[2016] UKFTT 0825 (TC)

TC05550

Appeal numbers: TC/2014/06239 & TC/2014/06240

EXCISE DUTY – Strike Out application – Assessment - Proportionality – Consumption – Tobacco Goods – Seizure - Penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

LYNDON NEALE & CHOOJAI NEALE **Appellants**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Bedford Tribunal Service, 8-10 Howard Street on 28 October 2016

Mr Lyndon Neale and Mrs Choojai Neale, the Appellants, appearing in person

Michael Paulin, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Her Majesty's Revenue and Customs (HMRC) apply to strike out the appeals brought by Mr and Mrs Neale, the two appellants, pursuant to Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the basis they have no reasonable prospect of success.

2. The appellants appeal against decisions of HMRC dated 5 September 2013, by which they were each assessed for the excise duty payable on imported goods in the sum of £1,036 pursuant to section 12 of the Finance Act 1994. The appellants each filed a Notice of Appeal on 12 November 2014 challenging the assessments.

Background Facts

3. The appeals arise from the seizure of tobacco from the appellants at the Port of Dover on 13 July 2013. On that date the appellants had returned from a day trip to France together with their two children.

4. Officers of UK Border Force (UKBF) found a total of 240 fifty-gram pouches of tobacco, 12 kilograms in total, which the appellants confirmed they had purchased for approximately £1,400, intending to split the tobacco equally between themselves.

5. Following interviews of the appellants by UKBF, the tobacco was seized as liable to forfeiture. In addition, the vehicle in which the appellants were travelling was seized. However, the vehicle was later restored for a fee of £500 to its owner, a hire company.

6. The appellants were served with a Seizure Information Notice and an official warning letter.

7. The appellants refused to sign both documents.

8. The appellants did not contest the seizure of tobacco and hence it was condemned as forfeited to the Crown and deemed to be imported for a commercial purpose.

9. In a letter dated 5 September 2013 Officer Hall of HMRC notified the appellants that two assessments, each for the sum of £1036, would be issued to them as excise duty due on the seized goods. Officer Hall outlined how the assessments had been calculated, the total sum of £2,072 being 100% of the value of the tax evaded on the 12 kilogrammes of tobacco seized.

10. At a later date the appellants were also each issued with penalties under section 13 of the Finance Act 1994 or schedule 41 to the Finance Act 2008 in the sum of £205 (totalling £410). These penalty sums were paid and were not appealed.

11. By letter dated 16 October 2013 the appellants requested HMRC review the decisions to issue the assessments.

12. By way of letters dated 2 December 2013 Officer Kunderan of HMRC stated that the original decisions to impose the assessments were upheld. The officer relied upon the fact that the appellants had not exercised the right to condemnation proceedings in a court of law, within the permitted timeframe of one calendar month, and thus the goods were condemned as forfeited to the Crown. Officer Kunderan further stated that by not challenging the seizure the opportunity was now lost for the appellants to assert that the goods had been imported for personal use.

13. In a letter dated 7 November 2014, Officer Brew of HMRC informed the appellants that they had not paid the outstanding duty.

14. By way of letters to the tribunal dated 11 & 12 November 2014, the appellants stated that they appealed against the decisions to issue each of them assessments to excise duty, in the sum of £1,036.

15. On 12 November 2014, the appellants lodged out of time notices of appeal against the assessments to excise duty.

16. At a hearing on 21 September 2015 Tribunal Judge John Brooks refused an application by HMRC to strike out the appeals on the basis they were made late.

17. Judge Brooks ordered that the appellants were permitted to amend their grounds of appeal to include arguments as to points of law on consumption and proportionality as explained by Judge John Walters at paragraphs 19 and 20 of the tribunal's decision in *James Murray v HMRC* [2015] UKFTT 371 (TC).

The appellants' grounds of appeal

18. On 29 September 2015 both appellants served amended grounds of appeal on the tribunal. The appellants' amended grounds of appeal began with introductory paragraphs and thereafter continued [grammatical and typographical corrections have been made]:

"We are also aware in some cases of seizure of goods, HMRC do not raise excise duty assessments or penalty assessments (eg. Samuel Ottey [2015] UKFTT 0246 (TC) and we are not aware of any rationale or justification for a different approach in some cases, such as the present, we are also aware that penalties have been raised in other similar cases where assessments to excise duty have been raised and do not know why a penalty was charged in this case. We make these points because we are uneasy about the apparent position being that different individuals in relevantly similar positions are being treated differently by HMRC to raise a penalty in Mr Murray's case.

We also note that in the appeal of Jeffrey Williams v HMRC (TC/2013/05378), the appellant, who was professionally represented, raised two points which did not need to be decided on the facts of that case, which could be relevant, if raised by or on behalf Mr Murray in this case.

They were points referred to in that decision (by tribunal in which Judge Walters was sitting) as the 'Consumption point and the Proportionality point'….

Shortly stated, the consumption point was that the assessment in Williams was bad because it was not compliant with the spirit of Excise Directive (Directive 2008/118/EC). This was said to be because the Directive makes it clear excise duties on consumption should not be charged where goods have been destroyed or irrevocably lost. The suggested importance of consumption being the justification for excise duty to be levied was said not to have been reflected in the Excise Duty (Holding Movement and Duty Point) Regulations 2010 under which the assessment in Williams, as in this case, was raised. It was submitted in Williams that HMRC cannot properly act contrary to the aims of the directive by assessing for excise duty on goods which they have seized and condemned, or alternatively, even if duties are chargeable it ought to be remitted back in the circumstances, so it is not reasonable to raise an assessment to excise duty in the first place.

