(a), or in the alternative, that the appeal has no reasonable prospect of success under Rule 8(3)(c):

> **8.** '(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 …'
>
> **8.** '(3) 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.'

EU 2008 Directive on excise duty

5. 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*) relevantly provides:

> 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 excise 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, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

Excise Goods (HMDP) Regulations

6. 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, and regs 13 and 88, so far as relevant, provide as follows:

> **Regulation 13**
>
> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose 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.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held –
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.'
>
> **Regulation 88**
>
> If in relation to any excise goods that are liable to duty that has not been paid there is –
>
> (a) a contravention of any provision of these Regulations, or
>
> (b) a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture.

Condemnation procedure and deemed forfeiture

7. 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.

8. 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.

9. 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.

Power to assess excise duty

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:

> **12 Assessments to excise duty**
>
> (1A) Subject to subsection (4) [on time limits] 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.
>
> […]
>
> (3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

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-sections 16(1), (4) and (5) relevantly provide:

> (1) An appeal against a decision on a review under section 15 […] may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> […]
>
> (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
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

FACTUAL BACKGROUND

12. From the documentary evidence provided for the application, the factual matrix giving rise to the excise duty assessment are as follows.

(1) On 24 February 2016, the appellant's vehicle, driven by the appellant's employee Jamie McAuley, was stopped at the border in Dover. The Seizure information notice was signed by McAuley (at 9:04 hrs) and provides details of the items seized, being one Scania DEZ9817, a fridge unit MGT 52, and an estimated 6 million Excellence cigarettes.

(2) McAuley provided documentation (purporting to be a CMR dated 23 February 2016) which indicated that the cargo on board was fruit and vegetables totalling 18,610 kilograms, with the details of (i) the consignor being 'JKM Gubbels' in the Netherlands, (ii) the consignee being 'Aldi Distribution Ltd' in Ireland, (iii) the issuer of the CMR being 'Thermotraffic' (temperature controlled logistics); (iv) the haulier being 'Mcgeown Haulage'; (v) transporter's vehicle registration being DEZ9817.

(3) Upon searching the vehicle, the border force officers discovered the cargo was in fact 6,800,400 cigarettes which would have attracted a duty of £1,640,936.00.

(4) The cigarettes were seized as excise goods without duty having been paid.

(5) A seal document of the vehicle exhibited on page 46 is dated 1 June 2016, sealed by an Officer Hirst (with the signature of a further witness) has as its entry under the heading 'From Place/Person': 'Jamie McAuley/ VEH SM60YKK/DEZ9817'.

Interview transcripts

13. The following interviews in chronological sequence were carried out by HMRC in relation to the seizure event on 24 February 2016:

(1) On 24 February 2016 (same date as the seizure event), with a Mr Meagher, warehouse section manager with Aldi at Aldi Regional Distribution Centre in Co. Kildare;

(2) On 7 June 2016, with Jamie McAuley at Folkestone Police Station to discuss matters that had arisen since his previous interview on being intercepted at Dover docks;

(3) On 14 July 2016, with Adrian McGeown, director of the appellant company, at Carne House, Belfast – the interview was conducted under police caution;

(4) On 1 August 2016, a witness statement of 4 pages was provided by a Mr Di Gennaro who had been the UK and European Logistics manager for Thermotraffic GmbH with its UK office in Bedford for seven years;

(5) On 4 April 2017, with a Mr Gubbels at Brunssum Police Station in the Netherlands.

14. The substantive details from the witness statements produced from the interviews are:

(1) From Aldi – the entity 'Aldi Distribution Ltd' does not exist; Aldi held no records of the consignor JKM Gubbles BV in the Netherlands; Aldi did not expect any consignment of vegetables in the three days following the date of seizure; Aldi order from local suppliers who sourced their own supplies, and vegetables never come direct to Aldi Distribution Centre.

(2) From McAuley – that Adrian McGeown is his 'boss', and the 'owner' of the company known as McGeown Transport Ltd; that either Adrian McGeown or Mark Hughes (the transport manager of the appellant company) gave him the specific delivery instructions of the consignment in question, for which McAuley left the UK on 20

February 2016. In relation to a detour he took to attend Scania depot in Germany for repairs service:

> 'McAuley: You need to check my tachograph card to see how long why they stamped my card. Scania stamped my card, cos there was movements. … you'd need to check what time I left and what time my card started. …'

(3) From Thermotraffic – the Rotterdam office confirmed with the regional office in Venlo that the company has no knowledge of the load and provided details of all known loads associated with McGeown Haulage Ltd. Further it was confirmed that:

(a) The Thermotraffic CMR exhibited was 'an old style' that was 'superseded' more than two years previous to the date of seizure, and a blank CMR that was in use at the relevant time was provided to HMRC.

