[2018] UKUT 45 (TCC)

Appeal number: UT/2017/0092
UT/2017/0093

PROCEDURE – refusal of application by HMRC to strike out appeals against assessments to excise duty and penalty – whether FTT erred in law in refusing application to strike out appeal against duty assessment - appeal allowed - Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10(1)(b) – whether FTT erred in law in awarding costs against HMRC for acting unreasonably in bringing proceedings – appeal allowed in part – use of striking out in relation to penalty appeals

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

LIAM HILL

Respondent

TRIBUNAL: JUDGE GREG SINFIELD
JUDGE THOMAS SCOTT

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 11 January 2018

James Puzey, counsel, 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. HMRC appeal against two decisions of the First-tier Tribunal ('FTT'). In the first decision, released on 3 January 2017, with neutral citation [2017] UKFTT 18 (TC), ('the Strike Out Decision'), the FTT refused an application by HMRC, under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules'), to strike out two appeals by Mr Liam Hill. The first appeal ('the Duty Appeal') was against an assessment for excise duty on tobacco that Mr Hill had bought in Belgium and was seized as liable to forfeiture when he returned to the United Kingdom. The second appeal ('the Penalty Appeal') was against the related assessment for a penalty for handling goods on which excise duty was due. HMRC do not challenge the FTT's decision not to strike out the Penalty Appeal but appeal against the Strike Out Decision only in relation to the Duty Appeal. In the second decision, released on 6 April 2017, with neutral citation [2017] UKFTT 277 (TC) ('the Costs Decision'), the FTT ordered HMRC to pay Mr Hill's costs of contesting HMRC's strike out application.

2. For the reasons set out below, we have decided that the FTT erred in law in its approach to the application to strike out the appeal against the assessment for duty. Accordingly, we set aside the Strike Out Decision in so far as it relates to the Duty Appeal and remake it. We conclude that the FTT has no jurisdiction to consider the Duty Appeal. We have concluded that the Costs Decision should be varied, and set aside as regards the Duty Appeal but upheld as regards the Penalty Appeal.

Factual background

3. There is no challenge to the FTT's statement of the undisputed facts that led to the appeal at [10] to [35] of the Strike Out Decision. The relevant facts derived from the FTT's findings and the documents before it may be summarised as follows.

4. On 24 March 2015, having arrived in Hull on a ferry from Belgium, Mr Hill was stopped by a Border Force officer (Mr M Robinson). Mr Hill was found to be carrying nine kilos of hand rolling tobacco ('HRT'). Mr Robinson interviewed Mr Hill. At the beginning of the interview, Mr Robinson read the 'Commerciality Statement' to Mr Hill which is as follows:

> "You have excise goods in your possession (control), and it appears that UK excise duty has not been paid on them. Goods may be held without payment of duty providing they have been acquired by you and are held for your own use.
>
> I intend to ask you some questions to establish whether these goods are held for your own use or for a commercial purpose. If you cannot provide me with a satisfactory explanation or if you do not stay for questioning it may lead me to conclude that the goods are held for a commercial purpose and your goods … may be seized as liable to forfeiture."

5. In reply to questions, Mr Hill said that the HRT had been bought by him for himself and his girlfriend and as gifts for relatives, including his mother, and a friend.

Mr Hill denied that he was being paid for the HRT. Mr Hill signed Mr Robinson's notes of the interview as an accurate record. At the end of the interview, after leaving the room and returning, Mr Robinson seized the HRT under section 139 of the Customs and Excise Management Act 1979 ('CEMA 1979'). Mr Robinson's notebook stated his reasons for seizing the HRT as follows:

> "Goods seized as not credible to spend €432 on self and €858 on others then to give the tobacco valued at €858 as gifts. Also when challenged, out of the six people claimed to be receiving gifts, passenger unable to provide a phone number for any of them claiming they'd all be at work."

6. Copies of the signed Forms BOR156 and BOR162 were given to Mr Hill, and Notices 1 and 12A were issued to him.

7. Mr Hill did not at any stage challenge the seizure. As a result, the HRT was deemed to have been duly condemned as forfeited under paragraph 5 of Schedule 3 to CEMA 1979.

8. HMRC subsequently assessed Mr Hill under section 12A(2) of the Finance Act 1994 ('FA 1994') for excise duty of £1,671 in relation to the HRT. HMRC also imposed a penalty of £936, later reduced to £350, on Mr Hill under paragraph 4 of Schedule 41 to the Finance Act 2008 ('FA 2008') for being concerned in carrying or otherwise dealing with the tobacco after the excise duty point without the duty having been paid or deferred.

The Appeal

9. HMRC upheld the duty assessment and reduced the penalty to £350 on review. On 8 June 2016, Mr Hill appealed to the FTT against the assessments for duty and the penalty. The Notice of Appeal stated that the grounds for appeal were as follows:

> "… The goods that were seized were for personal consumption and not for commercial reason. On the day the goods were seized there was no proof from the officer that the tobacco was for commercial reason, as I answered all his questions in full, and when asked if he could call my mother, I stated that if he was to make the call she may not be able to answer her mobile as she is not able to take calls during work hours. The officer then made the decision not to make the call and proceeded to believe it was for commercial reason."