The proportionality point was that the assessment excise duty was bad enough that to raise it in addition to seizing the goods was a disproportionate response and duplicated remedy for a perceived wrong.'

19. Thereafter there was a section of the grounds titled "amendment to the case of grounds on consumption & disproportionate". This stated as follows:

'On 13 July 2013 Mr and Mrs Neale and their two small children aged seven and nine years old arrived back from a day shopping trip in France and Belgium at the port of Dover. When they were stopped at the Customs point. They were asked where they had been that day and they informed the Border Force that they had been shopping for the day in France and Belgium due to Mr Neale having use of the company hire car, due to his company van being in the garage for servicing and that a day out with the kids would be fun.

Mr Neale was asked if he bought anything whilst in France and Belgium which he replied he purchased some tobacco and alcohol. They were then asked to pull into the search area which he did.

He was then asked to remove the tobacco from the car which was in the back of the car and not concealed in any way. It was still in the bags complete with receipt of purchase, approximately 12 kg which was two adults for their own consumption over a period year and a half. This was with receipts for 1400 Euros paid legitimately (note this is not concealed in any way and cannot be classified as smuggled).

Both Mr Neale and Mrs Neale were separated and interviewed and at no point did Mrs Neale have the offer of an interpreter to assist with the language differences as English is not Mrs Neale's first language.

Both Mr and Mrs Neale in their statements confirm that the goods were for their own consumption and had never said it was for any commercial use.

After around two hours searching the hire vehicle for anything else (which proved pointless due to there being nothing hidden or concealed in any way) they were then issued Notice 12A, the document that is issued which explains what to do if you wish to challenge the seizure by HM Revenue and Customs and then told their vehicle and goods were going to be seized.

At no point were they offered the chance to pay any duty on their goods that had been purchased legitimately from a neighbouring EU country. They were also told that if they wished to challenge the seizure ultimately they would lose as HM Revenue and Customs have

a strong legal team and that it would cost us in the region of £2,500 each and that they had only one month to challenge this seizure.

……

On 05/09/13 Mr and Mrs Neale had received a request they pay Excise Duty of £1,036 and an additional penalty payment of £205 each.

This surprised Mr and Mrs Neale as they had no idea why they would have to pay Excise Duty on goods they were not allowed to keep and had also been destroyed. This was very disproportionate as they had not been informed that when they decided to forfeit their own goods at the port of Dover that they would then be ordered to pay Excise duty in the future. Mr and Mrs Neale did pay the penalty thinking that this would be the end of the situation. Cheques had been sent with the letters as reference for the payment and the appeal would be made against the Excise Duty.

……..

This cannot be the fair and just way of presuming people are guilty because they haven't challenged the seizure of their only legally purchased goods in a neighbouring EU country.

In Summary

Mr and Mrs Neale in possibly being overzealous while shopping in France innocently and legally purchased tobacco for themselves, a potential saving over the following year-and-a-half. They found themselves having their transport goods seized/confiscated on the presumption it was of some commercial benefit and being stranded in Dover with two small children without any more funds in way of getting home and because they did not challenge this seizure are now being forced to pay excise duty on something they never even got to keep.

They had spent their savings which at that time is 1,400 Euros and possible loss of the main family income due to the company hired vehicle being seized.

This however was eventually recovered after a month to the cost of Mr Neale of another £500 and a warning from his employer. Further to this there were £410 in HMRC penalties which had been paid.

Now a demand for the excise duty of over £1,000 each for Mr and Mrs Neale is not proportionate in any way. They did not have the funds or the means to challenge UKBF back down in Dover in court regarding the illegal seizure of their goods and vehicle and also the UKBF operative had informed them they could lose and end up having to pay the costs in addition to their own legal costs (which seems to be a tactic of the UKBF down in Dover).

20. On 27 November 2015, the tribunal stayed the appeals for a period of 6 months and noted in its direction that it was at that time considering in other appeals the issue of whether excise duty is a tax on consumption and the proportionality of assessments on seized excise goods.

21. On 19 July 2016 HMRC applied to strike out the appeals following the decision of Judge Brooks in *Marcin Staniszewski and HMRC* [2016] UKFTT 0128 (TC) which was given on 12 February 2016.

Law

22. Under Rule 8(2)(c) of the Rules the Tribunal may strike all or part of an appellant's case if:

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

23. It is not disputed that the tobacco which the appellant brought into the United Kingdom from France constituted excise goods subject to excise duty under section 2 of the Tobacco Products Duty Act 1979 (and Article 1(1)(c) of the Excise Directive 2008/118/EC) and that duty has not been paid.

24. In such circumstances HMRC can issue an assessment to duty, as they did in this case, under s 12 of the Finance Act 1994. This provides:

> **12.– Assessments to excise duty**
>
> (1) … 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) there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.
>
> (1A) … 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.

25. Insofar as applicable to the present case, the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 provide:

> **Goods released for consumption in the United Kingdom-excise duty point**
>
> **5.** … there is an excise duty point at the time when excise goods are released for consumption within the United Kingdom.
>
> **6.**–(1) Excise goods are released for consumption in the United Kingdom at the time when goods–
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or

(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) "importation" means—

(a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

(b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) "EU excise goods" means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.

…

Goods already released for consumption in another Member State-excise duty point and persons liable to pay

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; and

(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 the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.

(4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:

(a) P's reasons for having possession or control of those goods;

(b) whether or not P is a revenue trader

(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities --

... 1 kilogramme of any other tobacco products

(i) whether P personally financed the purchase of the goods;

(j) any other circumstances that appear to be relevant.

