[2017] UKFTT 18 (TC)

TC05584

Appeal number: TC/2016/3281

TOBACCO PRODUCTS DUTY – HMRC applying to strike out appeals against assessments to duty and to a penalty under Schedule 41 FA 2008 – strike out application dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LIAM HILL **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at City Exchange, Leeds on 19 December 2016

The Appellant in person, assisted by Mr Ross Durham

Miss Rebecca Young, Presenting Officer, for the Respondents

DECISION

1. This hearing was of an application by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to strike out proceedings, or part of them, in relation to two appeals by Mr Liam Hill ("the appellant").

2. The first appeal was against an assessment to tobacco products duty made under s 12(1A) Finance Act ("FA") 1994 in the amount of £1,671. HMRC argued that the proceedings started by that appeal must be struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("FTT Rules") on the basis that this Tribunal had no jurisdiction in relation to the whole of the appeal, or possibly part of it.

3. The second appeal was the appellant's appeal against an assessment to a penalty for handling dutiable goods after the excise duty point, being goods on which duty had not been paid. The assessment was made under paragraph 16 of, and in accordance with paragraph 4 of, Schedule 41 FA 2008 ("Schedule 41") in the amount of £935. HMRC argued that the whole of the proceedings in relation to this appeal should be struck out under Rule 8(3)(c) of the FTT Rules on the basis that the appellant had no reasonable prospect of succeeding in his appeal.

4. It should be said at this point that the fact that HMRC was arguing for a strike out on one basis in relation to the duty assessment and another in relation to the penalty assessment only became apparent to me when Miss Young began to present her case. It was not what the respondents' Notice of Application ("the Application"), which I had read before the hearing, said. I have more to say about the Application and its shortcomings later.

5. The Application also sought a stay of a direction of the Tribunal addressed to HMRC and requiring it to produce its statement of case within 60 days of the date of the direction, which was 8 August 2016. The application was for a stay until 60 days after the determination of the application. This part of the application would of course only be applicable were I not to strike out both appeals.

6. At the end of the hearing I announced that I had decided not to strike out either appeal and so the application was dismissed. Miss Young asked for a decision notice giving full facts and reasons for my decision, and this decision notice contains those facts and reasons. I also said at the hearing that HMRC should have 30 days from the date of the decision to produce a statement of case. I reduced the time requested because it seemed to me that almost everything necessary to produce a statement of case had been done in preparing the Application. After the end of the hearing it occurred to me that because of the holiday period I should give HMRC 45 days and I directed accordingly in writing later that day.

Evidence and Facts

7. In a strike out application the normal rule is that the Tribunal assumes the facts, where in dispute, to be those most favourable to the appellant. In this case there were few undisputed facts: the only issue between the parties seemed, on the basis of such evidence as I had, to relate to the events at the port in Hull when Mr Hill disembarked from the ferry from Zeebrugge.

8. The evidence which I did have consisted of a bundle prepared by HMRC which contained (among other things):

(1) The appeal by the appellant and two pieces of correspondence from him to HMRC following up from HMRC's "pre-assessment" and their assessments.

(2) Extracts from the Notebook of Mr M Robinson, the Border Force officer who interviewed Mr Hill at Hull, together with copies of forms BOR156 and BOR162 showing Mr Hill's signature.

(3) The letters issued by HMRC starting with the "pre-assessment" letter (as HMRC call it) and culminating in a review conclusions letter.

(4) The notices of assessment and other associated documents.

9. During the hearing I asked Mr Hill some questions to clarify his grounds of appeal and the events at Hull, and I also heard from Mr Ross Durham who was assisting Mr Hill with his appeal and who himself had accompanied Mr Hill on the trip to Belgium and who had also been interviewed on arrival at Hull, but by a different officer.

The undisputed facts

10. On 24 March 2015 Mr Hill arrived at the Port of Hull on a ferry from Zeebrugge, Belgium.

11. Mr Hill was intercepted by a Border Force officer (Mr M Robinson) and asked whether he had anything that he should not have. He said no.

12. He was asked if he had any tobacco or alcohol. He replied that he had 18 packs of hand rolling tobacco ("HRT") amounting to 9 kg.

13. Mr Hill was asked to accompany the officer to a room. The tobacco was found by the officer to be 9 kg of three different brands.

14. Mr Hill produced receipts for the purchase of the HRT.

15. Mr Hill said that he bought the HRT for himself and his girlfriend, and for relatives including his mother, and for his mate. He denied, in response to leading questions, that he was being paid for acquiring the HRT for relatives etc.

16. At the request of Mr Robinson he rolled three cigarettes.

17. Mr Hill signed the Officer's Notebook as an accurate record, but this did not include the reasons given by Mr Robinson for seizing the HRT which came after Mr Hill's signature. The interview lasted about 1 hour 15 minutes. At the end, after leaving the room and returning, the officer seized the all the tobacco.

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

19. Mr Hill did not challenge the seizure in the Magistrates Court. He told us that he had been advised by Border Force that it would cost him £1,200 in legal fees if he did so and lost, so he did not think it was worth the risk. He did not read the documents given to him as he thought it pointless.

