[2018] UKUT 398 (TCC)

Appeal number: UT/2017/0177

EXCISE DUTY – refusal by HMRC to vary authorisation granted to user of trade specific denatured alcohol under Alcoholic Liquor Duties Act 1979 – whether decision capable of appeal to FTT – no – whether customer of user had standing to bring appeal – no – appeal struck out – proper approach to applications to strike out based on lack of jurisdiction

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellants**
- and -	
WOODSTREAM EUROPE LIMITED	**Respondent**

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London WC2 on 31 October 2018

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

The Respondent did not appear and was not represented

DECISION

Introduction

1. This is the decision on the appeal by HMRC against the decision of the First-tier Tribunal ("FTT") in *Woodstream Europe Ltd v Revenue and Customs Commissioners.* The FTT's decision (" the Decision") is published at [2017] UKFTT 657 (TC).

2. The Decision was and at this date remains the first reported case in the United Kingdom concerning the excise duty provisions relating to denatured alcohol.

The relevant facts

3. The Decision related solely to questions of law, the parties having agreed the relevant facts.

4. Woodstream Europe Limited ("Woodstream") was a customer of a UK manufacturer, Grosvenor Chemicals Limited ("Grosvenor"). In November 2010 HMRC granted to Grosvenor an authorisation, subject to conditions, to receive at its premises a stated amount and type of Trade Specific Denatured Alcohol ("TSDA"). In September 2016 Grosvenor applied to HMRC to vary that authorisation. On 31 October 2016 HMRC refused that request. On 18 January 2017 HMRC notified Grosvenor that it had, as requested, reviewed its decision, and upheld it. On 15 February 2017 Woodstream appealed to the FTT against HMRC's decision to refuse Grosvenor's request to vary its authorisation.

5. HMRC applied to the FTT to strike out the appeal. HMRC submitted that the FTT was bound to strike out the appeal on two grounds. First, the decision made by HMRC to refuse Grosvenor's request to vary its authorisation was not a decision in respect of which the legislation provided any right of appeal to the FTT. Secondly, Woodstream had no standing to bring the appeal before the FTT as it was simply a customer of the person who was so entitled, namely Grosvenor. For either or both reasons, argued HMRC, the FTT had no jurisdiction to consider the appeal.

6. The FTT (Judge Thomas) dismissed HMRC's application on both grounds. It concluded that there was an arguable interpretation of the relevant legislation to the effect that the decision was capable of appeal, so it refused to strike out the appeal on that basis. The FTT also concluded that Woodstream was arguably "a person in relation to whom" HMRC's decision had been made, so it refused to strike out the appeal for lack of standing.

7. HMRC applied for permission to appeal the Decision on both grounds. The FTT (Judge Poole) granted permission to appeal on the grounds requested.

8. In the hearing before us, neither Woodstream nor Grosvenor appeared or was represented.

Grounds of appeal

9. HMRC raised four grounds of appeal, as follows:

(1) The FTT erred in applying an incorrect test to the question of whether the Tribunal should strike out the appeal for want of jurisdiction.

(2) The FTT erred in its construction of the relevant legislation and thereby made an error of law in concluding that the HMRC decision was arguably capable of appeal.

(3) The FTT erred in applying an incorrect test to the question of whether the Tribunal should exercise its discretion to strike out the appeal on the grounds that the appellant did not have standing.

(4) The FTT erred in law in finding that the appellant did have standing.

10. We consider first grounds (1) and (3), which raise similar issues. We then turn to grounds (2) and (4).

The proper approach to an application to strike out based on lack of jurisdiction or standing

11. In relation to HMRC's application to strike out the appeal for lack of jurisdiction, the FTT set out its approach to that question as follows, starting at paragraph 44 of the Decision:

> **"My approach to the application**
>
> 44. This Tribunal is a creature of statute law and its jurisdiction is circumscribed by that law. This is reflected in Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Rules") which provides for how proceedings are started. It begins:
>
> > "Where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by …".
>
> 45. For an appeal to be entertained then there must be an enactment which provides not just for an appeal but for an appeal of the requisite character. In other words the appeal must be against an appealable decision, and a decision is only appealable if an enactment provides for it to be appealable to the Tribunal.
>
> 46. If the decision in this case is not appealable then the Tribunal has no option but to strike it out. But striking out is, as has been said, a nuclear option. It can be a merciful way of preventing time and resources being wasted in a hopeless cause; but it can also deprive a person of any chance of getting their arguments heard because it is a final disposition of the case.
>
> 47. There is a natural tendency in this case, where the prospect of an appeal has been dangled before the appellant and procedures gone through with that in mind only to be snatched away at the last minute, for a judge to strain to do what might be regarded as the just thing. This is the more so when by my quick calculation Schedule 5 to FA 1994

contains nearly 100 appealable decisions – surely this must be one is the thought.