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

(a) …

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

…

Time of payment of the duty

20.–(1) Subject to–

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

(b) any relief conferred by or under the customs and excise Acts; or

(c) any duty deferment arrangement,

duty must be paid at or before an excise duty point

…

Forfeiture of excise goods on which the duty has not been paid

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 should be liable to forfeiture.

(All subsequent references to Regulations are, unless otherwise stated, to the Excise Duty (Holding, Movement and Duty Point) Regulations 2010.)

26. Where excise duty, has not been paid or secured prior to the time that the goods are held for a commercial purpose, they are liable to forfeiture under section 49(1) of the Customs and Excise Management Act 1979 ("CEMA").

27. Section 139 CEMA provides:

(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.

(2) – (5)

(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.

28. Under schedule 3 to CEMA, in order to challenge the legality of the seizure a person is required to give notice of his claim to HMRC within a month of a notice of seizure being served on him. A failure to do so will, by virtue of paragraph 5 of schedule 3, result in the goods being "deemed to have been duly condemned as

forfeited." As is clear from the facts above the appellants did not challenge the seizure of the tobacco within the statutory time limit and therefore, as a result of paragraph 5 of schedule 3 to CEMA, it was "deemed to have been duly condemned as forfeited."

29. The effect of this deeming provision, as clarified by the Court of Appeal in *HMRC v Jones and Jones* [2011] STC 2206 ("*Jones*") and *HMRC v European Brand Trading Limited* [2016] EWCA Civ 90 and by the Upper Tribunal in *HMRC v Race* [2014] UKUT 331 (TCC) ("*Race*"), is that it is no longer open to the appellants to argue that the tobacco seized at Dover in July 2013 was for their personal use either in relation to a claim for restoration or, as in the present case, in the event of an assessment.

30. It therefore follows that, by virtue of Regulation 13(1), the tobacco held by the appellants was for a "commercial purpose" and liable to excise duty with the excise duty point being when it was "first so held" in the United Kingdom.

31. As Warren J, the then President of the Tax and Chancery Chamber, said at [31] in *Race*:

> "It is not open to him [Mr Race] to attempt to establish that he held the goods for his own personal use and not for a commercial purpose and at the same time maintain that the goods were acquired in another Member State. In my judgment, but subject to one point to which I will come, there is no room for further fact-finding on the question of whether seized goods were duty paid or not once the Schedule 3 procedure had determined that point."

He continued:

> 32. It is against that analysis that I turn to the Judge's reasons for refusing to strike out the appeal against the main assessment. His reasons were, in essence, the four particular factors which he summarised in [35] of the Decision:
>
> > a. It was arguable that *Jones* did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty.
> >
> > b. If Mr Race were to satisfy the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure, then the tribunal must arguably give him a remedy in order to vindicate his rights under Article 1 of the Convention which includes the right to a fair hearing.
> >
> > c. The same factual issues would in any event arise at the hearing of the appeal against the Penalty Assessment.
> >
> > d. Insofar as the strike-out application raised issues of law, the Judge did not consider it appropriate to determine those issues without a full investigation of the facts, referring to *Barratt v Enfield LB* [1999] UKHL 25.
>
> 33. Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT*. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-

restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.

34. The Judge supported his contrary conclusion by referring to the period between the expiry of the one month time-limit for challenging seizure and the point at which the assessment to excise duty was issued. The Judge commented that the owner of seized goods should not be forced to seek condemnation proceedings simply to guard against the possibility of a future tax or penalty assessment: see at [31] of the Decision. But that is precisely what he must do if he wishes to assert, if he were to be assessed, that the goods were not subject to forfeiture. The effect of the deeming provisions is that the goods are legally forfeit. Notice 12A is clear that, unless the seizure is challenged, it is not possible subsequently to argue that the goods were not liable to forfeiture because they were in fact held for personal use. I agree with Mr Puzey [counsel for HMRC] that it is not surprising or a cause for complaint that HMRC are entitled to assess for unpaid duty in respect of such goods. In any event, it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person or is otherwise deficient so that the factual issues in relation to an assessment and penalty assessment are likely to be different.

35. As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however, is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC; although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge. It is not, in any case, immediately obvious that there is anything in the point concerning procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A which set out clearly what he needed to do.

…

39. As to the third of the Judge's reasons, relating to the appeal against the Penalty Assessment, what the Judge was saying was that the issue whether Mr Race held the goods for his own personal use would arise for decision in the appeal against the Penalty Assessment. It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming.

40. …

41. As to the fourth reason, the need for a full investigation of the facts, it is no doubt, a sound general approach that a claim should be struck out only with a proper understanding of the facts. But as Lord Woolf MR put it in *Kent v Griffiths* [2001] QB 36 at [38] (in a factual context far removed from the present case):

> "Courts are now encouraged, where an issue or issue can be identified which will resolve or help to resolve litigation, to take

> that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. ……..Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law."
>
> 42. In the present case, the application to strike out was dealt with on the basis that Mr Race's factual contentions could be established. The basis for the application to strike out was a matter of law that did not require further factual determination. The question whether the First-tier Tribunal possessed a jurisdiction to reopen the issue of duty payment is one of law; the answer is, in my judgment, that it does not have such a jurisdiction. This conclusion means Mr Race's appeal against the Assessment cannot succeed even if the goods were acquired in another Member State by Mr Race or his son."