20. On 23 December 2015 an officer of HMRC, Mr Ansah, wrote to Mr Hill in a letter headed "About potential excise duty and penalty charges on forfeit goods". The letter explained that because he had not challenged the seizure it was open to HMRC to consider further action, including an assessment to recover excise duty due in respect of the forfeit goods and the imposition of a financial penalty. An "Excise Duty Schedule" and a "Penalty Explanation Sheet" were enclosed with the letter. The purpose of the letter was said to be to allow Mr Hill to provide any further information which he thought relevant for the purposes of determining the correct amount of duty and of the penalty. He was not however to make any representations to the effect that goods were not liable to forfeiture or seizure (even if he thought that was relevant).

21. The kind of representations that he might make were further explained, and they included details of any reasonable excuse he might have had (such excuse, it was said, normally being an unexpected or unusual event that could not be reasonably foreseen or was beyond his control) and whether he was eligible for a special reduction.

22. He was also asked to disclose any additional information (referred to in the letter as "telling, helping and giving"), an explanation of his behaviour and "any other circumstance that might affect consideration of the liability to a penalty, or the assessment or penalty amount".

23. He was also told in this letter that he could not appeal against it. Enclosed with the letter were factsheets on "The Human Rights Act and Penalties" and "Penalties for VAT and Excise Wrongdoing".

24. The penalty explanation schedule showed that a penalty had been charged under Schedule 41. The wrongdoing described was a recitation of the facts as reported to HMRC by the Border Force, including that nobody was available to provide confirmation that the tobacco was, so far as not for him and his girlfriend, for family members and a friend.

25. The schedule said that Mr Hill's behaviour was deliberate because (and this part was in quotation marks) "You misled the Border Force officer about the quantity of tobacco products in your luggage". His disclosure was also characterised as prompted. A reduction of:

(1) 10% (out of a possible 40%) was given for "telling" because Mr Hill was not able to provide evidence from the people he claimed the tobacco to be a gift for.

(2) 10% (out of a possible 40%) was given for "helping" because it was reasonable to expect the taxpayer to provide at least one telephone number to back up his claim.

(3) 20% (the maximum) was given for "giving" (ie giving co-operation).

26. The schedule added that, based on the information they had, HMRC did not consider there were special circumstances. The penalty shown on the schedule was £935.76, which represented 56% of the potential lost revenue, the duty assessed.

27. Mr Hill replied on 2 February explaining that he had not misled the Border Force but had correctly stated the amount he was carrying.

28. On 8 February Mr Ansah replied to Mr Hill saying that HMRC would give further reductions for disclosure but still regarded the behaviour as deliberate. The letter enclosed a duty assessment and a "Notice of Penalty". It also said under the heading "What to do if you disagree" that "[t]he notice of penalty assessment and the Officer's Assessment tell you what to do if you do not agree with them." (HMRC's capitalisations). Earlier in the letter it said that the factsheet "HMRC 1 HM Revenue & Customs decisions" was enclosed.

29. The duty assessment was dated 8 February and charged £1,671. The assessment "reasons code" shown on the notice was '23' which on another sheet EX603 (Explanatory Notes) is shown as meaning "duty point errors" and the assessment "method code" was '4' which is shown on that sheet as indicating "[o]ther credibility checks". Nothing in the several sheets I had refers to rights of appeal or review.

30. The notice of penalty assessment (NPPS2) shows a charge to a penalty of £584 (compared with £935.76 on the warning letter). No explanation of how this further reduction was arrived at was given.

31. The notice of penalty assessment does refer to appeals and reviews. About the latter it says "If you want a review, you need to write to tell me why you think my decision is wrong" and that the recipient could find out more in factsheet HMRC1 "HM Revenue and Customs decisions – what to do if you disagree".

32. On 16 February 2016 Mr Hill replied. His letter was noted as received on 24 February 2016 by the "Exception Handling Team". Mr Hill asked for a review and made further representations and reiterated his account of the interview.

33. On 6 May 2016 HMRC sent a letter to Mr Hill signed on behalf of Christopher Dakers. This letter came from the ISBC Dispute Resolution – Appeals and Reviews section of HMRC. It referred to Mr Hill's correspondence having been received in HMRC on 24 February 2016 and said that although normally HMRC have 45 days from the date of receipt to conduct a review, Mr Hill had agreed an extension of time

until 20 May 2016. [There is no evidence of this agreement or when the extension was agreed in the bundle.]

34. The letter went on to say that after consideration of the application and examination of the circumstances related to the request (sc for a review), it "*will*" [my emphasis] be decided if a review is appropriate. If a review is appropriate it "*will*" be carried out by Christopher Dakers, and when concluded this officer "will" write to advise the review conclusion.

35. *On 11 May 2016 Mr Dakers sent a letter saying he had completed his review and gave his conclusions* [my emphases]. In the letter he first referred to "our letter issued to you on 10 November 2015". [No such letter was in the bundle]. He explained that he was reducing the penalty because in his view the appellant's behaviour was not deliberate and that Mr Ansah, who had held that it was, was wrong. He gave a 90% reduction in the penalty which became £350. In all other respects he upheld Mr Ansah's conclusions.

36. Mr Hill notified his appeal to the Tribunal on 8 June 2016 and it was received on 10 June. HMRC allowed Mr Hill's hardship application in relation to the excise duty charged by the assessment.

The disputed facts

37. These relate to one aspect of the interview. The Border Force officer's Notebook records, immediately after noting that after the interview had been suspended for eight minutes:

> "MR [Mr M Robinson, Border Force] Would you be prepared to provide me with some telephone numbers that I could call to confirm your gifts?
>
> LH [Mr Liam Hill] Yes but they're all at work
>
> MR So is there anyone I can call?
>
> LH Well they're all at work.
>
> MR If I could call someone it would be helpful to you as at the moment I don't find it credible that you're giving away that much money as gifts.
>
> LH We all buy gifts when we go away. It's not always tobacco."