(b) The delivery reference 'MYATT 0001' entered into box 13 of the CMR was 'not consistent' with the format used by Thermotraffic, and the expected format is then given.

(c) The load was supposed to be delivered to Ireland would have been dealt by an office in Germany with its details in box 16.

(4) From JKM Gubbels – that it never responded to the advertisement placed by the appellant on 'Cool Load' website on 23 February 2016 as alleged; that JKM Gubbels has never heard of 'Cool Load' or worked with the appellant, and that it has always used its own haulier; that it has never done business with Thermotraffic; that it has not engaged in any business activities relating to the delivery of fruit and vegetables or potatoes since 2003; that the contact number on the CMR has a Belgian country code (not the Netherlands); that JKM Gubbels has never had a business or private address in Belgium.

(5) From Adrian McGeown – excerpts of the transcript of the interview:

(a) Regarding the control of the appellant company

Q: Now you're [sic] business it's McGeown Transport?
A: Mn –hm.
Q: Is that a limited company?
A: Yeah.
Q: And what is your role there?
A: Director
Q: You're the director?
A: Mn –hm.
Q: Are you the sole director?
A: Mn –hm.
Q: Okay. And how long has the company been running?
A: Ten years.
Q: So as director I take it you've overall responsibility of the company?
A: Yeah.

(b) When asked if Jamie McAuley was 'an agency driver' or has 'a full time contract', Adrian McGeown confirmed that McAuley is 'A full time driver' with the appellant company.

(c) In relation to the arrangements for McAuley to attend Scania for repairs:

> Q: … was it you or Mark [Hughes, manager at McGeown Transport Ltd] that made arrangements for Jamie to attend Scania for repairs?
>
> A: I'd say it would have been myself I'd imagine. … I handle all the breakdowns.

(d) In respect of the business entities of which Adrian McGeown is a director:

Q: Do you trade under any other names apart from McGeown Transport?
A: No, McGeown Transport is McGeown Transport.
Q: About Commercials, McGeown Commercials?
A: It's a separate company.
Q: You're a sole director again?
A: Yeah.
Q: And it goes, with the name … you're dealing, buying and selling of […] HGVs … Trailers … Not cars?
A: Not car, I do very few, mostly HGV, trailers, plant and machinery.

(e) In his interview, Adrian McGeown had confirmed more than once that the vehicle DEZ was in the control and possession of the appellant company:

> HMRC: … my colleague's finally confirmed earlier on that AY10 and SM60 are the vehicles that were sold. … you don't hold any operator's licence for those or do you?
>
> McGeown: No, those vehicles were for solely sale …
>
> HMRC: Sure. But you do for WLZ, **DEZ [9817]**, you control vehicles that …[interrupted] (Emphasis added)
>
> McGeown: That's correct. Those trucks we run … we run the transport fleet.'

(f) In relation to the two registration numbers found on the seized vehicle, McAuley had informed Border Force officers that he had found a second UK registration number plate SM60 YKK underneath plate DEZ 9817 prior to entering the port. In his interview by HMRC in July 2016, Mr McGeown variously stated:

(i) McGeown: YKK. Yes, correct because the number plate on DEZ when I was talking to one of the boys in the workshop was broken. It was smashed so it was … stuck over the top of that SM60 just to hold it in shape …

(ii) McGeown: … SM60 is nothing to do with us, I don't know what SM60 has to do with the case.

(iii) McGewon: what of *my* lorry, … that's still in Dover, DEZ [9817]?

PAYE and invoice records

15. From the PAYE Employer Records for McGeown Transport Ltd submitted to HMRC, JM McAuley was in the employment of the appellant from 6 April 2014 to 20 September 2019.

16. The transcript of the interview records that Mr McGeown had provided HMRC with an invoice dated 18 February 2016 to show a Scania R420 with registration SM60 YKK was sold for 46,000 euros.

Restoration request of seized vehicle

17. The respondents were given permission to provide the correspondence in relation to the restoration correspondence of Scania DEZ 9817after the hearing. The details from this cohort of documents relevant to the interlocutory hearing are as follows.

(1) By letter dated 3 March 2016, Adrian McGeown on the headed paper of McGeown Transport Ltd wrote to Border Force National Post Seizure Unit in relation to the vehicle with registration DEZ 9817, wherein it is stated:

> 'I attach a copy of the hire agreement from McGeown Commercials whom [sic] is the owner of this truck and trailer.'