32. Therefore, like Mr Race, the appellants could only be free of a liability (and from assessment) to excise duty in relation to the tobacco if they acquired it for their personal use. However, in the absence of any challenge to the seizure, they cannot now challenge their liability to the duty or the fact that it was not paid on such a basis.

HMRC's submissions

33. In support of its application to strike out the appeals HMRC relied upon the First-Tier Tribunal Decision in *Marcin Staniszewski v HMRC* [2016] UKFTT 0128 (TC) to submit that there was no realistic prospect of the appeals succeeding on either the 'consumption' or 'proportionality' points.

34. At paragraphs 27, 28 and 53 of the decision in *Staniszewski* Judge John Brooks decided that the Tribunal had no jurisdiction to consider the consumption and proportionality points in relation the seizure and assessment to duty of Excise Goods. However, the learned Judge went on to rule upon the substantive merits of the arguments nonetheless.

The consumption point

35. HMRC relied upon the reasoning in *Staniszewski* in support of striking out the appellant's 'consumption' ground of appeal.

36. To the extent it was raised in the appellants' grounds of appeal, the appellants' argument was that the tobacco had been seized so was not available to be consumed by them and excise duty was a tax on consumption so that the assessment to excise duty was not available in law as the tobacco was not liable to such duty.

37. HMRC relied upon the reasoning of Judge John Brooks at paragraphs 29 to 41 of his decision in *Staniszewski* to invite the tribunal to dismiss this ground of appeal as having no reasonable prospect of success. At paragraphs 29 to 41 of his decision Judge John Brooks stated:

Consumption Point

29. The Consumption point as described the Tribunal at [25] of the Strike Out Decision (see paragraph 2, above) is, in essence, an argument that Regulations, under which the assessment was made in this case are, as Judge Walters put it in the Strike Out Decision (and is repeated in Mr Staniszewski's amended grounds of appeal) "not compliant with the spirit" of the Excise Directive (Directive 2008/118/EC) in particular Paragraph 9 of the preamble which states:

> Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.

30. The amended grounds of appeal further explain that:

> One thing is made very clear was that excise duty is a duty on consumption. Preamble paragraph (9) of the Excise Directive states clearly that excise duty is a tax on the consumption of certain goods. This paragraph also introduced the concept that duty should not be charged where goods have been destroyed or irrevocably lost. This alone indicates that the loss or seizure or destruction of goods is not itself consumption. Similarly, the point at which duty arises is not itself a point of consumption, it is when goods are released for consumption. The goods are charged with duty at convenient harmonised points in the anticipation that consumption of the goods will follow. Whenever goods are irrevocably lost or destroyed the assumption is overturned and the basis for having charged duty is lost. In addition to the preamble, as with Directive 92/12/EEC before it Article (1) confirms that excise duty is a duty directly or indirectly on consumption. Whilst is accepted that the Directive sets a number of criteria to establish the time when excise duty can be chargeable before they [the goods] are consumed, these remain indirectly a tax on consumption.
>
> …
>
> The spirit of the Excise Directive is plainly that excise duty is not a tax on the goods being brought into the country, or being made, or in any other way exiting. Whilst they may describe when the duty can be charged, the duty is levied on their use. In order to further assist in this aim the Council included a number of specific provisions to harmonise the cancellation of excise duty in a few obvious scenarios.
>
> Article 37 includes an example of this in that goods which have been released for consumption in another Member State by way of direct selling. Where such goods suffer destruction or irretrievable loss during their transport as a consequence of authorisation by the competent authorities excise duty is not chargeable. Save for the fact that the appellant [Mr Staniszewski] was transporting goods solely for his personal use and the excise duty should not have been assessed in the first place, the seizure during transportation, and the subsequent condemnation by the Commissioners fits squarely within this provision.

31. However, rather than consider Article 37 in isolation, as in the amended grounds of appeal, it is necessary to look at it in context within the Excise Directive (Directive

2008/118/EC) as a whole to ascertain whether it provides a basis for the consumption point argument advanced on behalf of Mr Staniszewski All subsequent references to the Directive or Articles are, unless other stated, are references to this Directive or its Articles.

32. With that in mind I turn to the Directive, Article 1 of which provides:

> This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods')

Article 2 provides:

> Excise goods shall be subject to excise duty at the time of:
>
> (a) their production, including, where applicable, their extraction, within the territory of the Community;
>
> (b) their importation into the territory of the Community.

Article 7 provides:

> 1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) …
>
> (b) …
>
> (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
>
> (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.
>
> 3. …
>
> 4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption. For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods. The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.
>
> 5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.

33. Article 32 of the Directive provides that where a private individual has acquired excise goods for his own use and has personally transported those goods, excise duty "shall be charged only in the Member State in which the excise goods are acquired".

34. Articles 33 to 38 concern holding of goods in another Member State from that in which they were released for consumption and, as is clear from *Metro Cash & Carry Danmark ApS v Skatteministeriet* [2013] EUECJ C-315/12 do not substantially amend Articles 7 to 9 of Directive 92/12/EEC (the previous Excise Directive which the Directive replaced), as the amended grounds of appeal appear to suggest, but "reproduces the contents of those articles while clarifying it" (see at [42]).

35. Article 33 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.
>
> 4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.
>
> …

36. Article 36 makes provision for excise duty to be chargeable in the Member State of destination in distance selling arrangements where goods, already released for consumption in one Member State, are purchased by a person established in another Member State and are dispatched or transported to that other Member State by the vendor.

37. Article 37 provides;

> 1. In the situations referred to in Article 33(1) and Article 36(1), in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.