10. In the section of the Notice of Appeal in which the appellant is asked to state what the disputed decision should have been, Mr Hill stated:

> "The decision on the day of the seizure should have been that I was able to continue through customs with my tobacco just like my friend … The tobacco was for personal use…"

11. On 30 August 2016, HMRC applied to strike out that appeal under rule 8(2)(a) of the FTT Rules, which provides that the FTT must strike out the proceedings or part of

them if the FTT has no jurisdiction in relation to those proceedings or part of them. The basis for the application to strike out the Duty Appeal was that the FTT had no jurisdiction to hear it because the only ground relied on was that the goods were held for personal use, and that issue had been conclusively determined against Mr Hill by operation of the deeming provision in paragraph 5 of Schedule 3 to CEMA 1979. The basis for the application to strike out the Penalty Appeal was that, following on from the decision sought by HMRC on the Duty Appeal, the Penalty Appeal had no reasonable prospect of success (rule 8(3)(c) of the FTT Rules).

12. In the Strike Out Decision the FTT (Judge Thomas) dismissed the applications to strike out. The FTT declined to strike out the appeal against the duty assessment on the basis that Mr Hill was unrepresented and there were potential grounds of appeal, not advanced by Mr Hill, which the FTT had identified, that were not fanciful or unrealistic. Therefore, it could not be said either that the FTT had no jurisdiction to hear the appeal (rule 8(2)(a) of the FTT Rules) nor that it stood no realistic prospect of success (rule 8(3)(c) of the FTT Rules).

13. Judge Thomas stated as follows, at [76]:

> "76. I consider however that there are arguments that could be deployed at a hearing of the appeal which would not need to rely on the status of the goods as not having been held for commercial purposes. I label them:
>
> (1) The "forfeit for other reasons" argument
>
> (2) The different consumption argument
>
> (3) The invalid assessment argument
>
> (4) The RSP argument.
>
> 77. I stress here, because I was not entirely sure that Miss Young [the HMRC Presenting Officer] grasped fully why I was seeking to put some of these arguments (and some of those in relation to the penalty) to her, that I am not saying, and was not saying to her, that they are correct and are what I would find if I were to hear the appeal. I consider that they are arguments that Mr Hill could, perhaps with the assistance of the Tribunal if he was not represented professionally, put forward as not being fanciful or unrealistic."

14. The FTT also refused to strike out the Penalty Appeal. HMRC do not seek to appeal against the FTT's decision not to strike out the Penalty Appeal.

15. In the Strike Out Decision, Judge Thomas indicated that he was minded to order HMRC to pay Mr Hill's costs of attending the hearing under rule 10(1)(b) of the FTT Rules on the basis that HMRC had acted unreasonably in bringing the proceedings, ie the applications to strike out the appeals. The FTT directed the Commissioners to make any representations on why they should not pay Mr Hill's costs within 30 days. HMRC duly made representations and the FTT made an order under rule 10(1)(b) that HMRC should pay Mr Hill's costs and in particular:

> "(1) Costs incurred by the appellant and Mr Ross Durham [who assisted Mr Hill to present his appeal] in travelling to and from the hearing.
>
> (2) Costs (if any) incurred by the appellant in preparing for the hearing.
>
> (3) If [Mr Hill] was an employee and used part of his annual leave to attend the hearing or was not paid by his employer for the time during which he travelled to and from and attended the hearing, an amount equal to [Mr Hill's] pay for half a day."

16. The FTT gave its detailed reasons for making the costs order in the Costs Decision released on 6 April 2017. Mr Hill subsequently indicated to HMRC that he did not wish to enforce the order for costs made by the FTT.

17. HMRC applied to the FTT for permission to appeal the Strike Out Decision in so far as it related to Mr Hill's appeal against the duty assessment. HMRC have not sought to appeal against the dismissal of their application to strike out Mr Hill's appeal against the penalty. HMRC also applied for permission to appeal the Costs Decision. The FTT refused permission to appeal in both cases but permission was subsequently granted by the Upper Tribunal. It was a term of the grant of permission by the Upper Tribunal that, in the circumstances, HMRC would not seek an order that Mr Hill should pay their costs if HMRC were successful in their appeals. Mr Hill declined to take part in our hearing of HMRC's appeals.

Legislation

18. Excise duty is charged on HRT by section 2 of the Tobacco Products Duty Act 1979. Regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

19. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations') provide the duty point and identify liability for the duty in Regulation 13, which provides (so far as material):

> "(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 –
>
> …

(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.

…

(5) For the purposes of the exception in paragraph (3)(b) -

…

(b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

20. Regulation 20 of the 2010 Regulations provides for the time of payment of the duty and states:

"(1) Subject to -

(a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;

…

duty must be paid at or before an excise duty point."