(2) The 'Hire Agreements' attached are on the headed paper of 'McGeown Commercials /New & Used Trucks & Plant', which has identical address and telephone

and fax numbers as McGeown Transport Ltd. The agreements were completed with hand-written entries (indicated by italics) below; the second agreement was for the trailer.

> Date: *01-01-16*
>
> Hire agreement for *McGeown Tspt ltd 57 Cashel Rd Armagh*
>
> Hire of vehicle *DEZ 9817 Scania R500 / Lamberet Fridge trailer MGT 52*
>
> Due back date *30-06-16*

(3) By letter dated 7 June 2016, Adrian McGeown on the headed paper of McGeown Transport Ltd wrote to Border Force, and the first paragraph states:

> 'I am extremely disappointed with your decision not to restore my lorry and trailer which was stopped in dover [Dover] on 24th feb.'
>
> 'McGeown commercials own the lorry and trailer and are rented to mcgeown transport which are 2 separate companys [sic] …' (Lower cases original)

18. Also produced post-hearing was the record of the 'Registered Keeper' of the vehicle Scania DEZ 9817 on Form V5C(NI), which stated the owner being 'McGeown' and the address being '57 Cashel Road, Tassagh Armagh BT60 2QZ' (which was the business address of the appellant company); the form recorded the date of acquisition by McGeown as 'Acquired vehicle on 01-10-2008', and 28 June 2005 as the date of first registration of the vehicle.

PROCEDURAL BACKGROUND

Assessment and Review Conclusion

19. On 11 September 2017, HMRC issued an assessment to excise duty in the sum of £1,640,936 to the appellant.

20. By letter dated 9 October 2017, the appellant through its representative requested a review of HMRC's decision to issue the excise duty assessment.

21. By letter dated 10 November 2017, the review officer upheld the decision based on the following 'review findings':

(1) The cigarettes were discovered in a vehicle owned by McGeown Transport Ltd, and driven by one of its employees.

(2) That at the relevant time McGeown Transport Ltd was the 'controlling body responsible for the movement and delivery of the goods'.

(3) That the 'vehicles driven by [the appellant's] employees contained more than one UK licence plate, concealed from view'.

(4) That the 'CMR documents have also been proven by Fraud Investigations Services to be fabricated'.

(5) That the seizure of the goods was not challenged and as such the goods were deemed condemned as forfeited to the Crown after one calendar month of the date of the seizure notice had elapsed.

Appeal and Further and Better Particulars

22. On 5 December 2017, the appellant lodged an in-time Notice of Appeal with the Tribunal, which stated its ground of appeal as follows:

> 'On the basis of the decision in *Taylor and Woods* [sic *Wood*] together with other reasons the Appellant would therefore contend that he is not liable for the excise duty claimed.'

23. On application by HMRC, and the Tribunal issued Direction on 19 June 2018 for compliance by the appellant to provide Further and Better Particulars of its grounds of appeal, which was served on 16 August 2018, stating as follows:

> 'The Appellant states that [it] relies upon … *Taylor and Woods* [2013] EWCA Crim 1151, wherein the Court decided that a haulier who had no notice that his vehicle was carrying excise goods could not be liable for the duty on those goods. …'
>
> '… The Appellant in this matter was entirely unaware that these other goods had been secreted upon his vehicle and therefore is not liable for the duty upon them.'
>
> 'The attempt by HM Revenue and Customs to state that the simple fact that these goods had been found on a vehicle connected to the Appellant was enough to fix him with the liability for the duty flies in the face of the Judgement as set out in Taylor and Woods.'

24. The Further and Better Particulars conclude with the following paragraph:

> 'We trust that the Respondent is now fully aware of the nature of the Appellant's case and can produce a Statement of Case in this matter.' (Emphasis added)

Stay behind the *Perfect* case

25. Based on the grounds as stated in the appellant's Further and Better Particulars, the appeal was stayed behind *HMRC v Martyn Perfect* [2019] EWCA Civ 465 ('*Perfect 2019*'), which considered whether a person who is unaware that they are in physical possession of excise goods at the point of chargeability are labile for the duty on those goods. There was no objection to the stay by the parties.

26. The Court of Appeal hearing the *Perfect* case made an Article 267 reference to the Court of Justice of the European Union (the 'CJEU') on 3 April 2019. In *Commissioners for HMRC v WR* (Case C-279/19) ('*HMRC v WR*') released on 10 June 2021, the CJEU held that, in such circumstances, a haulier would be liable for the duty on the goods, even if they were not aware that they were carrying duty goods and had no interest in them. The *Perfect* case was remitted to the domestic court to hear the residual matter.