> The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.
>
> The guarantee lodged pursuant to Article 34(2)(a) or Article 36(4)(a) shall be released.
>
> 2. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 1 are determined.

38. Article 37, therefore, can only apply to goods that have been "totally destroyed" or "irretrievably lost" in specific circumstances at a point prior to that at which a liability to excise duty would otherwise arise. This is not the position in the present case as the cigarettes, which were released for consumption in Poland, were held for a commercial purpose in the United Kingdom and therefore, in accordance with Article 33 (and Regulation 13 which implements Article 33 into United Kingdom domestic law), were subject to and became chargeable to excise duty in the United Kingdom when held in the United Kingdom (see Article 33(1) and Regulation 13(1)).

39. I also agree with Mr Macnab's submission that any argument to the effect that seizure of the goods could constitute "the total destruction or irretrievable loss of the excise goods during their transport … as a consequence of authorisation by the competent authorities of that Member State" would lead to excise goods being seized and forfeited because they were liable to unpaid excise duty ceasing to be liable to that duty by reason of their seizure and forfeiture and, in the absence of liability to excise duty, the goods would no longer be liable to seizure and forfeiture. If this were the case it would lead to the absurd position that goods could never be seized and subject to forfeiture as the very act of seizure and forfeiture would render the goods not liable to seizure or forfeiture in the first place.

40. It is clear from the Directive and the Regulations (which have implemented the Directive into domestic law) that excise duty becomes chargeable when excise goods are "released for consumption" (see Article 7 and Regulations 5 and 6) or when held for commercial purposes in Member State other than that from which they were released for consumption (see Articles 32 and 33 and Regulation 13) and not, in the literal sense as envisaged by the consumption point, when they are actually consumed.

41. As such, I consider the consumption point to have been advanced on a misconceived basis and find that it cannot assist Mr Staniszewski in any appeal against the assessment.

The proportionality point

38. HMRC also relied upon the reasoning in *Staniszewski* in support of striking out the 'proportionality' ground of appeal.

39. In effect the appellants' proportionality ground is that the imposition of an assessment to excise duty in addition to the seizure of the goods and other financial sanctions they have suffered is disproportionate.

40. HMRC relied upon the decision of the Tribunal in *Staniszewski* to submit that this ground of appeal had no realistic prospect of success. At paragraphs 42 to 50 of the decision Judge John Brooks stated:

Proportionality Point

42. In essence the proportionality point, as described in the Strike Out Decision, is that is disproportionate for HMRC to assess Mr Staniszewski to excise duty when the cigarettes have been seized and forfeited.

43. Proportionality, as Lord Reed and Lord Toulson (with whom the other members of the Supreme Court agreed) in *Lumsden & Ors (on the application of) v Legal Services Board* [2015] UKSC 41 ("*Lumsden*"), remind us (at [24] and [25]) is "a general principle of EU law" which "applies to national measures falling within the scope of EU law" and includes excise duty. They also note, at [26] that:

> "It is also important to appreciate, at the outset, that the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground, the four-stage analysis of proportionality which was explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, paras 20 and 72-76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights, is not applicable to proportionality in EU law."

44. They continued by considering the "nature of the test of proportionality" as follows:

> "33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.
>
> 34. Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in

another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.

35. Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying upon derogations from general EU rights, and the review of national measures implementing EU law.

36. …

37. …

38. Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned."

45. The first of the passages from *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, to which the Supreme referred in *Lumsden* (at [26]) was where Lord Sumption JSC said, at [20]:

"The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I

agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with."

46. The other passage referred to the following observations of Lord Reed JSC:

"72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

De Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg *Jersild v Denmark* (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R*

(Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para 45.

74. The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *De Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights

infringement is disproportionate to the likely benefits of the impugned measure (step four)."

47. The Upper Tribunal (Rose J, President and Judge Berner) considered proportionality in relation the VAT Default Surcharge regime in *HMRC v Trinity Mirror plc* [2015] UKUT 421 (TCC) where it said, at [14]:

> "VAT is of course a tax derived from EU Directives which stipulate in detail the persons on whom and the activities for which the tax is to be imposed by the Member States. This ensures that the application of the tax is the same in all EU Member States. The EU Directives require Member States to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due in their respective territories (see *Dyrektor Izby Skarbowej w Biaymstoku v Profaktor Kulesza, Frankowski, Jówiak, Orowski* (Case C-188/09) [2010] ECR I-7639 ("*Profaktor*")), at [21]."

It continued:

> "56. In respect of penalties the principle of proportionality, according to EU law, is concerned with two objectives. One is the objective of the penalty itself; the other the underlying aims of the directive. But more broadly, the objective of the penalty in enforcing collection of tax is itself a natural consequence of the essential aim of the directive to ensure the neutrality of taxation of economic activities.
>
> 57. In *Total Technology* the Upper Tribunal rightly focused not only on the general aim of the default surcharge regime to ensure compliance with a taxpayer's obligations to file returns and to pay tax, but on the specifics of that regime. It did so because questions of proportionality can only be judged against the aim of the legislation (*Total Technology*, at [79]). But the tribunal did not 5 examine in detail the other relevant objective, namely the underlying aim of the directive, which we consider to be the more fundamental question.
>
> 58. That question is in our view fundamental because the way the principle of proportionality has been expressed in the case law is not confined to an examination of the penalty simply by reference to the gravity of the infringement. It is not enough for a penalty simply to be found to be disproportionate to the gravity of the default; it must be "so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive"] (*Louloudakis*, at [70], referred to above).
>
> 59. The underlying aim of the directive that is relevant for this purpose was considered in *Profaktor*. It is the principle of fiscal neutrality in its sense of ensuring a neutral tax burden which protects the taxable person, since the common system of VAT is intended to tax only the final consumer. This is reflected, for example, in the system of deductions, in the UK of input tax, designed to ensure that the taxable person is not improperly charged to VAT.