21. Regulation 88 of the 2010 Regulations provides that, where there is a contravention of the regulations in relation to excise goods in respect of which duty has not been paid, those goods are liable to forfeiture.

22. Section 49 of CEMA 1979 provides, so far as relevant that:

"(1) Where…

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment…

those goods shall… be liable to forfeiture."

23. Under section 139(1) of CEMA 1979 any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an appropriate officer.

24. Schedule 5 to CEMA 1979 provides, so far as relevant:

"(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.

…

(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… the thing in question shall be deemed to have been duly condemned as forfeited."

Case law

25. Before we discuss the FTT's reasoning and conclusions, it is useful to describe two decisions that are relevant to the issue in this appeal.

26. The first is the decision of the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 ('*Jones*'). Mr and Mrs Jones were stopped at Hull Ferry Port with a large quantity of tobacco, wine and beer that was seized, together with their car, on the basis that it was for held for a commercial purpose. The seizing officer reached that view following an interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially, they challenged the legality of the seizure by serving a notice of claim pursuant to Paragraph 1 of Schedule 3 to CEMA 1979. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who at that time were represented by solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the FTT. The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal upheld this decision on an appeal by HMRC. HMRC appealed again to the Court of Appeal on the ground that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use. The Court of Appeal agreed. Mummery LJ's summary of his conclusions at [71] included the following:

> "(4) The stipulated statutory effect of [Mr and Mrs Jones's] withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that [Mr and Mrs Jones] were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as [Mr and Mrs Jones] argued in the tribunal, being imported

> legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to [Mr and Mrs Jones]. In brief, the deemed effect of [Mr and Mrs Jones's] failure to contest condemnation of the goods by the court was that the goods were being illegally imported by [Mr and Mrs Jones] for commercial use."

27. The *Jones* case was only concerned with an appeal against a refusal to restore seized goods. The question whether a decision not to challenge the seizure of excise goods also prevents the Tribunal from finding that the goods were for personal use in an appeal against an assessment for excise duty was considered by the Upper Tribunal in *HMRC v Nicholas Race* [2014] UKUT 0331 ('*Race*'). In that case, HMRC found just under 11,000 cigarettes, 800 grams of HRT and 24.75 litres of red wine at Mr Race's home. As they were not satisfied that the excise goods were not held for a commercial purpose, HMRC seized the goods and assessed Mr Race for excise duty of £2,317. HMRC later assessed Mr Race for a penalty of £892. Mr Race appealed against both the excise duty assessment and the penalty. His sole ground of appeal was that the goods were purchased for personal consumption and as Christmas gifts for his family. HMRC applied to strike out the appeal against the excise duty assessment (but not the penalty appeal) on the basis that the tribunal did not have jurisdiction and, or alternatively, that there was no reasonable prospect of the appeal succeeding. The FTT refused HMRC's application to strike out the excise duty appeal, holding, among other things, that it was arguable that the *Jones* case did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty. HMRC appealed to the Upper Tribunal.

28. In *Race*, Warren J reviewed the decision of the Court of Appeal in the *Jones* case and observed at [26] of the decision in that case:

> "*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

29. In relation to the First-tier Tribunal's conclusion that the *Jones* case did not prevent the tribunal from considering whether the goods were for personal use, Warren J held at [33] that:

> "I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* ... The fact that the appeal is against an assessment to

> excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

The FTT's approach to the strike out application

30. The FTT discussed at length its approach to the strike out application at [42] to [67] of the Strike Out Decision. It considered the decisions in *Jones* and *Race*, and focused in that context on the question of whether the application to strike out an excise duty assessment is more appropriately made under rule 8(3)(c) of the FTT Rules or rule 8(2)(a). At [63], the FTT stated, without ruling on the point, that:

> "As a result I am not convinced that applications to strike out an appeal against an assessment to excise duty are appropriately to be made under Rule 8(2)(a) rather than Rule 8(3)(c). The relevance is of course that the if Rule 8(2)(a) applies, then strike out is mandatory: if Rule 8(3)(c) applies strike out is discretionary."

31. The FTT observed, at [64], that:

> "It might well be said by HMRC in riposte to this point (and it was said in this case) that the appellant's only expressed ground of appeal is "personal use", so therefore this is a lack of jurisdiction case. But the appellant here is a litigant in person."

32. So, the FTT first raised doubt as to whether the issue for consideration by the Tribunal was jurisdiction, and the question of a mandatory strike out on the authority of *Jones* and *Race*. It then concluded that because Mr Hill was unrepresented, the FTT was not confined in considering the strike out application to the stated grounds of appeal. Judge Thomas then proceeded to identify the four arguments referred to at [13] above, and stated that he considered those arguments as "not being fanciful or unrealistic": [77] of the Strike Out Decision.