38. And later in relation to the seizure it says:

> "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."

39. In his reply to the warning letter of 23 December 2015 Mr Hill had challenged the Border Force's account of the circumstances in which he was asked to provide confirmation of the gifts. He says the Border Force officer asked if he could contact Mr Hill's mother but Mr Hill explained that she was not allowed to take calls at work.

40. Mr Hill also mentioned that his friend (who was Mr Durham) had also been questioned and that when he had given Border Force his own mother's number they had contacted her and then let Mr Durham leave with all his tobacco which was more than Mr Hill's. Mr Hill says that the officer told him that if he had been able to speak to Mr Hill's mother he would have been allowed to proceed with his HRT.

41. At the hearing Mr Durham corroborated Mr Hill's account of what had happened to him (Mr Durham) at the port.

Striking out and the Tribunal's attitude to applications

42. Rule 8 of the FTT Rules provides:

> "**8 Striking out a party's case**
>
> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
>
> (5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
>
> …"

43. From this it can be seen that a strike out under Rule 8(2)(a) (lack of jurisdiction) is mandatory, but a strike out under Rule 8(3)(c) (no reasonable prospect of success) is discretionary. It can also be seen that in neither case can an application be made to

reinstate the proceedings, although an appeal may be made against the decision to strike out.

44. It is also the case that in the two types of strike out sought in this case, the appellant must be given an opportunity to make representations. This was done in this case by giving Mr Hill the opportunity to address the Tribunal.

45. This Tribunal, like all the Tribunals established under the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), is a creature of statute. It may only hear and make decisions on those proceedings which TCEA and the FTT Rules say it may.

46. This is reflected for example in Rules 20 and 21 of the FTT Rules. Rule 20(1) says that "where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by ….". Rule 21(1) is in substantially similar terms. There is no other Rule which permits proceedings to be started.

47. It is necessary in every case then to examine the appeal to ensure that there is an "enactment" which does provide for an appeal to the Tribunal. This is not of course usually an issue. In the major taxes with which this Tribunal deals, provisions such as ss 49D, 49G and 49H Taxes Management Act 1970 ("TMA") provide for appeals against income tax, corporation tax and capital gains tax assessments and other decisions and s 83G Value Added Tax Act 1994 ("VATA") provides for appeals against VAT decisions to be notified and made respectively to the Tribunal. Those provisions of those Acts can only apply if there is a provision in the Acts granting a right of appeal (such as s 31 TMA and s 83 VATA).

48. What an appeal may be made against is normally (and in this case is) the assessment or decision. With some appeals (including Mr Hill's) there is no restriction on the grounds of appeal that may be put forward: in others the appeal power may limit the grounds of appeal.

49. It follows that if the stated ground of appeal is not one which seeks to query HMRC's basis for making the decision at all or the amount in which it is made, it is unlikely that the Tribunal will be able to hear an appeal. It will not have jurisdiction.

50. The Upper Tribunal (Tax and Chancery Chamber) has indeed confirmed in cases such as *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) and *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) that a ground of appeal which seeks to impugn the reasonableness or rationality of HMRC's decision-making procedures, the proportionality of the liability or penalty or alleges that the appellant had a legitimate expectation that HMRC would not assess or make a particular decision is not a ground of appeal which the First-tier Tribunal ("FTT") can entertain, unless the relevant enactment provides an appropriate power. An example of the latter would be the ability of the Tribunal to review an HMRC decision about special circumstances in penalty cases of the decision is flawed in judicial review terms.

51. If the Tribunal did consider such matters as legitimate expectation it would be acting beyond its powers and that is the reason why the Tribunal must strike out proceedings that are outside its jurisdiction and cannot reinstate them.

52. In this case HMRC cite three decisions as demonstrating that this tribunal has no jurisdiction to hear an appeal against the assessment to excise duty. They are ***HMRC v Laurence Jones and Joan Jones*** [2011] EWCA Civ 824 ("***Jones & Jones***"), ***HMRC v Nicholas Race*** [2014] UKUT 331 (TCC) ***("Race UT")*** and ***Staniszewski v HMRC*** [2016] UKFTT 128 (TC) ("***Staniszewski***").

53. ***Jones & Jones*** was not a case where an assessment to excise duty was in consideration. It was a case where the appellants were seeking the restoration of their tobacco and of the car in which it had been carried. The car and the goods had been seized by HMRC because HMRC considered that the goods were being imported for a commercial purpose without duty being paid and because the car was used to carry the goods. Where this happens there are, confusingly most people agree, two roads which may be travelled. The owners of the goods and vehicle can start condemnation proceedings in the Magistrates Court and if they are successful the goods and vehicle (or money to their value) will be restored. If they are unsuccessful then the goods are duly condemned as forfeit and pass to the Crown who may sell them or destroy them. It is possible for a person whose goods are condemned by the Court to seek restoration or a monetary equivalent from HMRC and depending on HMRC's policy in relation to the type of goods and the conduct of the person they may do so unconditionally or on a condition such as payment of a fee.