48. What is more the appellant cannot seek to get the Tribunal to actually overturn the decision of HMRC. If the decision is an appealable decision it will be an "ancillary decision" within the meaning of s 16 FA 1994, and that means that the Tribunal's jurisdiction is limited to requiring HMRC to review their decision, with if the Tribunal thinks fit, directions as to how it must do that. Again the initial thought is that there must be a provision allowing a person who is the subject of a decision with major economic consequences to at least get another review on perhaps a more informed basis.

49. I must however guard against allowing such natural tendencies to influence my decision. On the other hand a prospective appellant against an important decision with substantial economic consequences potentially at stake should not be deprived of a remedy on a technicality.

50. And my task here is, in my view, not to say whether there is definitely an appealable decision, but whether there is clearly not. The test I employ is that for applications to strike out on the grounds that there is no reasonable prospect of success, so that I am anxious to see if there is any non-fanciful argument that could be employed at any hearing of the case, especially given that the appellant is not legally represented.

51. I also take this approach in relation to the question of standing, but there are other considerations there."

12. The FTT's refusal to strike out for want of jurisdiction is expressed in the following terms:

> "84. Based on the discussion above I am not satisfied that the Tribunal clearly does not have jurisdiction, and so I refuse to strike out the appeal on that basis.
>
> 85. I must emphasise to the appellant that this decision does not mean that I think the interpretation of paragraph 3(2) Schedule 5 FA 1994 that I have suggested is correct and that they would win any appeal. What I have decided is that an interpretation of the sub-paragraph along the lines I have set out is arguable, and that the appellant should be allowed to put it at a hearing of the appeal."

13. In relation to HMRC's application to strike out on the basis that the appellant lacked standing, Judge Thomas suggested to Ms Vicary (who also appeared for HMRC before the FTT) various arguments which he considered might be raised by the appellant. He set out his conclusions as follows:

> "90. I do not accept that it is clear that the appellant is not a person in relation to whom the decision was made…I consider that the very close connection between the applications by Grosvenor and the interests of Woodstream makes it strongly arguable that the appellant has standing.
>
> …

> 93. I think it is properly arguable that the appellant has standing as a person related to the applicant, and I refuse to strike out the appeal on the basis that it does not."

14. The FTT was correct in observing that the Tribunal is a creature of statute law and its jurisdiction is circumscribed by that law. In relation to strike-out applications, that jurisdiction is found in Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"). That Rule, which was not set out in the Decision, provides, so far as relevant, as follows:

> "**8—Striking out a party's case**
>
> …
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (c) The Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

15. If the FTT lacks jurisdiction it *must* strike out the proceedings. That is a binary decision, which the Tribunal must address and determine at the hearing of the strike-out application. This is to be contrasted with an application to strike out a claim, or part of it, on the grounds that it has no reasonable prospect of success. In the latter case, the Tribunal will not exercise its discretion to strike out if there is a non-fanciful argument in support of the claim, or relevant part.

16. In this respect, we agree with the conclusion of this Tribunal in *Raftopoulou v Commissioners for Revenue & Customs* [2015] UKUT 579 (TCC). Although the Court of Appeal overturned the decision of the Upper Tribunal on the substantive issue in that case, it did not refer to or reconsider the Upper Tribunal's conclusion on this point. The Upper Tribunal in *Raftopoulou* firmly rejected the argument that in relation to an application to strike out for lack of jurisdiction the correct approach was the same as that on an application to strike out under Rule 8(3)(c), stating as follows:

> "25. We do not agree. There is in our judgment no basis, whether in statute or by reference to [*Revenue and Customs Commissioners v Fairford Group plc* [2014] UKUT 329 (TCC)], or the authorities referred to in that case, for the proposition advanced by [Counsel] in this respect. The test of whether there is a realistic as opposed to a fanciful prospect of succeeding referred to in *Fairford* is clearly directed at explaining how a tribunal should approach its discretion in cases where the ground of strike out is whether the proceedings stand a reasonable prospect of success. The strike out under consideration in this appeal

> was by contrast on the grounds of jurisdiction. It is clear that in relation to strike outs on the basis of lack of jurisdiction the test is a binary one; either the tribunal has jurisdiction or it does not…"

17. In this case, the FTT erred in law by conflating the test to be applied under Rule 8(2)(a) with that to be applied under Rule 8(3)(c). That is evident from paragraphs 50 and 51 of the Decision set out at [11] above.

18. The distinction between mandatory and discretionary strike-outs is not removed or eroded by the presence of individual factors such as those referred to by the FTT at paragraphs 47 to 49 of the Decision. The proper task before the FTT was not to identify potentially non-fanciful arguments that jurisdiction might exist. The task was to determine whether jurisdiction did or did not exist; if it did, the application on that ground would inevitably be refused, and if it did not it would inevitably be granted.

19. We consider that the same principles apply in relation to an application to strike out for lack of standing. Section 16(2A) Finance Act 1994, which we discuss in detail below, stipulates that an appeal against a relevant decision "shall not be entertained unless the appellant" is a person within one of the specified categories. The task before the FTT in this case was not to suggest possible lines of argument as to why standing might exist, and then to refuse the strike-out application on the basis that those arguments were "properly arguable" (paragraph 93 of the decision) or "strongly arguable" (paragraph 90). The task was to decide whether the appellant had standing or not. If it did not, then by virtue of section 16(2A) the FTT could not entertain the appeal and the striking out of the application must follow.

20. Accordingly, we conclude that the FTT erred in law in its approach to the applications to strike out based on lack of jurisdiction and lack of standing. We turn now to the substantive issues arising in relation to those applications.

Did an appeal lie to the FTT against HMRC's decision?

Background: denatured alcohol

21. Most countries impose specific taxes and duties on alcohol used for human consumption. European Union law provides an exemption from the excise duty which would otherwise apply to alcohol where that alcohol is "completely denatured". The United Kingdom has enacted legislation dealing with the exemption. Such denatured alcohol may be either "industrial" or, as in this appeal, "trade specific". Denatured alcohol is, broadly, alcohol which has been subjected to a process intended to make it unpalatable for human consumption. Denaturing will typically involve adding a chemical to the alcohol which makes it extremely bitter, foul-smelling or nauseating. It may also (as with methylated spirit) have a dye added to mark its status.

22. Denatured alcohol facilitates the use of ethanol in a variety of industrial and commercial situations. The process of making it unpalatable for human consumption is intended to permit this while preventing consumption of alcohol which has not borne the normal duties and taxes. The tax legislation therefore closely regulates the manufacture and supply of denatured alcohol. It also deals with the position of other

parties who may be part of the supply chain for denatured alcohol, such as those who receive or store it.

Relevant legislation

23. The UK law relating to denatured alcohol is found in Part 6 of the Alcoholic Liquor Duties Act 1979 ("ALDA"). Section 75 deals with manufacturers and those who deal wholesale, and section 77 provides the power to make more wide-reaching regulations, as follows:

> "**Denatured alcohol**
>
> **75 Licence or authority to manufacture and deal wholesale in denatured alcohol**
>
> (1) The Commissioners may authorise any distiller, rectifier or compounder to denature dutiable alcoholic liquor, and any person so authorised is referred to in this Act as an "authorised denaturer".
>
> (2) No person other than an authorised denaturer shall denature dutiable alcoholic liquor or deal wholesale in denatured alcohol unless he holds an excise licence as a denaturer under this section.
>
> (5) Where any person, not being an authorised denaturer, denatures dutiable alcoholic liquor otherwise than under and in accordance with a licence under this section his doing so shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).
>
> (6) The Commissioners may at any time revoke or suspend any authorisation or licence granted under this section.
>
> (7) For the purposes of this section, dealing wholesale means the sale at any one time to any one person of a quantity of denatured alcohol of not less than 20 litres or such smaller quantity as the Commissioners may by regulations specify.
>
> …
>
> **77 Power to make regulations relating to denatured alcohol**
>
> (1) The Commissioners may with a view to the protection of the revenue make regulations—
>
> (a) regulating the denaturing of dutiable alcoholic liquor and the supply, storage, removal, sale, delivery, receipt, use and exportation or shipment as stores of denatured alcohol;
>
> …
>
> (2) Different regulations may be made under this section with respect to different classes of denatured alcohol or different kinds of denatured alcohol of any class and, without prejudice to the generality of subsection (1) above, regulations under this section may—
>
> (a) provide for the imposition under the regulations of conditions and restrictions relating to the matters mentioned in that subsection; and
>
> (aa) frame any provision of the regulations with respect to the supply, receipt or use of denatured alcohol by reference to matters to be contained from time to time in a notice published in accordance with the regulations by the Commissioners and having effect until withdrawn in accordance with the regulations;