33. Before we consider on the facts the four arguments identified by the FTT, and whether they justified a refusal to strike out the Duty Appeal, we first consider whether the reasoning which led the FTT to formulate those arguments was a proper approach.

34. We agree that the FTT must take care when an appellant is unrepresented to ensure that the overriding objective in rule 2 of the FTT Rules is met. We fully endorse, as did Mr Puzey who appeared on behalf of HMRC, the comments of the FTT (Judge Staker) in *Jamie Garland v HMRC* [2016] UKFTT 573 (TC) at [14] to [17]:

> "14. As regards HMRC's reliance on rule 8(3)(c), the Tribunal accepts that if the notice of appeal sets out no grounds of appeal with any reasonable prospect of succeeding, the Appellant risks a successful strike out application being made by HMRC. However, in cases involving unrepresented appellants, it can occur that the notice of appeal fails to disclose any arguable grounds of appeal, even though there is potential merit in the appeal.

15. In *Aleena Electronics Limited v Revenue and Customs* [2011] UKFTT 608 (TC), it was said at [60]:

'It is the ethos of the Tribunal system and certainly that of the Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not. Where the Appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask.'

16. Default paper cases and simple basic cases in particular may involve an unrepresented appellant who wishes to exercise the right of appeal to the Tribunal against a decision that the appellant considers to be harsh and unfair, even though the appellant has no knowledge of the law and is incapable of articulating a legally arguable ground of appeal. It is possible for the Tribunal in such a case to hear the appellant's account of the facts and to consider this together with all of the evidence presented by the parties, and for the Tribunal to satisfy itself as to the facts, and to determine for itself whether the HMRC decision is in accordance with the facts and the law. In such a case, even if it should turn out that the appeal was hopeless, the unrepresented appellant at least has the satisfaction of knowing that his or her case has been considered by an independent judicial body. Furthermore, the appeal may not turn out to be hopeless, and it may ultimately be allowed in whole or in part. In the case of an unrepresented appellant, failure of a notice of appeal to state an arguable ground of appeal should therefore not in every case necessarily lead automatically to a strike out application being granted.

17. That is not to say that the Tribunal should allow every case to proceed, no matter how hopeless it appears, merely because the appellant is unrepresented. Apart from anything else, the Tribunal will always have to have regard to the overriding objective in rule 2 of the Tribunal's Rules. In a case of any complexity, hearing and determining a strike out application may involve less time and fewer resources than the hearing of the substantive appeal. In such a case, if no viable grounds of appeal are set out in the notice of appeal, it may therefore be proportionate and efficient initially to determine at a strike out hearing whether there is any justification for the appeal to proceed to a substantive hearing, and for a strike out application to be granted if no ground of appeal with a reasonable prospect of succeeding has been identified at

> the strike out hearing. On the other hand, in a default paper case or a simple basic case, the time and resources required for a strike out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike out application may not be granted, the most efficient way of disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court."

35. It is important to understand the balancing exercise indicated by Judge Staker's observations. In the case of a strike out application against an unrepresented appellant, a failure to state an arguable ground of appeal should not "in every case necessarily lead automatically" to the strike out being granted. On the other hand, not every case should proceed merely because the appellant is unrepresented; it may be proportionate and efficient having regard to the overriding objective to grant the strike out application "if no ground of appeal with a reasonable prospect of succeeding has been identified at the strike out hearing".

36. It is implicit in this approach that in most (though not all) cases a failure to identify an arguable ground of appeal, even where the appellant is unrepresented, should lead to the strike out being granted. In our judgment, to begin with the opposing assumption, that a strike out is inappropriate in most cases where the appellant is unrepresented, would be the wrong approach. The FTT appears in this case to have inclined towards that wrong approach.

37. It would also be wrong to elide the question of whether the FTT should take on a more inquisitorial role in rooting out potential grounds of appeal with the question of whether the application is most appropriately dealt with under rule 8(2)(a) or rule 8(3)(c) of the FTT Rules. Where, as in the Duty Appeal in this case, the application is made on the grounds that *Jones* and *Race* preclude the FTT's jurisdiction, that question must be considered and determined by the tribunal. The tribunal must not duck that issue by choosing to treat the application as made under rule 8(3)(c), thereby engaging the tribunal's discretion. The application of rule 8(3)(c) arises only if the FTT determines that there are grounds of appeal over which it does have jurisdiction. Although the FTT did not explicitly determine the rule 8(2)(a) question, it is implicit in the judgment that Judge Thomas did regard the Tribunal as having jurisdiction over the Duty Appeal. Whether or not that is correct in law is to be determined by considering the four arguments identified by Judge Thomas. If the conclusion that the Tribunal had jurisdiction was correct, it then becomes necessary to consider the exercise of the FTT's discretion in determining that those reasons justified a conclusion that a strike out under rule 8(3)(c) would be inappropriate.