54. Where a person does not begin condemnation proceedings or withdraws from them then by virtue of paragraph 5 Schedule 3 Customs and Excise Management Act 1979 ("CEMA") the goods concerned are deemed to have been duly condemned. But restoration may still be requested.

55. This was the case in ***Jones & Jones***. The Court of Appeal held that it was not open to the Joneses when seeking restoration to argue that the goods were in fact for their personal use, and they could not say they had committed no offence which would justify the seizure. This was the result of the deemed condemnation under Schedule 3 CEMA: Mummery LJ said at [71] and [73]:

> "71. …
>
> …
>
> (4) The stipulated statutory effect of the respondents' 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 the respondents 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 the respondents 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 the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
>
> …
>
> 73. To sum up: the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the respondents' personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the respondents' own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol: there is no judge-made exception to the application of paragraph 5 according to its terms; the respondents had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation."

56. The decision is replete with reference to "jurisdiction". But a point it stresses is that a condemnation and restoration involved two jurisdictions, that of the Magistrates Court and that of the Tribunal. It would amount to an abuse of process if the Tribunal were in effect to set aside or overturn the effect of an order of the Court or even a deemed order, so the Tribunal's jurisdiction, which undoubtedly does include hearing an appeal against non-restoration, does not extend to querying the Court's order in that hearing.

57. In *Race UT* the situation was different. Mr Race had had tobacco in his possession at home in the UK seized and duly condemned as forfeit. He had subsequently been assessed to duty and a penalty. In his decision, which is binding on me for what it decides, Warren J said at [33]:

> "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."

58. It is worth noting that in the First-tier Tribunal HMRC had put their case on the alternative bases of Rule 8(2)(a) and Rule 8(3)(c). In the Upper Tribunal Warren J records them as arguing only that "even assuming the facts to be as Mr Race had stated them, Mr Race could not succeed in his appeal against the Assessment". At [48] Warren J said:

> "HMRC applied, after all, to strike out Mr Race's appeal against the Assessment which, as it stood at the time of the application and as it stands today, raises only one ground of appeal namely that the goods were acquired for personal use. For reasons which I have given, and assuming that Mr Race did not serve a valid Notice of Claim, Mr Race cannot succeed on that ground whichever factual scenario is adopted and none of the reasons given by the Judge justified his refusal to strike out the claim. In my judgment, under the scenario where there was no Notice of Claim, the approach adopted by the Judge was not correct. It is open to me, as an appellate judge, to revisit the exercise of the discretion whether or not to strike out the appeal. I would without hesitation strike out the appeal."

59. The reference to "discretion" here and other references to the appeal succeeding or not suggest to me that Warren J was re-exercising the F-tT's discretion under Rule 8(3)(c). When the case returned to the F-tT to deal with one issue which the Upper Tribunal had indicated it would not, on the basis of the facts as known, strike out, Judge Cannan said at [25] of *Race v HMRC* [2014] UKFTT 1085 (TC) ("*Race FTT2"*):

> "In all the circumstances I am satisfied that Mr Race has no reasonable prospect of establishing that he did give HMRC a notice of claim challenging the legality of the seizure of the Goods. The Goods are therefore deemed to have been imported otherwise than for personal use and Mr Race's sole ground of appeal against the assessment to excise duty must fail. I therefore strike out the appeal in so far as it relates to the excise duty assessment."

60. That also seems redolent of a Rule 8(3)(c) application (no reasonable prospect).

61. This does not seem a surprising conclusion when it is remembered that in *Race UT* Warren J noted that a "personal use" argument could not in any event succeed if it was correct that Mr Race had acquired excise goods on which the duty was unpaid after their importation from "a man in a pub" as HMRC allege he told them. And Warren J expressly mentioned at [34] that in an appeal against an assessment to duty:

> "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 …."

62. A further point that occurs to me is this. Suppose a person appeals against an assessment to duty on the grounds that (a) the tobacco seized at an airport or port was for personal use and (b) the assessment is defective for some other reason, eg one of the reasons identified by Warren J in *Race UT* at [34]. In that case it seems to me to be a more difficult argument to say that "part of the proceedings" should be struck out because of lack of jurisdiction than to say that a part of the proceedings should be struck out because there is part of the appellant's case (and I note that the word "case" is used in heading to Rule 8) about which there is no reasonable prospect of success.

63. 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.

64. 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. In *Jamie Garland v HMRC* [2016] UKFTT 573 (TC), this Tribunal (Judge Christopher Staker QC) said:

> "14. As regards HMRC's reliance on rule 8(3)(c), the Tribunal accepts that if the 40 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."

65. I agree with everything that Judge Staker says here and I consider below what arguments the appellant might be able to deploy should the case go to appeal.

66. In *Glen Lyn Generations Ltd v HMRC* this Tribunal (Judge Barbara Mosedale) considered the power in Rule 8(3)(c):

> "*Test for no reasonable prospect of success*
>
> 6. I agree with Mr Voice [counsel for HMRC] that this test is the same test as applies to summary judgment in the Courts and that is whether there is 'a real prospect of success.' In *Swain v Hillman* [2001] CP Rep 16 this was described as follows:
>
> > 'The word "real" distinguishes fanciful prospects of success or, ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success…'
>
> 7. And in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) Colman J further defined the test:
>
> > "For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty…"
>
> 8. Mr Voice accepted that it was for HMRC to satisfy me that the appeal (or a party of it) had only a fanciful prospect of prospect of success and unless they did so it could not be struck out (or partly struck out)."