27. On 23 February 2022, the Court of Appeal heard the *Perfect* case as respects the residual matter, and released its decision as *HMRC v Perfect* [2022] EWCA Civ 330 ('*Perfect 2022*'). As a result of the European Union (Withdrawal) Act 2018 whereby the UK Courts are bound by all CJEU decisions released before midnight on 31 December 2020, and in respect of refences made by UK Courts and tribunals before the end of 2020. The Court of Appeal in *Perfect 2022* therefore found that it was bound by the CJEU reference decision on *Perfect*.

HMRC's strike-out application

28. On 22 August 2022, HMRC applied to have the appeal struck out on the basis of the CJEU judgment in *HMRC v WR* at [36]:

> 'Article 33(3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, *even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty*.' (HMRC's emphasis)

29. The grounds for the strike-out application are that:

(1) The Tribunal is bound by law to find that the appellant being unaware that its cargo was excise goods does not prevent the appellant being liable to the excise duty.

(2) As such, the appellant's only ground of appeal is one of which the Tribunal is unable to find in its favour.

(3) HMRC consider that if the appellant were to ask the Tribunal to make different finding that the CJEU and the Court of Appeal, that would be in effect asking the Tribunal to exceed its jurisdiction and to act contrary to primary legislation in the form of the European Union (Withdrawal) Act 2018.

Appellant's notice of objection

30. By notice (undated) lodged on 18 October 2022, the appellant's representative opposed the strike-out application, stating the following as its grounds:

> 'The Appellant herein McGeown Transport Ltd states that the strike out application in this matter is entirely misconceived.
>
> It is an essential component of HMRC's case that the Appellant herein was the person holding the goods at the duty point. The Appellant's case is that McGeown Transport Ltd was not the party holding the goods at the duty point.
>
> The goods were being held by McGeown Haulage which is an entirely separate road transport operator.
>
> The Appellant would direct the Tribunal's attention to the fact that both the CMR document and the transport order clearly identify the transporter and holder of the goods in this matter. The Appellant is neither.
>
> We trust that it should be clear that HMRC's reliance upon the case of Perfect is entirely misconceived in this matter given that it should be clear that the present Appellant could not be liable for the duty under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.'

31. The appellant has provided no documents for inclusion in the hearing bundle in support of its notice of objection.

DISCUSSION

Application to strike out

32. Having heard the parties' respective positions in relation to the strike-out application, the issue for determination is whether the Tribunal has jurisdiction to consider the appellant's appeal as stated, and/or whether the appellant has a reasonable prospect of success in its appeal. The sole ground of appeal as stated in the Further and Better Particulars lodged on 16 August 2018 is that: '*The Appellant in this matter was entirely unaware that these other goods had been secreted upon his vehicle and therefore is not liable for the duty upon them*'.

33. For HMRC, Mr Fallon submits the application for strike out the appeal is made because:

(1) The CJEU has confirmed in *HMRC v WR* that a haulier does not require knowledge of possession of excise goods, nor a right or interest in the goods, to be liable to the duty. The only requirement for liability to arise is 'holding' of the goods.

(2) The Court of Appeal in *Perfect 2022* at [14] considered that the CJEU judgment in *HMRC v WR* to have 'binding force in their entirety on and in the United Kingdom' as provided by the agreement between the UK and the EU.

(3) The Court of Appeal in *Perfect 2022* reached the same conclusion as the CJEU:

> '[22] … In other words, a person need not be aware that excise duty is being evaded to be holding or making delivery of goods for the purposes of regulation 13 of the 2010 Regulations or article 33 of the 2008 Directive.
>
> [23] It follows that the fact that Mr Perfect had neither actual nor constructive knowledge of the smuggling of the beer he was carrying cannot exempt him from liability from excise duty.'

(4) HMRC contend therefore that this Tribunal must determine that the appellant's original ground of appeal, that it had no knowledge of 'holding' the cigarettes in its vehicle has no reasonable prospect of success, since the Tribunal is bound by the CJEU reference decision and the Court of Appeal decision in *Perfect 2022*.

(5) Further, HMRC submit that it is perhaps for this reason that the appellant seems to have abandoned this argument stated in its Further and Better Particulars following the CJEU reference decision in *HMRC v WR* and *Perfect 2022*.

(6) While HMRC do not (currently) wish to take a point on this from a conduct or costs perspective, the respondents note that it is inappropriate for a professional representative to change the appellant's grounds of appeal in this way, particularly after claiming to have made the respondents '*fully aware*' of its case in the Further and Better Particulars.