Arguments identified by the FTT as available to Mr Hill

38. We now turn to consider the reasons given by the FTT for refusing to strike out the Duty Appeal. These reasons were the four arguments identified at [13] above that the FTT considered were available to Mr Hill, which were not precluded by the effect of

the deeming provision, as discussed in *Jones* and *Race*, and were not fanciful or unrealistic.

"Forfeit for other reasons" argument

39. The FTT considered there was a possible argument that the reason for the seizure of Mr Hill's tobacco was not that the tobacco itself was for commercial use, but that it had been mixed with other forfeitable goods, and that it was arguable on that basis that Mr Hill was not precluded from asserting that the goods were for his personal use and thus not dutiable. This potential argument was explained by Judge Thomas as "following from" certain comments of the FTT (Judge Hellier) in *John Patrick Lewis v HMRC & anor* [2015] UKFTT 640, at [32] to [36].

40. It is not necessary for the purposes of this appeal for us to determine whether the comments in *John Patrick Lewis* are good law. It is, however, necessary to understand the limited scope of those comments. First, it should be emphasised that that decision was a hearing of a strike out application and not a hearing on the substantive issue. Secondly, it must be borne in mind that pursuant to section 141(1)(b) of CEMA 1979 where any thing has become liable to forfeiture, then "any other thing mixed, packed or found with the thing so liable" is also liable to forfeiture. It is apparent from the directions appended to the decision in *John Patrick Lewis* that the potential argument raised by Judge Hellier related solely to the ambit of the deeming provision where there were facts to suggest that the goods seized might have been mixed with the goods of *another person*.

41. In this appeal, the FTT gave no indication that it appreciated and had taken into account these limitations in reaching its decision. That was an error. Further, the application of the statements in *John Patrick Lewis* to the facts of the appeal by the FTT appeared to confuse what Mr Hill said were his reasons for holding the HRT (which was determined against him by the deeming provision) with the reasons given by the Border Force for the seizure.

42. In any event, even the possibility of an argument based on the extension of the comments in *John Patrick Lewis* to goods owned entirely by the appellant was not justified by any of the facts in this appeal. We agree with Mr Puzey that the FTT's analysis of the potential factual conclusions on this issue was contrary to all of the material before it and the stated position of both of the parties. It was unrealistic and fanciful to conclude that there could be any reason other than commercial use for the seizure and forfeiture. Mr Hill understood that to be the reason for seizure. That was evident from the following documents:

(1) Mr Hill's grounds of appeal to the FTT;

(2) Various letters between Mr Hill and HMRC, and

(3) The seizing officer's notes of interview. These notes were signed by Mr Hill at the conclusion of the questions. The seizing officer read out the statement to Mr Hill at the start of the interview which explains that questions will be asked to determine whether goods are held for a commercial purpose or not; this is '*the commerciality statement*'. The questions asked subsequently were plainly directed to that issue. The conclusions set out in the Officer's notebook can only sensibly be read as providing the evidential reasoning for a conclusion that none of the seized goods were held for personal use.

43. We find for these reasons that refusal of the application to strike out the Duty Appeal on the basis of this argument was an error in law.

The Different Consumption Argument

44. The second argument identified by the FTT was based on its analysis of the decision of the Court of Justice of the European Union (the 'CJEU') in Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ECR 2010 I-03799 ('*DTL*'). *DTL* concerned three consignments of cigarettes smuggled into Denmark. Two of the consignments came directly from a non-EU country to Denmark by sea. The other consignment was transported by road from a non-EU country to Denmark via Germany. In all cases, the cigarettes were seized on their entry into Denmark and subsequently destroyed by the Danish authorities. The Danish authorities could not collect the tax due from the transporters in question and so demanded payment of customs duty, excise duty and VAT from DTL which was the guarantor in relation to the transport operations. DTL contested the demand for duties and VAT and the Danish court referred some questions to the CJEU. In relation to whether DTL was liable to pay excise duty, the CJEU considered whether a chargeable event had occurred under Article 5(1) of Council Directive 92/12/EEC on excise duty, as amended by Council Directive 96/99/EC, which was the relevant directive at that time. Under Article 5(1), the relevant chargeable event is the entry of the excise goods into the territory of the EU. The CJEU distinguished between the cigarettes that were transported by sea and thus entered the EU in Denmark and the cigarettes that arrived in Denmark by road via Germany where they had entered the EU. The CJEU noted in paragraph 73 of its judgment that the cigarettes that arrived in Denmark by sea were seized before going beyond the first customs office situated inside the territory of the EU and subsequently destroyed. That meant that the cigarettes never entered into the territory of the EU for the purposes of Article 5(1) and thus no chargeable event occurred. Consequently, those cigarettes were not subject to excise duty. By contrast, the CJEU held (in paragraph 74) that the cigarettes that came through Germany had entered into the territory of the EU because they had passed beyond the customs office there with the result that the chargeable event for excise duty had occurred in relation to those goods.