..."

24. Section 5 of the Finance Act 1995 ("FA 1995") sets out further enabling provisions in relation to regulations, and refers to the review and appeal machinery in respect of certain decisions. So far as relevant it states as follows:

> "**5 Denatured alcohol**
>
> (3) The power of the Commissioners to make regulations defining denatured alcohol for the purposes of this section shall include—
>
> (a) power, in prescribing any substance or any manner of mixing a substance with a liquor, to do so by reference to such circumstances or other factors, or to the approval or opinion of such persons (including the authorities of another member State), as they may consider appropriate;
>
> (b) power to make different provision for different cases; and
>
> (c) power to make such supplemental, incidental, consequential and transitional provision as the Commissioners think fit;
>
> and a statutory instrument containing any regulations under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (4) Sections 13A to 16 of the Finance Act 1994 (review and appeals) shall have effect in relation to any decision which—
>
> (a) is made under or for the purposes of any regulations under this section, and
>
> (b) is a decision given to any person as to whether a manner of mixing any substance with any liquor is to be, or to continue to be, approved in his case, or as to the conditions subject to which it is so approved,
>
> as if that decision were a decision falling within section 13A(2)(j) of that Act."

25. The regulations referred to in section 77 ALDA and section 5 FA 1995 are the Denatured Alcohol Regulations 2005 (SI 2005/1524) ("the 2005 Regulations"). The relevant regulations are as follows:

> "**2 Interpretation**
>
> In these Regulations—
>
> …
>
> "producer" means—
>
> (a) a person who is a distiller, rectifier or compounder, and who is authorized by the Commissioners under section 75 of the Act to denature alcohol; or
>
> (b) a person who holds an excise licence granted under that section, and who denatures or intends to denature alcohol at any premises;
>
> …
>
> **8 Producer's application for approval and entry of premises**
>
> (1) A producer must, in respect of each set of premises at which he intends to make a class of denatured alcohol, make written application to the Commissioners for approval of the process he intends to employ when making that denatured alcohol.
>
> …

Part 4

Receipt, Use and Supply of Denatured Alcohol

12 Application

This Part applies to industrial denatured alcohol and trade specific denatured alcohol that has not been incorporated into a product that is not for human consumption.

13 Receipt and use of industrial denatured alcohol and trade specific denatured alcohol

(1) No person may receive or use industrial denatured alcohol or trade specific denatured alcohol other than in accordance with the provisions of this Part.

(2) A person may receive industrial denatured alcohol or trade specific denatured alcohol only if he is authorized in writing by the Commissioners to receive that class of denatured alcohol.

(3) A person wishing to be authorized to receive industrial denatured alcohol or trade specific denatured alcohol must—

(a) apply to the Commissioners in the form and manner specified in a notice they publish that has not been withdrawn by a further notice; and

(b) if he wishes to receive trade specific denatured alcohol made in accordance with a formulation approved under regulation 7(2), describe the formulation in his application.

(4) The Commissioners may authorize a person to receive industrial denatured alcohol or trade specific denatured alcohol—

(a) subject to restrictions on the uses to which that denatured alcohol may be put;

(b) subject to restrictions on the formulations of denatured alcohol that may be received; and

(c) subject to such conditions as they see fit to impose.

(5) Where there has been a change in any of the particulars that were included in a person's application for authorization, before receiving any further supplies of industrial denatured alcohol or trade specific denatured alcohol, he must give the Commissioners notice of that change in such form and manner as they require.