67. I follow the approach set out in [8].

The application to strike out the duty assessment

68. Miss Young argued that the effect of the Court of Appeal decision in *Jones & Jones* was that the FTT did not have jurisdiction to decide whether or not goods seized and deemed forfeit were really being imported for other than commercial use.

69. It followed from *Race UT* that in an appeal against a duty assessment my jurisdiction was limited to considering whether HMRC had correctly identified the appellant and whether the assessment met the statutory requirements.

70. Mr Hill had however only argued in his grounds of appeal that the goods were for his personal use. The Tribunal should grant the application to strike out under Rule 8(2)(a).

71. The Application also referred to this Tribunal's decision in *Staniszewski* where Judge John Brooks held that the Tribunal does not have jurisdiction to hear the so-called "consumption" and "proportionality" points in relation to the assessment to duty.

72. In relation to the penalty Miss Young argued that the conditions for imposing the penalty had been met, and that it could not be argued by the appellant that the goods were for personal use in view of *Race UT*.

73. The reviewing officer had accepted that the behaviour of Mr Hill was not deliberate and had given a 90% reduction for the quality of his disclosure. Both the officer making the assessment and the reviewing officer had considered whether a special reduction should be made and had concluded there were no special circumstances.

74. The Tribunal should hold that there was no reasonable prospect of success for Mr Hill and should exercise its discretion to strike out the appeal against the penalty.

Discussion – the assessment to duty

75. I agree with HMRC that in an appeal against the assessment to duty it is not open to the Tribunal to accept an argument from the appellant that any tobacco which has been duly condemned on the basis that it was being held for commercial purposes was not in fact held for those purposes, with the hoped for result that the assessment cannot stand. This is because of the decision in *Race UT* which is binding on me,

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 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.

The "forfeit for other reasons" argument

78. This argument follows from what is said by Judge Charles Hellier in *John Patrick Lewis v HMRC & anor* [2015] UKFTT 640 (TC) ("*JP Lewis*") in the context of an assessment to duty:

> "32. We agree that if goods are legally forfeit the legality of the seizure carries with it "any fact that forms part of the conclusion". The question however is what fact is relevant? Goods may be legally seized for a number of different reasons: they may be prohibited weapons, illegal drugs, goods used in the carriage of dutiable forfeitable goods, goods mixed or packed with forfeitable goods, or goods on which duty should have been paid but has not been. Which of these factors is to be taken as a fact which is a necessary component of the legality of their forfeiture?
>
> 33. There is nothing to our minds in the quotations from *Jones* in the Respondents' reply which answers this question. In that case there was no other reason suggested for the seizure by the officer or in the circumstances of the seizure.
>
> …
>
> 35. However, even if the Respondents are correct, we did not have any evidence from the seizing officer. The officer did not give evidence and was not cross examined. We cannot say what the seizing officer's reasons were. Further, Mr Lewis's account of the seizure indicates some friction between him and the officer which a tribunal might find has a bearing on the decision to make the seizure or its reasons. We cannot assume that there is no reasonable prospect of showing that the reasons for the seizure were not as stated by the officer or by the Respondents.
>
> 36. As a result we cannot conclude that the tribunal would have to assume that the goods were not for Mr Lewis's own use."

79. In this case Mr Hill has raised on more than one occasion, including in his Notice of Appeal, that he was told by the Border Force that it was his inability to give the Force a number on which his mother could be contacted that led to the seizure, by contrast with what happened to his friend, Mr Durham, who was able to give a number on which his mother could be contacted.

80. The Border Force seized all the tobacco including that which Mr Hill said was for his own use and in relation to which he passed the "rolling up" test set for him by the Force. It is a reasonable inference that Mr Hill's own tobacco was seized because it was mixed with forfeitable goods (the gifts).

81. This suggestion is supported to a degree by entries in the Mr Robinson's Notebook and by statements made by Mr Ansah.

82. I cannot say that there is no reasonable prospect of that argument succeeding. Much may depend on the evidence given at the appeal hearing by Mr Hill, Mr Durham, Mr Robinson of the Border Force and possible Mr Ansah and Mr Hill's mother.

The different consumption argument

83. In *Staniszewski* Judge Brooks dismissed an argument based on a provision of the EU Excise Duty Directive (2008/118/EC) which allowed a relief from duty for goods totally destroyed or irretrievably lost (article 37 of the Directive). The argument was

based on the proposition that excise duty is a duty on consumption and if the tobacco is seized and destroyed it cannot be consumed by anyone.

84. Being a decision of this, the First-tier, Tribunal, Judge Brooks' decision is not binding in other cases before this Tribunal. The argument with which I am concerned was not in any case put to Judge Brooks although there are similarities.

85. The argument relies on inferences that might be drawn from a decision of the European Court of Justice, Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ECR 2010 I-03799 ("*DTL*"). The argument would be based on the following nine paragraphs (§§86 to 94) which is my analysis of what the decision in *DTL* stands for and how it might be applied by analogy. By way of a note of caution it should be explained that the provisions of the Customs Code and the Excise Duty Directive referred to are not necessarily the current provisions, which may have changed in relevant parts.

86. It is beyond doubt that when tobacco is seized and confiscated at the first customs point on entry into the EU, any customs debt is extinguished in accordance with Article ("Art") 233(1)(d) of the Customs Code ("CC").