Prospect of success as pleaded in the Further and Better Particulars

34. The original ground of appeal as stated in the Notice and elaborated in the Further and Better Particulars is the appellant's lack of knowledge that more than 6 million cigarettes 'had been secreted upon his vehicle' and cited *Taylor and Wood* in support of its case.

35. *Taylor and Wood* concerned an appeal by Stephen Taylor (joined appellant Robert Wood) who pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. Confiscation proceedings under section 6 of the Proceeds of Crime Act 2002 ('POCA') followed, and a confiscation order was made in the sum of £148,500 against Mr Taylor, which was the subject matter of the appeal.

36. The material distinction in *Taylor and Wood* from the present appeal was that Mr Taylor had pleaded guilty to being *knowingly* concerned in the evasion of duty, while the appellant's original pleadings were that it was *unknowingly* being concerned in holding excise goods without duty paid. The appellant's primary case was therefore directly opposite to the fundamental fact upon which Mr Taylor's appeal against the confiscation order was founded.

37. Apart from this fundamental distinction in the factual matrix relevant to *Taylor and Wood*, the appeal against the confiscation order in *Taylor and Wood* was an appeal under the criminal proceedings, with fraud being the crime to underpin the relevance of POCA. The present appeal is under civil proceedings and no fraudulent evasion of duty is alleged. With these fundamental differences, it is unclear how *Taylor and Wood* was intended to assist the appellant's case, notwithstanding the Further and Better Particulars.

38. The relevant authority for considering the strike-out application is the CJEU's ruling in *HMRC v WR*. In this respect, I have regard to the questions being referred by the Court of Appeal in *Perfect* to the CJEU, which are set out in the following terms:

> '1. Is a person ... who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive [2008/118] in circumstances where that person:
>
> (a) had no legal or beneficial interest in the excise goods;

> (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
>
> (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?
>
> 2. Is the answer to Question 1 different if [the person in question] ... did not know that the goods he was in possession of were excise goods?'

39. The CJEU's interpretation of the purpose of Article 33(3) of the 2008 Directive in relation to the referred questions is as follows:

> '[33] ...the Advocate General observed [that] …, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in one Member State and held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.
>
> [34] However, to impose an additional condition requiring that the 'person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.'

40. In conclusion, the CJEU reiterated at [36] (as cited above) that the terms of the Article 33(3) do not require additional conditions to be satisfied other than 'being in physical possession' of the goods at the relevant time for a liability to excise duty to arise.

41. The Court of Appeal in *Perfect 2022* summarised the effect of the CJEU ruling in *HMRC v WR* in the context of the European Union (Withdrawal) Act 2018 in the following terms:

> '[66] … in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. … where, as here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives as explained by Lord Hoffmann in [*Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34, [2005] 1 WLR 1754].'

42. Regulation 13(1) of the HMDP Regulations provides for 'the excise duty point is the time when those goods are first so held'. The appellant's original pleadings that the goods had been '*secreted upon his vehicle*' is an admission of the fact that the 6 million cigarettes were held in the appellant's vehicle. By its own admission, the appellant was the holder of the goods at the relevant time. The application of the *Perfect* line of authority is that strict liability is the feature of the regime, and as the holder of the goods, the appellant is therefore liable to the unpaid excise duty, and it is unnecessary for HMRC to establish whether he had actual or constructive knowledge of the goods being excise goods with unpaid duty.

Conclusion: Strike-out granted

43. The appellant's original ground of appeal therefore has no prospect of success. The appellant's pleadings based on its lack of knowledge of the cigarettes being on a vehicle in its control and possession is simply irrelevant in a scheme of strict liability. For this reason, I grant the application to strike out the appeal as pleaded in the Further and Better particulars.

Appellant's notice of objection to the strike-out application

44. In its notice to oppose the strike-out application lodged on 22 October 2022 (more than 4 years after the Further and Better Particulars), the appellant's case would seem to have changed to: '*McGeown Transport Ltd was not the party holding the goods at the duty point*'.

45. As Mr Fallon has suggested, the appellant may have realised that following the *Perfect* decisions, the appeal has no prospect of success based on its original pleadings. In its notice of objection to the strike-out application, the appellant has not actually engaged with its original ground of appeal to which the strike-out application relates.

46. Instead of defending its original pleadings to resist the strike-out, the notice of objection lodged in October 2022 in effect sought to amend the appellant's pleadings nearly 5 years (some 4 years 9 months) after the lodgement of the Notice of Appeal in December 2017. The appellant has made no application to amend its grounds of appeal prior to the lift of stay behind *Perfect.* The first imitation that the appellant appears to have abandoned its original ground of appeal was in its notice to oppose the strike out application.