(6) The Commissioners may at any time for reasonable cause vary or revoke any authorization granted or any condition or restriction imposed under this regulation.

(7) A person may receive industrial denatured alcohol or any formulation of trade specific denatured alcohol only if, before he is supplied with that denatured alcohol, he furnishes the supplier with a copy of his authorization.

(8) A person authorized under this regulation must keep and preserve such records relating to his use of denatured alcohol as the Commissioners may specify in a notice published by them and not withdrawn by a further notice.

(9) A person authorized under this regulation must comply with and ensure compliance with any conditions or restrictions imposed in accordance with this regulation.

…"

26. The law relating to appeals against decisions under ALDA is contained in the Finance Act 1994 ("FA 1994"). The relevant provisions are as follows:

> "**Customs and excise reviews and appeals**
>
> **13A Meaning of "relevant decision"**
>
> (1) This section applies for the purposes of the following provisions of this Chapter.
>
> (2) A reference to a relevant decision is a reference to any of the following decisions—
>
> …
>
> (j) any decision by HMRC which is of a description specified in Schedule 5 to this Act … [*including any decision made under s 5(4)(a) or (b) FA 1995 – see §11*]
>
> …
>
> **16 Appeals to a tribunal**
>
> (1) An appeal against a decision on 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.
>
> …
>
> (1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days…
>
> …
>
> (2A) An appeal under this section with respect to a relevant decision … shall not be entertained unless the appellant is—
>
> …
>
> (b) a person in relation to whom, or on whose application, the relevant decision has been made,
>
> (c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied.
>
> …
>
> (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 may 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.

…

(6) On an appeal under this section … it shall … be for the appellant to show that the grounds on which any such appeal is brought have been established.

…

(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.

…

SCHEDULE 5

…

The Alcoholic Liquor Duties Act 1979

3 (1) The following decisions under or for the purposes of the Alcoholic Liquor Duties Act 1979, that is to say—

…

(o) any decision as to whether or not an authorisation or licence for the purposes of section 75 (denatured alcohol) is to be granted to any person or as to the revocation or suspension of any such authorisation or licence;

(2) Any decision which is made under or for the purposes of any regulations under section 13 or 77 of the Alcoholic Liquor Duties Act 1979 (regulation of the manufacture of spirits, methylated spirits and denatured alcohol) and is a decision as to whether or not any premises, plant or process is to be, or to continue to be, approved for any purpose or as to the conditions subject to which any premises, plant or process is so approved.

…"

The HMRC decision

27. On 23 November 2010 HMRC sent a notice to Grosvenor described as "your user authorisation letter". It stated that HMRC authorised Grosvenor to receive and use a specified amount of a particular TSDA at its premises subject to it only being used to produce disinfectants. The authorisation covered receipt and use, but not production. On 8 September 2016 Woodstream Corporation, a US company, wrote to HMRC stating that its UK subsidiary, Woodstream, requested authorisation for a change of use of the relevant TSDA in respect of which Grosvenor had been authorised. The change was from using the relevant TSDA to manufacture disinfectants to using it to manufacture agrochemicals. Woodstream explained that it had selected Grosvenor to act as its toll manufacturer. HMRC informed Woodstream that the application should be made by Grosvenor. On 28 September 2016 Grosvenor submitted a request to amend its November 2010 authorisation, stating that it was applying in conjunction with Woodstream. On 31 October 2016 HMRC wrote to Grosvenor refusing its application to amend its authorisation. Following further correspondence, and the provision of further information by Woodstream, HMRC reconsidered its refusal. On 18 January 2017 HMRC confirmed its refusal of the application. It was HMRC's letter of 18

January 2017 which was the subject of the appellant's appeal and HMRC's application to strike it out.

The FTT's analysis and conclusions

28. The FTT concluded that it was "arguable" that the HMRC decision was capable of appeal. The essential elements of the FTT's reasoning (at paragraphs 53 to 83 of the Decision) can, we consider, be summarised as follows:

(1) The only basis on which the HMRC decision might be a "relevant decision" and therefore capable of appeal would be if it fell within paragraph 3(2) of Schedule 5 FA 1994 (set out at [26] above).