87. It is also beyond doubt that where tobacco brought into the EU is seized and confiscated at any other location within the EU, whether in the first territory or on or after crossing the border into another member state ("MS"), the customs debt is not extinguished, and so a customs debt may be due.

88. The rationale for this difference is that in the first situation the goods do not enter the economic networks of the EU and so there is no competition with EU goods, whereas in the second there is a risk that the goods will not be detected and will enter those networks. See also Case C-459/07 *Veli Elshani v Hauptzollamt Linz* [2009] ECR I-2759.

89. For VAT purposes the relevant provisions must be interpreted in the same way as for customs duty.

90. For excise duty, Art 5(1) of the Excise Duty Directive ("EDD") must be interpreted in the light of the concept of "introduction" in the CC, and so goods enter the EU as soon as they go beyond the place of the first customs post is in the EU. No chargeable event occurs for the EDD if Art 233(1)(d) of the CC applies and the goods are confiscated.

91. But after the goods go beyond the first customs point there is a chargeable event.

92. Art 6(1) EDD must be interpreted as meaning that excise goods are only imported into the EU after they have gone past the first customs point.

93. References in *DTL* to the case where goods are released for consumption in EU state and transported to another MS do not refer to cases where goods are seized and confiscated at the border of the second state, but deal with the competence of either state to collect excise duty.

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 EDD must be interpreted as extinguishing the arriving MS excise duty debt (or not imposing it in the first place).

The invalid assessment argument

96. In *NT-ADA Ltd (formerly NT Jersey Ltd) v HMRC* [2016] UKFTT 642 (TC) ("*NT-ADA*") this Tribunal (also Judge John Brooks) considered what the effect on the validity of an assessment was if HMRC had not followed the law relating to reviews and appeals. At [24] onwards he said (omitting irrelevant passages):

> "*Section 67 VATA Penalty*
>
> 24. The s 67 VATA Penalty of £234,833 was imposed, by HMRC, on 4 April 2016, on the grounds that NTJ [*ie NT-ADA Ltd*] had failed to notify its liability to register for VAT "at the proper time." The letter containing notice of the penalty, like the VAT registration certificate, was not sent to NTJ's address in Jersey but to where HMRC considered it had a fixed establishment in the UK. It was subsequently sent to NTJ which, as noted above, on 29 April 2016 notified the Tribunal of its appeal.
>
> 25. Under a sub-heading 'What to do if you disagree with this notice" the letter stated:
>
> > 'If you disagree with this decision you can ask for a review by an independent HMRC Officer by writing to the address above within 30 days of the date of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished.'
>
> 26. As with the registration certificate Mr Gordon argues that the penalty notice is ineffective as it was notified to the wrong address contrary to s 98 VATA and did not offer a review contrary to s 83A VATA (see above). He says that the use of "ask" in the letter is, in the language of contract law, more akin to an invitation to treat than an offer as it does not provide any assurance that a request for a review would be granted. However, Mr Jones contends that the letter is plainly an offer and that it is "splitting hairs" to say otherwise.
>
> 29. I accept Mr Gordon's submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant "can ask for a review" without any assurance that it will be granted. Rather it should have been stated, as it was in the 29 October 2012 letter, that an appellant has "a statutory right to a review". In my

> judgment the failure to make it clear to NTJ that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it."

97. In this case it is not apparent from the evidence I have seen that anything at all was said to Mr Hill about his rights to an appeal against the excise duty assessment and a review of the decision. The letter from Mr Ansah of 8 February 2016 suggested that details about what to do if he disagreed with the duty assessment would be found in the assessment notice, but I can see nothing there about appeals and reviews. It was also suggested in this letter that he should read, among others, an enclosed factsheet HMRC1.

98. It is therefore arguable that if HMRC cannot put forward evidence that Mr Hill was clearly told of his rights to a review of the assessment and that he was offered a review, not told he could ask for one, the assessment would be invalid as held by Judge Brooks in *NT-ADA*.

The RSP argument

99. Tobacco duty is a mixture of a fixed amount and an ad valorem amount (s 2 Tobacco Products Duty Act 1979). The ad valorem amount is based on the UK retail selling price ("RSP") of the tobacco. The duty calculation sent to Mr Hill shows that the rate of duty per kg is the same for each of the three brands of tobacco, Amberleaf, Goldleaf and Golden Virginia at £185.74. HMRC maintain lists of the RSP of most types of tobacco in the UK. The lists were not put in evidence so it is impossible to see whether HMRC have used the correct price for each brand.

100. It is possible that there could be an accidental use of one price for all three brands or it may be that indeed the RSP for each brand is the same. But it is not fanciful to suppose that Mr Hill may be able to show that the calculations are wrong. This of course is one of the matters which Warren J says can be left to the jurisdiction of this tribunal in an appeal against a duty assessment.

Discussion – the assessment to a penalty

101. I consider that there are arguments that could be deployed at a hearing of the appeal against the penalty assessment. If argument (2) or (3) in §76 succeeded they would be unnecessary as the penalty would fall to be cancelled as a consequence of the cancellation of the duty assessment. If argument (1) or (4) succeeded the duty assessment would be reduced and so the penalty would be reduced commensurately.

102. In order to found some of these arguments it may be necessary to consider whether *Race UT* applies to penalties. On numerous occasions Warren J makes it clear that the question of an appeal against a penalty was not an issue before him or the FTT. That can also be seen in *Race FTT2*. But Warren J did say something about penalties in *Race UT*. At [39] he said:

> "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."