47. A change of the ground(s) of appeal must be made by application, and the opposing party must be afforded the opportunity to make representations before the Tribunal decides whether the new ground(s) should be admitted. To consider the notice of objection to the strike-out in any other terms than as an application by the appellant to amend its pleadings runs the risk of admitting the new grounds of appeal through the back door, without putting the onus squarely on the appellant to prove why permission to amend its pleadings at such late stage should be granted. The appellant's position in this respect is succinctly stated by Judge Mosedale in *Asiana Ltd v HMRC* [2019] UKFTT 267 (TC) ('*Asiana*'):

> '[15] … the law on pleadings is clear: the appellant must state what are its grounds of appeal. If it does not, it cannot rely on those grounds. And if it wants to rely on a new ground of appeal, as it does here, it must apply for permission to amend. …'

48. Notwithstanding the absence of a formal application to amend its pleadings, in the interests of justice and fairness, and for completeness, I will go on to consider the appellant's notice of objection as an application to amend its pleadings by reference to its true substance.

Principles for considering proposed amendment

49. In deciding whether the application to amend its pleadings should be allowed or refused, the significant delay in bringing the application weighs heavily against the appellant. In this respect, I have special regard to what Mrs Justice Carr stated in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) ('*Quah*'):

> '[36] An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.'

50. With reference to a number of authorities[1], Carr J summarised the relevant principles applicable to considering 'very late applications' at [38] in *Quah*:

> [38] Drawing these authorities together, the relevant principles can be stated simply as follows :
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.'

51. The principles enunciated in *Quah* are directly relevant to this Tribunal, as illustrated by the Upper Tribunal (Newy J and Judge Bishopp) in *Denley v HMRC* [2017] UKUT 340 (TCC).

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[1] *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Viv 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

Appellant's representations for the proposed amendment

52. Mr McNamee's oral representations to supplement what has been stated in the notice of objection are summarised as follows:

(1) This is an appeal under s 16 FA 1994 against HMRC's review conclusion to raise the excise duty assessment, and it is asserted that the appellant is 'entitled to change its case at any time'.

(2) The Court of Appeal 'changed the interpretation of the law which had been up to that point set out in the decision of *Taylor and Wood*'.

(3) The appeal process directs that a Statement of Case be served by HMRC before the appellant serves its evidence – 'the stage at which at appellant's evidence is to be submitted has not yet been reached'.

(4) The essential part of the pleadings is whether the appellant was 'holding the goods'. The appellant's contentions are that: (a) it was not the operator, and (b) it was not the owner of the vehicle in which the goods were held.

(5) The two essential elements for evidence in the appeal are therefore: (a) who in law was the operator; and (b) who in law owned the vehicle.

(6) It is asserted that 'McGeown Transport Ltd did not have operator licence', whereas 'McGeown Haulage did have an operator licence'; and that the appellant would be 'providing absolute proof' that it held no operator licence.

(7) The appellant further contends that it did not have 'ownership' of the vehicle in which relevant goods were found; that the appellant company provides employment of a driver to operate but it did not have control over the driver. It is asserted that the regulations provide that it must be the operators who control the driver, and this is a matter to be flashed out in a full trial.

HMRC's grounds for opposing the amendment

53. The respondents oppose the appellant's application to amend its pleadings. In this respect, Mr Fallon submits, inter alia, that:

(1) Following the CJEU and Court of Appeal decisions in the *Perfect* case, HMRC are of the view that the only way for the appellant to avoid liability is to demonstrate that it was not 'holding' the goods at the duty point.

(2) In short, the appellant must demonstrate that it was not in physical possession of the cigarettes when the goods entered the UK, which now appears to be the appellant's sole contention.

(3) In making this argument, the appellant now states that the documents which purport to be the CMR and the Transport Order showing the name McGeown Haulage, as opposed to McGeown Transport.

(4) HMRC know McGeown Haulage Ltd to be another haulage company, owned and operated by the same family as McGeown Transport Ltd, based on the same street.

(5) HMRC contend that this argument has no reasonable prospect of success in accordance with the approach set out by the Upper Tribunal in *HMRC v Fairford Group plc & Another* [2014] UKUT 329 (TCC) at [41]:

> 'The Tribunal must consider whether there is a realistic … prospect of succeeding on the issue at a full hearing. … A realistic prospect of success is

one that carries some degree of conviction and not one that is merely arguable … The Tribunal must avoid conducting a "mini-trial".'

(6) The appellant's contention appears to rest entirely on a single document the purported CMR and the purported Transport Order attached to it.