45. The FTT set out its analysis of *DTL* at [86] to [94] of the Strike Out Decision. The FTT's conclusion and how it might be applied to Mr Hill's case are at [94] and [95]:

> "94. On an intra-EU movement of goods on which excise duty has been paid in the MS of departure and where the goods are held in the arrival MS for a commercial purpose but are not declared or on which duty is not paid, the goods may be seized and confiscated. There is of course no customs duty or VAT on such a movement or introduction. Seizure and confiscation under CEMA results in the goods being removed from the economic network of the arriving MS and so not being in competition with domestic products on which duty is paid in the arrival MS.
>
> 95. In my view in these circumstances it is not a fanciful argument to say that the [excise duty directive] must be

> interpreted as extinguishing the arriving MS excise duty debt (or not imposing it in the first place)."

46. Mr Puzey submitted that the FTT was wrong to conclude that the CJEU's decision in *DTL* provided an argument under EU law that excise duty is not due when goods, which were already in the EU, are transported from one member state to another where they are seized at the point of entry as being held for a commercial purpose without excise duty being paid or deferred. He contended that *DTL* had nothing to do with the intra-EU movement of excise goods. We agree. The FTT's view is based on an inference that the CJEU's reasoning in *DTL* in relation to the excise goods imported from non-EU countries into a member state can be applied to movements of excise goods between member states. We do not see how the reasoning of the CJEU in *DTL* can apply to Mr Hill's situation. In any event, the CJEU considered the excise duty treatment of goods that move between member states and its reasoning in relation to that movement shows that the FTT's view is untenable. It is clear from paragraph 74 of *DTL* that where excise goods that are already in the EU move from one member state to another then they are subject to excise duty. Which member state is entitled to collect the excise duty and who is liable to pay it are determined by the excise duty directive and the relevant national legislation which implements it. In *DTL*, the CJEU concluded that the excise duty due on the cigarettes that were transported via Germany should be collected by the German authorities because that was where the cigarettes first entered into the territory of the EU. There is no dispute that the HRT bought by Mr Hill in Belgium was duty paid in the EU or about the effect of the UK legislation in this case. Applying the CJEU's reasoning in paragraph 74 of *DTL* and the UK legislation, the HRT is chargeable to excise duty. If the FTT's view were correct then the CJEU would have reached a different conclusion in relation to the cigarettes imported via Germany.

47. For these reasons we find that the FTT made an error of law in refusing the application to strike out the Duty Appeal on the basis of this argument, which stood no realistic prospect of success.

The Invalid Assessment Argument

48. The FTT concluded that it was arguable that if the Commissioners could not put forward evidence that they had informed Mr Hill of his right to ask for a review of the duty assessment then that assessment would be invalid. In reaching that conclusion the FTT relied on the FTT decision in *NT ADA Ltd v HMRC* [2016] UKFTT 642 (TC) which held that a failure to inform a taxpayer of the right under section 83A of the Value Added Tax Act 1994 ('VATA') to request a review of a VAT assessment or penalty or any other decision under section 83 would invalidate the decision. Without identifying any provision of excise duty law to the same effect as section 83A of VATA, Judge Thomas held that the same could apply in the present case because he had not seen anything to inform Mr Hill of his right to appeal the excise duty assessment or ask for a review of it: [97] of the Strike Out Decision.

49. Again, it is not necessary for us to determine whether the comments of Judge Brooks in *NT ADA* are correct in law, and indeed it would be inappropriate to do so since the decision is the subject of an appeal. However, the decision by Judge Thomas to refuse the strike out application on the basis of this possible argument was flawed in two fundamental respects amounting to an error in law.

50. First, the FTT gave no consideration to whether the same argument applied in respect of an excise duty assessment given the applicable statutory framework. Subsequent to the Strike Out Decision, the Upper Tribunal has in fact concluded that in relation to excise duty there is no obligation to refer to "a statutory right of review", as indicated in *NT ADA*, and that there is nothing in section 15A FA 1994 to impose such a requirement: *Denley v HMRC* [2017] UKUT 340 (TCC) at [57] to [60]. While clearly the FTT could not have been aware of *Denley*, the omission to identify or consider this issue was an error in law.

51. Secondly, all the evidence available to the FTT suggested not only that Mr Hill had been offered a review, but that he had in fact taken up that offer. The *Excise Duty Assessment – preliminary notice*, dated 23 December 2015, and sent to Mr Hill, referred to the ability to ask for a review once a decision was reached. This document was clearly received by Mr Hill because it was annexed to his notice of appeal. The factsheets enclosed with the excise duty assessment dated 8 February 2016 explained clearly the right to a review or appeal. One of those factsheets was annexed to the notice of appeal. Finally, Mr Hill wrote to HMRC referring to the factsheet and requesting a statutory review.

The RSP argument

52. The fourth argument identified by the FTT was that since tobacco duty was a mixture of a fixed amount and ad valorem amount, the duty might have been wrongly calculated. That argument was based on an error of law, as the duty for HRT (the subject of the appeal) is set at a flat rate. In his refusal to permit HMRC to appeal against the strike out decision, Judge Thomas accepted that he was wrong to have identified this as a possible argument for Mr Hill.