103. In *van Driessche v HMRC* [2016] UKFTT 441 (TC) ("*van Driessche*") (Judge Ann Redston and Julian Stafford) this Tribunal considered the question whether the decision in *Race UT* applies to a penalty. In Judge Redston's decision she remarked that what Warren J said at [39] of *Race UT* was not relevant to his decision, what used to be called, before Latin tags were frowned upon, *obiter dicta*. The *van Driessche* decision contains at [140] to [187] an impressive marshalling of the arguments for and against deeming applying to penalty appeals. After considering what would be the effect on her case if deeming did apply the judge stated the Tribunal's conclusions thus:

> "***Overall conclusions on matters other than honesty***
>
> 196. We pause at this point to summarise the position so far:
>
> (1) HMRC have failed to show that Mrs Van Driessche engaged "in any conduct for the purpose of evading" customs duty, excise duty or import VAT.
>
> (2) It is arguable that CEMA Schedule 3 applies to penalty appeals generally, so as to deem a person who has failed to challenge the seizure of the goods at the magistrate's court to have engaged in the conduct which underlies the penalty, although we are inclined to the view that deeming does not apply to penalty appeals.
>
> (3) Even if deeming does apply to penalty appeals generally, it cannot operate so as to deem part of Euroairport to be outside the EU. That would be both absurd and a breach of EU law.
>
> (4) However, goods bought at Euroairport could be deemed to have been purchased duty free.
>
> 197. Because it is arguable that deeming could apply so as to treat the goods as having been purchased duty free, and because we can decide this case without expressing a final view on that point, we moved on to considering whether Mrs Van Driessche was dishonest."

104. If the Tribunal in *van Driessche* is correct, then it would be open to Mr Hill to argue, among other things, that what he did does not constitute in fact the conduct to which paragraph 4 Schedule 41 applies, or that he had a reasonable excuse for what he actually did or that there were special circumstances which HMRC should have, but did not, take account of. I am inclined to the view that even if deeming does apply to penalties, what actually happened at the port or airport may be taken into account in considering some of the arguments, so long as they do not rely on it being shown that the goods were not in fact for a commercial purpose.

105. I now consider the arguments that may be open to Mr Hill. I label them:

(1) The "*Jacobson*" argument

(2) The invalid penalty argument

(3) The paragraph 4 "unpaid duty" argument

(4) Quality of disclosure argument

(5) Reasonable excuse argument

(6) Special circumstances argument.

I also consider in relation to each whether they still have force if in fact deeming does apply to penalties.

The "Jacobson" argument

106. In *Jacobson v HMRC* [2016] UKFTT 570 (TC) the Tribunal (Judge Richard Thomas, the judge in this case, and Susan Stott) held that a penalty under paragraph 4 Schedule 41 did not apply at an airport. The arguments are set out at [32] to [75] of that decision. Exactly the same reasoning would apply at a port. Depending on the layout of the port the case may be even be stronger, and both Mr Hill and a Border Force officer would be able to give evidence about the layout. I have in mind here [16] of the Tribunal decision in *JP Lewis* which was about the arrangements at Coquelles just before the Channel Tunnel.

107. The *Jacobson* argument would be relevant whether or not deeming applies to penalties. It should be noted that I have given permission to HMRC to appeal the decision in *Jacobson* to the Upper Tribunal.

The invalid penalty argument

108. This argument is also based on *NT-ADA* (see §§96 to 98). In the case of the penalty the notice of assessment did refer to a review, but in the same terms as in *NT-ADA*.

109. This argument would be relevant whether or not deeming applies to penalties.

The paragraph 4 "unpaid duty" argument

110. If, contrary to the *Jacobson* argument, a penalty may be charged under paragraph 4 Schedule 41 at a port or airport, the question arises whether it is open to an appellant to argue that duty is not unpaid because no liability to duty arose. The argument would be that, if deeming does not apply to penalties, the appellant may be able to show that no duty arose because the goods were in fact not held etc for commercial use.

111. A variation on that argument would apply if the "forfeit for other reasons" argument succeeds. If deeming does apply to penalties but does not affect goods forfeit for being mixed in with commercial goods, then it would be open to show that those mixed in goods were for personal use so that no duty arose and none was unpaid after the duty point.

Quality of disclosure argument

112. In any appeal against a penalty where a reduction from a maximum may be given for the quality of a person's disclosure (mainly Schedule 41 FA 2008 and Schedule 24 FA 2007 - errors in documents affecting tax liability) it is open to the appellant to argue for a greater reduction than HMRC have allowed. In this case the penalty percentage after reduction is 21% while the minimum is 20% for the behaviour as now categorised by HMRC, so arguing for a reduction would not make much difference (about £17).

113. In principle however it is open to the appellant and would seem to me to be available whether deeming applies or not.

Reasonable excuse argument

114. Paragraph 20 Schedule 41 provides that in the context of paragraph 4 if the appellant has a reasonable excuse for handling goods which are chargeable with duty at a time when the duty is outstanding, liability to a penalty does not arise, so that the penalty assessment if made must be quashed.