(7) HMRC contend that the argument is simply not arguable, because the documents relied on are 'very clearly fabricated'. On the face of it, the purported cargo was to be fruit and vegetables, when the real cargo was in cigarettes, and other numerous inaccuracies as concerns the identities of the consignor, consignee, and transporter. The documents were produced to be 'deliberately inaccurate', 'with the sole intention being to mislead the respondents and the UK authorities'.

Prospect of success of the amended pleadings

54. The appellant's proposed amended pleadings are to say that it was not 'holding' the cigarettes for the purposes of Regulation 13 of the Excise Goods (HMDP) Regulations. At a substantive hearing, the burden on the appellant would be to prove that it was not the 'holder' of the goods at the duty point. At the interlocutory stage, the burden on the appellant is to demonstrate that the proposed amendment in such terms has a reasonable prospect of success; in other words, as stated in *Quah*, it 'has to have a case that is better than merely arguable'.

55. Whether the appellant has a case that is better than merely arguable, I address the two assertions upon which the proposed pleadings are founded by considering the evidential basis as to (a) whether the vehicle found to have contained the cigarettes was in the possession and control of McGeown Transport Ltd, and (b) McGeown Haulage being the 'holder' as alleged.

Control of vehicle seized with goods

56. I have regard to the evidence emanating from the seizure event on 24 February 2016 which points to the fact that the appellant, McGeown Transport Ltd, was 'holding' the cigarettes for the purposes of this appeal.

(1) The driver of the vehicle which contained the cigarettes, Jamie McAuley, was employed exclusively by McGeown Transport Ltd at the time of the seizure.

(2) In his interview, McAuley referred to Adrian McGeown as his 'boss', and the 'owner' of McGeown Transport Ltd.

(3) As such, the cigarettes were held by an employee of McGeown Transport Ltd in the course of his work for the appellant company, and consequently, the cigarettes were held by McGeown Transport Ltd as a matter of fact.

(4) During an interview conducted under police caution, Adrian McGeown, the director of McGeown Transport Ltd, confirmed that the business concerned in the seizure event was indeed McGeown Transport Ltd (and not McGeown Haulage Ltd as now asserted). Adrian McGeown confirmed that '*McGeown Transport is McGeown Transport*' in no uncertain terms.

(5) During the interview, Adrian McGeown went into considerable detail about how a second number plate came to be found on the vehicle used in the transport of cigarettes, which had the registration number DEZ 9817, and that Adrian McGeown stated that he was the person handling 'all the breakdowns' and would be the person to have arranged for McAuley to attend repairs of DEZ 9817 at Scania Germany before its arrival at Dover.

(6) During the interview, Adrian McGeown was specifically asked whether McGeown Transport Ltd controls the vehicle with registration number DEZ 9817, and he confirmed: '*That's correct. Those trucks we run the trans … we run the transport fleet, yeah'*.

(7) Adrian McGeown then queried with the interviewing officer regarding the restoration DEZ 981 by referring to the vehicle as 'my lorry': '*Well what of my lorry, …, that's still in Dover, DEZ?*

57. The contemporaneous documentation provides further support to McGeown Transport Ltd being the 'holder' of the goods for the purposes of Regulation 13.

(1) McAuley's PAYE employment records show that he had been employed for nearly 2 years since 6 April 2014 when the seizure event took place (on 24 February 2016).

(2) The sale invoice dated 18 February 2016 produced by Adrian McGeown in relation to the sale of Scania SM60 YKK by McGeown Commercials, which was also controlled by Adrian McGeown, and was part of the background and connection to the fact that SM60 YKK number plate (for whatever reasons) was found to be attached to the number plate of DEZ 9817 (in whatever manner).

(3) The letter of 3 March 2016 to apply for restoration of the seized DEZ 9817 was written by Adrian McGeown on McGeown Transport Ltd headed paper as the party with control and ownership of the DEZ 9817 to have the legal standing to request restoration.

(4) The 'Hire Agreement' attached to the restoration application letter was the evidence Adrian McGeown relied on to establish ownership and control of DEZ 9817 for the purposes of the restoration request.

(5) In the letter of 7 June 2016 in relation to the decision by Border Force not to restore DEZ 9817, Adrian McGeown referred to the vehicle as 'my lorry and trailer'.

(6) The 'Registered Keeper' of the vehicle Scania DEZ 9817 on Form V5C(NI) clearly stated the connection of 'McGeown' (however construed) at the same business premises of the appellant company.