(2) Regulation 13(4) of the 2005 Regulations (see [25] above) authorised a person to receive TSDA. Regulation 13(6) allowed HMRC to vary or revoke any authorisation granted or any condition or restriction imposed under Regulation 13. The FTT appeared to consider that there were two HMRC decisions and concluded as follows:

> "*Are either of the regulation 13 decisions arguably within paragraph 3(2)?*
>
> 65. Paragraph 3(2) suitably comminuted reads:
>
> > "Any decision which is made under or for the purposes of [the 2005 Regulations] and is a decision as to whether or not any premises, plant or process is to be, or to continue to be, approved for any purpose or as to the conditions subject to which any premises, plant or process is so approved".
>
> 66. In my view both paragraphs (4) and (6) of regulation 13 arguably fall within the description in paragraph 3(2). What Grosvenor does with denatured alcohol it receives is to process it by using it to manufacture various products…Grosvenor is approved to use TSDA 7 in any process it employs to make disinfectant. It wishes to be approved to use TSDA 7 in a process to produce agrochemicals.
>
> 67. The relevant decision of HMRC is, on this basis, capable of being characterised as either one not to authorise Grosvenor to use TSDA 7 for making agrochemicals within regulation 13(4) or not to vary its authorisation within regulation 13(6). Both would be decisions as to whether or not any process is to be approved or as to the conditions subject to which it is to be approved."

(3) HMRC's argument that paragraph 3(2) applied only to decisions relating to premises, plant and processes and not to authorisation of persons was wrong and/or an unduly narrow reading of the legislation.

Discussion

29. In order for HMRC's decision in this case to be capable of appeal to the FTT, it would need to be a "relevant decision". That is the effect of section 16 FA 1994. The FTT was correct to identify that the only category of "relevant decision" which might conceivably cover the HMRC decision was paragraph 3(2) of Schedule 5 FA 1994.

None of the other ALDA decisions listed in Schedule 5 would encompass the HMRC decision. The FTT correctly recognised that although paragraph 3(1)(o) of Schedule 5 (set out at [26] above) refers to denatured alcohol, it does so solely in respect of a decision by HMRC regarding an authorisation or licence under section 75 ALDA. Since section 75 relates only to manufacturing, it was not in point in this case: see paragraphs 57 and 58 of the Decision.

30. In considering whether or not HMRC's decision falls within the wording of paragraph 3(2), it is first helpful to understand the structure and purpose of the 2005 Regulations. The Regulations distinguish between *producers* of TSDA and *users* of TSDA, and regulate each in a different way. A "producer" is a defined term: see Regulation 2 set out at [25] above. The distinction in treatment has a logic, because the risk of misuse and associated loss of excise duty is much higher in relation to a producer of TSDA than a user. A producer is authorised to use high strength raw ethanol, which would normally carry a high rate of duty. The Regulations therefore tightly control the processes used by the producer: see, for instance, Regulation 8(1), set out at [25] above, which requires specific HMRC approval of the process to be used at each set of premises. A user, by contrast, will be dealing with ethanol which has already been denatured, through an approved process, so the risk of misuse and associated loss of duty is lower. Accordingly, in respect of users the Regulations adopt a lighter touch and control only use and change of use.

31. The FTT confused, or elided, the regulatory regimes and the HMRC decisions which arise under them for producers and users. While it might be said that toll manufacturing is a "process" in a broad, commercial sense, in the Regulations "process" is used to describe the process used by a manufacturer of TSDA.

32. In this case, the HMRC decision was a refusal to vary the use covered by Grosvenor's 2010 authorisation. The FTT considered that this decision fell within either or both of Regulation 13(4) and 13(6) of the 2005 Regulations. We agree. It could properly be described as a refusal by HMRC to "authorise [Grosvenor/Woodstream] to receive" TSDA, within subparagraph (4), or a refusal by HMRC to "vary…any authorisation granted or any condition or restriction imposed" under Regulation 13, within subparagraph (6).

33. We consider that such a decision is not, however, a "relevant decision" within the meaning of paragraph 3(2) of Schedule 5. That subparagraph relates, and only relates, to "a decision as to whether or not any premises, plant or process is to be, or continue to be, approved for any purpose or as to the conditions subject to which any premises, plant or process is so approved". The HMRC decision in this case related to *authorisation* (not "approval") of a *person* (not of premises, plant or process). The approval of premises, plant or process is part and parcel of the way in which the Regulations deal with the risks arising in relation to a producer, not a user such as Grosvenor or Woodstream. The terminology used by the draftsman in both the 2005 Regulations and paragraph 3(2) is consistent with this distinction.