48. Excise duty, like VAT, is a tax derived from EU Directives and its aim is to raise revenue either directly or indirectly on the consumption of excise goods. Although the United Kingdom measure that requires payment of the duty in accordance with the Directive, namely

s 12 of the Finance Act 1994, is, as a revenue raising measure, not immune to challenge on grounds of proportionality, as Stanley Burnton J (as he then was) recognised in *R (Federation of Tour Operator) v HM Treasury* [2008] STC 547 (in a passage which was quoted with approval by Waller LJ on appeal at [2008] STC 2524 at [21]):

> "134. The latitude to be accorded by the judicial branch of government to the Executive and Legislative branches varies with the context: see the speech of Lord Nicholls in *A v Secretary of State for the Home Dep*t; *X v Secretary of State for the Home Dept* [2004] UKHL 56 at [80], [2005] 2 AC 68 at [80]:
>
> > "80 … the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question and the extent of the encroachment upon that right."
>
> 135. The right engaged in the present case is less important than Human Rights Convention rights under, for example, arts 2, 3 and 5. In this connection, it is pertinent to recall what the European Court of Human Rights said in *James v UK* (Application 8793/79) (1986) 8 EHRR 123, para 42 of the judgment:
>
> > "42 … the object and purpose of Article 1 (P1-1) … is primarily to guard against the arbitrary confiscation of property."
> >
> > The encroachment on the claimants' rights under A1P1 in this case does not approach confiscation, and does not demand anxious scrutiny by the court. Far from it, in the present context (see (1986) 8 EHRR 123, para 46):
> >
> > "46. … The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation …"
>
> 136. Thus in the Gasus case [*Gasus Dosier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403], referred to above, the European Court of Human Rights held that a measure entitling the Netherlands tax authorities to seize and to realise property in the possession of a defaulting taxpayer that belonged to the applicant, who had sold that property subject to its retention of title, was not disproportionate. It expressed the approach of the Court of Human Rights in such a case as follows (see (1995) 20 EHRR 403, para 60 of the judgment):
>
> > "60. As follows from the previous paragraph, the present case concerns the right of States to enact such laws as they deem necessary for the purpose of 'securing the payment of taxes' …

> In passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question whether—and if so, to what extent—the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."
>
> 137. In my judgment, there is no difference between the approach of the court to a measure to secure the payment of taxes in the sense of that considered in Gasus and the approach to a substantive tax measure, ie a decision to impose a particular tax or to increase it. In order to challenge successfully such a measure, it must be shown that the legislature's assessment is "devoid of reasonable foundation".
>
> 138. Furthermore, the jurisprudence of the European Court of Human Rights does not justify this court in declaring a tax measure incompatible because its objects could have been secured more efficiently or effectively by a different measure. The cases of James and Gasus show that the fact that a particular class of persons is subject to a measure that engages A1P1 is a factor to be taken into account, but does not of itself lead to a conclusion of incompatibility.'

49. Having regard to s 12 of the Finance Act 1994, it clearly does not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation. It therefore follows that its provisions must be proportionate and in that I agree with the Tribunal (Judge Popplewell and Ms Bridge) in *HMRC v Lane* [2015] UKFTT 423 (TC) at [66], that:

> "The doctrine of proportionality is relevant to the penalties but not to the duty itself."

50. Accordingly I find that Mr Staniszewski cannot succeed on the proportionality point.

The Appellants' submissions

41. Both appellants made oral submissions to the tribunal, Mrs Neale with the assistance of an interpreter, in reply to the application to the effect that their appeals had reasonable prospects of success and should not be struck out.

42. They relied upon their amended grounds of appeals. In summary, they invited the tribunal to consider whether they should be assessed to duty based on the consumption of tobacco which was not in fact available to them to consume because it had been seized.

43. They also invited the Tribunal to consider the proportionality of the assessment to duty in addition to the other financial sanctions they have suffered, namely: the loss of the goods which they had paid for and which had been seized; their payment of the penalties; and the payment of the fee for the restoration of the vehicle.

Discussion and Decision

44. For the reasons set out above the tribunal has no jurisdiction to consider that part of the appellants' grounds of appeals which argue that the tobacco was brought into the UK by the Appellants for their personal use. The lack of jurisdiction in question applies to appeals against excise assessments as much as non-restoration appeals (see *The Commissioners for Revenue & Customs v Jones & Anor* [2011] EWCA Civ 824; and *Nicholas Race v Commissioners for HMRC* [2014] UKUT 331 (TCC) as set out above).

45. In respect of the other amended grounds, the '*Consumption and Proportionality'* grounds of appeal, HMRC's strike out application was made under Rule 8(2)(c) on the basis that the appellants' appeals had no realistic prospect of success.

46. No application was made before me that the tribunal had no jurisdiction to entertain these grounds of appeal for the purposes of Rule 8(2)(a). Therefore, in respect of these grounds I find it unnecessary to determine whether the tribunal has jurisdiction to determine them. I note that the decision of Judge John Brooks in *Staniszewski* that it has the tribunal has no such jurisdiction.

47. In any event, while it is a first instance decision and not binding upon me, I respectfully agree with the reasoning and conclusion of the Judge John Brooks at paragraphs 29 to 41 of the decision in *Staniszewski* that excise duty becomes chargeable when excise goods (in this case tobacco) are released for consumption or held for commercial purposes in a Member state other than that from which they are released for consumption.