58. In view of the above evidence, I conclude that Adrian McGeown, as the director of McGeown Transport Ltd, had confirmed that DEZ 9817, being the vehicle on which the cigarettes were discovered, was in the possession and control of McGeown Transport Ltd. The conclusion is consistent with contemporaneous documentation. As such, I conclude that the cigarettes were in the possession of an employee of McGeown Transport Ltd, and in a vehicle controlled by McGeown Transport Ltd, as confirmed by the director of McGeown Transport Ltd in no uncertain terms. The appellant, McGeown Transport Ltd, is the 'holder' of the excise goods that had evaded duty at the duty point for the purposes of Regulation 13.

McGeown Haulage as 'holder'

59. The Appellant's amended case is that McGeown Haulage was the entity with an operator licence, and that the goods were being held by an entirely separate road transport operator to the appellant company. The statements on the notice of objection refer to 'McGeown Transport Ltd was not the party holding the goods at the duty point' – but 'McGeown Haulage' was the party holding the goods at the duty point as stated on the CMR and 'the transport order'.

60. It is stated for the appellant in the notice of objection that it would direct the Tribunal's attention to the fact that both the CMR document and the transport order clearly identify the transporter and holder of the goods in this matter, and that 'the Appellant is neither'.

61. While the copy of the purported CMR has been lodged in the application bundle produced by HMRC, the 'transport order' does not seem to have been included in the bundle, and the appellant has not sought to provide a copy.

62. It is noted that 'McGeown Haulage' appeared on the CMR which accompanied the goods at the time of seizure. In the light of the statements provided by Gubbels (purported consignor),

Thermotraffic (purported Logistics manager), and Aldi (purported consignee), I am satisfied that HMRC have good grounds to state that the purported CMR was a complete fabrication; that it was inherently implausible for the purported CMR to have been originated with Thermotraffic, since the purported CMR was on an 'old' form superseded some 2 years prior and was no longer in use by Thermotraffic at the time of the seizure event. The stated haulier as 'McGeown Haulage' on the purported CMR therefore has no probative value to found the assertion upon which the amended pleadings are solely staked.

63. Furthermore, I have special regard to the late stage of introducing 'McGeown Haulage' as the relevant 'holder' when the purported CMR had stated it as the haulier at all times.

(1) During Adrian McGeown's interview, when he was asked several times from different angles by HMRC about the entity in question which was concerned with the seizure event, at no stage did Adrian McGeown mention McGeown Haulage.

(2) In the Notice of Appeal, there was no reference whatsoever that McGeown Haulage was the haulier.

(3) The appeal was stayed for some two years behind *Perfect* and the appellant did not object at any stage that McGeown Transport Ltd was in fact not the holder of the goods but McGeown Haulage should be the relevant entity.

(4) In the Further and Better Particulars, the reliance of *Taylor and Wood* by the appellant would make no sense if McGeown Transport Ltd was not the 'holder' of the goods, since *Taylor and Wood* is a case about the haulier having knowledge of the cargo being carried.

(5) Mr Fallon points out that '[t]he absurdity of the appellant's position is made clear in its Further and Better Particulars' where its representative has stated:

> 'The Appellant [ie McGeown Transport Ltd] in this matter was entirely unaware that these other goods were secreted upon <u>his vehicle</u> …'

(6) As a matter of fact, the appellant's representative has confirmed in the Further and Better Particulars that the cigarettes found on the vehicle was connected to McGeown Transport Ltd as a 'simple fact':

> …. <u>the simple fact that these goods had been found on a vehicle connected to the Appellant</u> …' (Emphasis added)

64. Given the foregoing, and especially in view of what the appellant's representative had stated in the Further and Better Particulars as 'the simple fact', the premise upon which the amended pleadings are staked to make McGeown Haulage as the concerned party is in direct contradiction to the original pleadings.

65. Furthermore, the proposed amendment seeks to raise a version of the facts of the case which is plainly self-contradictory to the original pleadings, and is totally unsupported by contemporaneous documentation. It is inherently implausible that the purported CMR could have been originated by the supposed entity Thermotraffic. The purported CMR therefore has no probative value that can support the amended pleadings that seek sole reliance thereon.

66. The long delay in bringing the amendment weighs heavily against the granting the application in any event. As the application is refused after applying the test as that for summary judgment, it is not necessary to consider the long delay which would have been a relevant factor in reaching my decision.

Conclusion: the application to amend pleadings

67. I conclude that the appellant's proposed amendment is not one which is better than merely arguable – it is not even arguable. The appellant's application to amend its pleadings is refused because it is clear that the proposed amendment has no real prospect of success.

DISPOSITION

68. The respondents' application to strike out the appeal is granted.

69. The appellant's application to amend its grounds of appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

HEIDI POON
TRIBUNAL JUDGE

Release Date: 27 September 2023