34. The FTT cited, as a further reason why its construction of paragraph 3(2) of FA 1994 was arguable, a concern that Schedule 5 of FA 1994 may not have been properly

updated, following the coming into force of the 2005 Regulations, in particular because it continued to refer to "plant" and "methylated spirits". The FTT's concern was, however, based on a mistaken perception of the legislation, in two ways, and thus provides no support for its construction of paragraph 3(2). First, the word "plant" remains relevant because paragraph 3(2) of Schedule 5 to the FA also applies to regulations relating to the manufacture of spirits made under section 13 of ALDA, including regulation 4(1) of the Spirits Regulations 1991, which refers to "plant". Second, the words "methylated spirits" do not in fact appear in the current legislation, having been removed by paragraph 3 to Schedule 29 of the Finance Act 1995, as from 1 May 1995.

35. The absence of any right of appeal to the FTT in this case may seem surprising, but in our view the legislation is clear. We also make three observations. First, there are numerous other examples of decisions made under provisions of the tax legislation which have been held to be not capable of appeal to the FTT, and in respect of which appeals have been properly struck out for lack of jurisdiction. Secondly, Ms Vicary accepted, rightly in our view, that in principle a decision such as that in this case could be the subject of an application for judicial review. Finally, as we have observed, there is a logic, in terms of risk management, in distinguishing between decisions relating to users and those relating to producers.

36. We conclude that the HMRC decision in this case was not capable of appeal to the FTT, and that the appeal should have been struck out for this reason.

Did Woodstream have standing?

37. Since we have concluded that the HMRC decision was not a "relevant decision", it is strictly unnecessary for us to determine the issue of standing. However, since HMRC was granted permission to appeal on the point, and the issue is of wider interest, we have done so.

38. Standing is determined in this case under section 16(2A), which states as follows:

> "(2A) An appeal under this section with respect to a relevant decision…shall not be entertained unless the appellant is—
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by the relevant decision,
>
> (b) a person in relation to whom, or on whose application, the relevant decision has been made, or
>
> (c) a person on whom the conditions, limitations, restrictions, prohibitions or other requirements to which the relevant decision relates are or are to be imposed or applied."

39. The FTT did not say so explicitly, but it appears to have concluded that neither paragraph (a) nor paragraph (c) of subsection (2A) applied to Woodstream. We agree.

40. The FTT then suggested various lines of argument in relation to paragraph (b), concluding on the basis of those arguments that it was arguable that Woodstream fell within that paragraph. The primary reason for this conclusion was that while Grosvenor was the person "on whose application" the relevant decision had been made, Woodstream was (arguably) "a person in relation to whom" that decision had been made. The FTT took into account "the very close connection between the applications by Grosvenor and the interests of Woodstream" (see paragraph 90 of the Decision).

41. We consider that the FTT erred in law in its analysis. The wording of paragraph (b) does not refer to a person who may have an interest in a relevant decision, or in relation to whom a decision has an effect, or who is closely connected with someone who does have standing. It certainly does not extend standing, as the FTT stated at paragraph 93 of its Decision, to "a person related to the applicant". It refers to a person in relation to whom a relevant decision "has been made". In this case, Woodstream was not authorised, it did not come to hold an authorisation, and it was not a user within the legislation. HMRC were scrupulous in insisting that the request to vary Grosvenor's authorisation was sent by Grosvenor. Both the initial decision by HMRC to refuse the variation on 31 October 2016 and the decision on 18 January 2017 to uphold that refusal were decisions made and only made in relation to Grosvenor.

42. As the FTT noted (at paragraph 94 of its Decision), the question of standing could have been resolved in practice by Grosvenor applying to be substituted as the appellant under Rule 9 of the FTT Rules, or to be joined to the proceedings.

43. We conclude that Woodstream did not have standing to make the appeal, and that it should have been struck out accordingly for that reason.

Disposition

44. For the reasons given, we set aside the Decision, and remake it, striking out the appeal for lack of jurisdiction.

MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

RELEASE DATE: 29 November 2018