Conclusion on refusal of strike out application

53. We conclude that the FTT erred in law in refusing to strike out the Duty Appeal. The application should have been granted pursuant to rule 8(2)(a) of the FTT Rules, because the FTT had no jurisdiction to consider the issue, and any arguments to the contrary stood no realistic prospect of success.

54. In relation to the appropriate approach by the FTT in considering a strike out application in respect of a duty assessment against an unrepresented appellant, some observations may be helpful, with the caveat that each case turns on its facts. It is not always the best way to further the overriding objective, or to assist an appellant, to devise ingenious arguments simply in order to keep an appeal alive. We agree with the comment of Walker J in *Chambers v Rooney* [2017] EWHC 285(QB), at [17], cited by Judge Thomas in his Costs Decision, that striking out can be of particular value to litigants in person. As Walker J expressed it, at [18] of his judgment:

> "18. There is a real danger that litigants in person may press on with parts of a claim which seem to them to demonstrate how badly the other side has behaved but for which there is no legal basis. Similarly, there may be parts of the claim for which, despite the strong suspicions or firm belief of the litigant in person, there is plainly no factual basis."

55. While it is appropriate for the FTT to adopt a more inquisitorial role in relation to a striking out application against an unrepresented appellant, care must be taken in identifying and objectively evaluating grounds of appeal not raised by the appellant. Any such grounds should be based on or derived from facts discernible from the evidence before the tribunal, including at the hearing, and should be arguments which, as a matter of law, the tribunal considers to have a reasonable prospect of success. There is no standard "checklist" of arguments which the tribunal should be raising and considering in that exercise.

The Costs Decision

56. The FTT in its Costs Decision awarded costs to Mr Hill against HMRC under rule 10(1)(b) of the FTT Rules. This provides that the FTT may make an order in respect of costs "if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings." Rule 10(2) provides that the FTT may make such an order on an application or of its own initiative.

Reasons given by the FTT

57. The FTT's decision was based on HMRC having acted unreasonably in *bringing* the proceedings. The decision was supported by the following propositions (all paragraph references being to the Costs Decision):

> (1) It is incumbent on HMRC to prepare their strike out application with care, and with attention to the facts of the particular case. Failure to do so would be one indication of unreasonable conduct: [18].
>
> (2) Where HMRC rely on a single decision (*Race*) they must ensure that there is "an overwhelming case" that the effect of that decision is that the appeal will "inevitably" fail: [19].
>
> (3) HMRC had in their application failed to take account of and comment on a number of FTT decisions identified by Judge Thomas and unhelpful to HMRC's application: [20] and [21].
>
> (4) It was "plain" that Mr Hill would have a "non-fanciful" argument that *John Patrick Lewis* applied. The failure by HMRC to recognise that *alone* amounted to unreasonable behaviour within rule 10(1)(b): [23] to [28].
>
> (5) A "minor factor" in the FTT's decision was that HMRC's notice of application was, in Judge Thomas's words, "disgracefully slipshod", "incompetently prepared" and "appallingly badly drafted": [31]. Producing a document of that calibre amounted to a failure to co-operate with the tribunal: [32].
>
> (6) HMRC's conduct in bringing the proceedings was unreasonable because it may well have forced Mr Hill to incur costs that he would not otherwise have had to incur had the appeal been allowed to proceed to a full hearing: [34]. An award of costs by the tribunal would recognise the disproportionate effect as to costs which HMRC's actions had had on Mr Hill: [36].

58. The FTT also considered that, for a number of reasons, HMRC had acted unreasonably in bringing proceedings to strike out the Penalty Appeal. Although HMRC did not appeal against the Penalty Decision, their conduct in relation to the

penalty appeal remains relevant in considering the Costs Decision. We deal with this issue below.

A value judgment

59. The Upper Tribunal confirmed in *Marshall & Co v HMRC* [2016] UKUT 116 (TCC) that the issue before the FTT in relation to the costs order was effectively a value judgment. In considering an appeal against such a decision, as stated in *Catanã v Revenue and Customs Commissioners* [2012] UKUT 172 (TTC) at [16]:

> "16. The principal difficulty facing Mr Catanã in this appeal is the fact that…the making of a costs direction is a matter for judicial discretion. If I am to allow this appeal I have to be satisfied, not that I would, or even might, have made a different direction myself, but that Judge Kempster exercised his discretion in an unreasonable manner—that is, he failed to apply the correct law, took into account the irrelevant, ignored the relevant or reached a conclusion which no judge, properly exercising his discretion, could reasonably have reached. That is, plainly, a difficult task."

Excise Duty Appeal

60. We have considered carefully and at length whether to interfere with the FTT's value judgment in this case. As regards HMRC's application to strike out the Excise Duty Appeal, we have concluded that the FTT did err in law in awarding costs in respect of that application, because it exercised its discretion in an unreasonable manner.