48. The appellants' tobacco was held for a commercial purpose in the UK for a period of time (however short) before seizure and became liable to the charge of excise duty which was unpaid. The fact that the goods were seized by UKBF and they are no longer available to the appellant or others to consume is irrelevant to the liability to excise duty. Therefore, the appellants have no reasonable prospect of success in advancing the 'consumption' ground of appeal to challenge the assessments to excise duty.

49. I strike out this ground of appeal.

50. In respect of the 'proportionality' ground I also respectfully agree with the reasoning and conclusion of the Judge John Brooks at paragraphs 42 to 50 of the decision in *Staniszewski*. The assessment to pay excise duty which is due by virtue of section 12 of the Finance Act 1994 is proportionate even when the tobacco in question has been seized and forfeited.

51. *Staniszewski* has subsequently been approved by a further First Tier Tribunal decision in *Vladimir Pilats v Director Of Border Revenue* **[**2016] UKFTT 193 (TC). At paragraph 60 of that decision Judge Herrington stated:

60. Furthermore, this Tribunal has in the recent case of Staniszewski v HMRC [2016] UKFTT 128 held that the doctrine of proportionality is relevant to penalties but not to the duty itself. The Tribunal observed that excise duty is a tax derived from EU Directives and its

aim is to raise revenue either directly or indirectly on the consumption of excise goods. Although the assessment power in s 12 FA 1994 was a revenue raising measure, it was not immune to challenge on grounds of proportionality. However, s 12 in the Tribunal's view clearly did not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation and it therefore follows that its provisions must be proportionate: see [48] to [50] of the decision. We respectfully follow the reasoning of the Tribunal in that case. This is also consistent with the reasoning in Smith to the effect that although the goods were only made available for consumption for the short period of time between the excise duty point occurring (once the customs post was 20 passed) and the time that they were seized this was sufficient for the defendant to have obtained a benefit by having evaded the payment of excise duty. Likewise, it appears to us that the moment the appellant brought the Cigarettes into the UK without having declared them the excise duty point arose and the liability to excise duty arose and could be assessed pursuant to s 12. In those circumstances, we cannot see that it can be said that it is in principle disproportionate to assess duty on goods which have been seized because they have been taken past the excise duty point without them having been declared. The assessment is simply the inevitable consequence of an excise duty point having arisen and the appellant, as the person in possession of the goods at the time the excise duty point arose is the person liable to be assessed.

52. Therefore the 'proportionality' ground of appeal must also be struck out as it has no reasonable prospect of success.

Conclusion on the appellants' grounds of appeal

53. The appellants have no reasonable prospect of success in advancing any of their grounds of appeal against the assessments to excise duty. I therefore direct that their amended grounds of appeal be struck out.

Proportionality of the penalties

54. The appellants have not appealed against the imposition of the penalties upon them in the total sum of £410. Furthermore, they have already paid this sum and they have made no application to amend their grounds of appeal further to include any appeal against the penalties.

55. Nevertheless, the appellants did rely on the total financial consequences imposed upon them as a result of their importation of tobacco, including the penalties, as being disproportionate. They asked the tribunal to take into consideration:

a) The seizure of the goods (their purchase price being said to be either £1,400 or 1,400 euros);

b) The Excise Duty assessments to a total of £2,072;

c) The restoration fee for release of the vehicle being said to be £500; and

d) The penalties imposed in the total sum of £410.

56. The tribunal therefore considered whether it should interpret the appellants' grounds of appeals as being appeals against the penalties in addition to the excise duty assessments.

57. On balance, the tribunal considers this is not required by the overriding objective to deal with cases fairly and justly. The appellants have chosen not to appeal against the penalties but pay the sums involved. To the extent that the appellants have raised proportionality arguments, these have been in respect of the assessments to duty rather than the imposition of penalties.

58. In any event, the tribunal is of the view that the penalties imposed upon the appellants could not be found to be disproportionate.

59. In *Staniszewski* Judge Brooks stated at paragraphs 51 and 52 of his decision:

51 With regard to proportionality in relation to excise duty penalties, although, not part of this preliminary hearing, I consider that an analogy can be drawn with the VAT default surcharge regime which has been considered by the Upper Tribunal in *HMRC v Total Technology Limited* [2013] STC 681 and *HMRC v Trinity Mirror plc* (see above) in which the regime itself was held to be fair, or as the Upper Tribunal at [100] of *Total Technology* said;

> "…it does not suffer from any flaw which renders it non-compliant with the principle of proportionality".

52. This was because of, inter alia, the "reasonable excuse" exception to the surcharge. A similar provision, paragraph 20 of schedule 41 to the Finance Act 2008 exists with regard to excise duty penalties in addition to the possibility, to which the Tribunal referred in the Strike Out Decision, of a reduction or stay in the penalty by reason of special circumstances under paragraph 14 of schedule 41 to the Finance Act 2008. Therefore, like the VAT default surcharge regime the excise duty penalty regime has been arrived at by the application of a rational scheme that cannot be characterised as devoid of all reasonable foundation and, as such, I consider it does comply with the principle of proportionality. However, that is not to say that a penalty could never be disproportionate if it were plainly unfair with a possible example being a penalty issued after the seizure and forfeiture of a vehicle (in accordance with s 141 CEMA) which was not restored.