61. In relation to the substantive points made by the FTT in justifying the costs order, we do not consider that poor drafting is a matter which would, of itself, normally justify a costs order under rule 10(1)(b). It might conceivably be relevant in relation to "conducting" proceedings, but that head of rule 10(1)(b) was not identified or considered in the FTT. In any event, we suggest that would only amount to unreasonable conduct where it went beyond poor or slipshod drafting and had a material adverse impact on the other party, for example in relation to the party's ability to present its case or respond to the other party's points. In this case, no such elements were identified and do not appear to have been present and, in our view, it was not a reasonable exercise of judicial discretion to punish the poor drafting by a costs order.

62. The FTT's primary reason for the costs order appears to have been that HMRC acted unreasonably in failing to recognise the argument based on *John Patrick Lewis*. For the reasons we have given above in considering that argument in relation to the Strike Out Decision, that was an error of law. Far from being "plain" that there was a tenable argument, the argument had no prospect of success on the facts, and it was in no sense unreasonable for HMRC implicitly to take that position in its application.

63. The FTT concluded that HMRC acted unreasonably in not ensuring that there was "an overwhelming case" that *Race* "inevitably" caused the appeal to fail. There is no justification for setting this as the threshold to avoid unreasonable behaviour for cost purposes in applying to strike out, for either party, and to do so was an error of law.

64. The argument that HMRC acted unreasonably in applying for a strike out rather than allowing the appeal to go to a full hearing is relevant in principle to the issue of unreasonable behaviour. However, in this case that question is inextricably linked to the merits of and reasoning behind the Strike Out Decision, and since we have determined that that decision was wrong in law and cannot stand, the argument is not a justification in this case for a costs order under rule 10(1)(b). Far from being unnecessary, as the FTT determined, the costs of the strike out hearing for Mr Hill were, as regards the Duty Appeal, fully justified; the strike out should have been allowed.

Penalty appeal

65. HMRC did not appeal the Strike Out Decision as regards the Penalty Appeal, and in our opinion, they were right not to do so. However, HMRC's conduct in seeking to strike out the penalty in the first place remains relevant to whether they acted unreasonably for the purposes of rule 10(1)(b). The Costs Decision sets out the FTT's reasons for concluding that HMRC did act unreasonably, not only as regards the Duty Appeal but also specifically as regards the Penalty Appeal, and we now turn to that aspect of the Costs Order.

66. In relation to an appeal against excise duty where the only identified ground of appeal is determined by the deeming provisions and *Race*, an application to strike out, sought under rule 8(2)(a), is likely to be a justifiable course of action. However, in relation to any related penalty, the position is very different. Even leaving aside the issue of whether the deeming provisions apply to penalties, it is difficult to envisage circumstances in which a strike out of a penalty appeal would be justified. That is because it is unlikely to be possible in practice properly to establish at a striking out hearing—which should not involve a 'mini-trial' of the facts—whether the appellant has a reasonable excuse or special circumstances exist. Striking out an appeal against the penalty in such a situation would be premature.

67. Where HMRC have applied to strike out a penalty claim and the relevant statutory provisions contain defences for reasonable excuse and/or special circumstances, and the application is refused by the FTT, it would not be inappropriate for the FTT to consider a costs order under rule 10(1)(b) as regards that application. That is what the FTT did in this case, as an element of its Costs Decision.

68. As set out above in relation to the costs order as regards the Duty Appeal, our task is not to determine whether we would have awarded costs in this case. As *Catanã* explains, it is to determine whether the FTT's value judgment in deciding to do so was an unreasonable exercise of judicial discretion. Taking into account our observations regarding the striking out of penalty appeals such as Mr Hill's, we have concluded that as regards HMRC's application to strike out the Penalty Appeal Judge Thomas's reasoning and decision to award costs were not unreasonable and so should stand.

69. In relation to the costs relating to that application, it is difficult if not impractical to segregate Mr Hill's costs in relation to the application to strike out the Duty Appeal from those in relation to the application to strike out the Penalty Appeal. We consider that costs in relation to the Penalty Appeal aspect would properly encompass and be confined to the costs incurred by Mr Hill and his colleague Mr Durham in travelling to and from and attending the striking out hearing, plus costs (if any) incurred by Mr Hill in preparing for the hearing.

Disposition

70. The Strike Out Decision is set aside so far as it relates to the Duty Appeal. We remake the decision and strike out the Duty Appeal on the basis that the FTT had no jurisdiction to determine that matter.

71. The Costs Decision is varied and set aside so far as it relates to the Duty Appeal. So far as it relates to the Penalty Appeal the Costs Decision is upheld, with costs awarded on the basis described at [69], to be summarily assessed if the parties cannot agree.

Greg Sinfield
Upper Tribunal Judge

Thomas Scott
Upper Tribunal Judge

Release date: 14 February 2018