60. In *Pilats* Judge Herrington stated at paragraphs 59 and 61 of his decision:

59. Smith and Waya are therefore authority for the proposition that the imposition of a penalty, seizure of goods and the vehicle in which they were conveyed and the making of an assessment for the unpaid excise duty would not, depending on the circumstances, be a disproportionate response to a deliberate smuggling attempt.

…….

61. It is therefore our view that in considering the question of proportionality we should leave out of account the fact that that an assessment to excise duty has been made and the amount of that assessment. In other words, the assessment itself can never be regarded as disproportionate. We should therefore only consider whether the sanctions themselves for the failure to declare the goods are disproportionate in the circumstances that is the seizure of the Cigarettes and the Vehicle and the charging of the penalty. That is not to say that in an appropriate case it would not be necessary to take into account the overall financial impact of

those sanctions on the offender, and in that regard clearly the fact that he has liability to pay the excise duty may need to be to be taken into account.

61. In considering the proportionality of the penalties in addition to the other financial sanctions imposed upon the appellants, I am guided by *Pilats* and paragraphs 63 and 64 of the judgment of Lord Phillips judgment in the Court of Appeal's decision in *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766 on the proportionality of restoration of vehicles:

"63 Having regard to these considerations, I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.

64 The Commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified."

62. I apply this guidance when considering the total financial impact upon the appellants which has or will result from their importation of tobacco and whether the application of penalties in addition to the other sanctions is disproportionate.

63. It is fair to note that the appellants have borne a heavy burden in terms of the losses they have sustained or may sustain as a result of the seizure. They have lost the tobacco, which cost them around 1,400 Euros (although the officer's notebooks suggest the appellants stated this was around £1,400), they have paid a restoration fee for the vehicle in the sum of £500 and they are liable to pay HMRC excise duty and penalties totalling £2,482 in total. The total financial impact for the appellants is therefore around £4,382 if all the sanctions are upheld and satisfied.

64. The tribunal should "stand back" and conduct an overall proportionality assessment. Given that the value of the tobacco was around £1,400 at most and the value of duty unpaid at the time was £2,072, I consider that a total sanction of around £4,382, including the penalties, is proportionate. The total sanction is around three times the value of the tobacco and over twice the value of the unpaid excise duty. The

penalties, in the total sum of £410, are around 20% of the duty payable and around 30% of the value of the tobacco.

65. While there was some financial hardship imposed upon Mr and Mrs Neale, in his submissions to the tribunal Mr Neale accepted he had been able to repay both the restoration vehicle fee and the penalties imposed and had not lost his employment as a result of the seizure of the goods.

66. It is fair to note that as a result of the protracted procedural history of the appeals, including the appellant's late appeals, the seizure and payments made by the appellants are now some three years old.

67. Against this must be weighed the allegations of UKBF which lie behind the seizure of the tobacco. There has been no oral evidence heard by the tribunal as regards the seizure but I am bound to accept the deemed finding that the tobacco was held for a commercial purpose. I also accept the supporting factual submissions that HMRC have made against the appellants in relation to the seizure where those submissions are consistent with the deemed finding and appear reasonable.

68. I accept HMRC's submissions that:

(1) Mr Neale had in May 2013 imported a quantity of tobacco, which Mr Neale stated was only 0.5 kilogrammes but was said by Mrs Neale to have cost £1,000, only 10 weeks prior to the seizure in question.

(2) The appellants each had in their possession over 5 times the guidance level of tobacco of 1 kilogram (the value of the duty unpaid or evaded was £1,036 for each appellant).

(3) The appellants' initial declaration as to how much tobacco they had in their possession was incorrect.

(4) There were material inconsistencies with respect to the accounts the appellants gave to the UKBF and the evidence that was made available such as the receipts (which tallied to 17 kilograms of tobacco).

69. While UKBF does not allege that the appellants concealed the goods, nor does it appear the appellants were involved in large scale commercial smuggling, there are therefore some aggravating features such as a degree of dissimulation and a previous importation of tobacco.

70. In my view this was not the most serious or aggravated smuggling attempt, but falls somewhere in the lower to middle ranges of commercial importations. Had the appellants' importation been successful, then there would have been a loss to the exchequer of over £2,000 and unfair competition with the legitimate tobacco trade.

71. Therefore, even though there has been a degree of financial hardship suffered by the appellant, and the total financial impact is over twice the value of the duty involved, this has resulted from their holding goods for a commercial purpose and the overall consequences are not disproportionate.

72. In the light of all the relevant circumstances, I do not consider that the penalties imposed of £205 upon each appellant nor the total financial value of the sanctions imposed by UKBF and HMRC to be disproportionate.

Post Script

73. UKBF and HMRC have a wide range of financial sanctions at their disposal, in addition to or alternative to criminal sanctions, consequent on the seizure of goods for non-payment or evasion of excise duty. I respectfully endorse what was said in *Pilats* at paragraph 98 of the decision:

> 98. Nevertheless, in our view it is important that the two agencies develop a single comprehensive policy which deals with the question as to when it would be considered appropriate to impose penalties as well as refusing restoration. This policy could cover both cases of deliberate smuggling for profit as well as less serious cases. As we have indicated, if the two agencies continue to have entirely separate policies there is a clear risk in more flawed decisions being made.

74. The formulation, and potentially publication, of such a policy and guidance to the taxpayer may also assist in informing importers of their rights and deterring those who may be tempted to evade the payment of excise duty through smuggling or otherwise.

Conclusion

75. On the basis of the foregoing the appeals have no reasonable prospects of success. They are struck out.

76. 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.

TRIBUNAL JUDGE
RUPERT JONES

RELEASE DATE: 8 DECEMBER 2016