115. The overriding condition is that the act is not deliberate. In this case HMRC have conceded that the act was not deliberate. There is no need to debate quite what "deliberate" means in this context: but treating the behaviour as non-deliberate seems to me to carry the implication that the appellant genuinely thought that he was entitled to import all the tobacco without paying duty. The question then would be whether that genuine intention is enough to qualify as a reasonable excuse, and whether any other reason might so qualify. It cannot be the case that there is no reasonable prospect of establishing a reasonable excuse, and this may be done whether or not deeming applies in penalty cases.

116. It will be noted that the pre-assessment letter referred to a reasonable excuse as being something out of the ordinary and outside the appellant's control (see §21). In *ETB (2014) Ltd v HMRC* [2016] UKUT 424 (TCC) the Upper Tribunal has expressed its dismay, adding to the chorus of FTT judges, that HMRC are continuing to expound this notion which is based on the minority judgment in the Court of Appeal in *Commissioners of Customs and Excise v Steptoe* [1992] STC 757.

117. Oddly HMRC's letters in this case suggested to the appellant that he could provide information to show he had a reasonable excuse while at the same time they maintained and continued to maintain until the review that his action was deliberate.

118. A reasonable excuse argument would seem to be available irrespective of whether deeming applies to penalties.

Special circumstances argument

119. HMRC may, if they think it right, reduce a penalty under paragraph 4 because there are special circumstances. This clearly means something other than that the appellant has a reasonable excuse, and so is available where the behaviour is

deliberate. It must also go beyond the "telling, helping and giving" the informs the reduction made under paragraph 13 Schedule 41.

120. HMRC said in their letter of 23 December 2015 (see §21) that:

> "In other cases [where there is no reasonable excuse] we may reduce the amount of the penalty if there are special circumstances. If you believe there are special circumstances please write and tell us; you should be aware that, for these purposes, special circumstances do not include your inability to pay the penalty.
>
> If you believe that you have a reasonable excuse for having committed the excise wrongdoing or that you are eligible for a special reduction, please write and tell us; examples of the sort of information we will consider are set out below.
>
> …
>
> The sort of information that may be relevant can include any of the following:
>
> - Disclosure of additional information (also referred to as 'telling, helping and giving').
> - An explanation of your behaviour
> - Any other circumstance that may affect consideration of the liability to a penalty, or the assessment or penalty amount."

121. The penalty explanation schedule issued on the same day said that, based on the information they had, they considered there were no special circumstances.

122. Factsheet CC/FS12 which was enclosed with the 23 December letter (and referred to as available from HMRC's website in the penalty explanation schedule enclosed with that letter) says that:

> "If there are any special circumstances that you believe the officer dealing with the check should take into consideration when working out the penalty, you should let them know straightway".

123. In his reply of 2 January 2016, Mr Hill gave a large amount of information and made representations.

124. In his letter of 8 February 2016, the covering letter for the duty and penalty assessment, Mr Ansah asked for:

> "any relevant information which may affect HMRC's view on … any other circumstances that may lead us to reduce the penalty further".

125. HMRC's decision on whether to give a special reduction is is not open to challenge in the Tribunal generally, but can be challenged on appeal if that decision is flawed in judicial review terms, ie if HMRC failed to take something into account that they should have, or took something into account they should not have, or that there was an error of law.

126. The appellant may, at a hearing, be able to show that the decision was flawed. He could perhaps point to the fact that he did do what HMRC asked in their letter of 23 December 2015 and the various documents and factsheets enclosed there and gave his comprehensive account of what happened at the port. HMRC do not seem to have considered whether any of Mr Hill's representations disclosed what amounted to special circumstances.

127. He might also point out that the statements made by HMRC in various letters and factsheets sent to him (see §§120 to 122 and 124) are so self-contradictory, confusing and uninformative (nowhere do they say what might amount to special circumstances even when they say they are doing that) that they cannot have given his representations proper consideration.

128. It may also be relevant to establish the reason for the apparently discriminatory behaviour by the Border Force in their treatment of Mr Hill and Mr Durham respectively, and of their use of a policy which apparently considers that the best independent evidence of the truth of a passenger's argument that they are bringing in the tobacco as gifts is to seek confirmation from a person's mother that her son is not a smuggler.

129. In responding to such an argument HMRC may have to put in evidence records entered by them in their compliance database which would show their reasoning on this issue, and the assumptions they made particularly about the effect of *Jones & Jones* and *Race UT*.

130. A special circumstances argument would seem to be available irrespective of whether deeming applies to penalties. It is difficult to see how the deeming would affect such an argument.

Why was I dealing with a strike out?

131. At the end of his decision in *Garland*, Judge Staker said this:

> "17. That [*what was said in [16] – see §64*] 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.
>
> 18. The Tribunal is satisfied that the present case is such a case. It has been allocated to the standard category, but it appears to be no more complex than a simple basic case. The Appellant indicated that she anticipated presenting no evidence other than her own oral evidence (and possibly that of her mother). For the strike out application hearing, HMRC produced a bundle of documents which appears to contain nearly all of the documents that would be expected in the bundle at a substantive hearing. For the strike out application hearing, HMRC also prepared a skeleton argument. The hearing of the strike out application was listed for half a day. It is difficult to imagine that the substantive hearing of this appeal could take more than half a day. Had the hearing on 9 August 2016 been a hearing of the substantive appeal rather than of a strike out application, this appeal might have been dealt with to finality by now. The Tribunal doubts that the strike out application would have been made in a case such as the present but for the fact that HMRC considered the point of principle in *Jones* and *Race* to be in issue (which for the reasons above, it is not)."

132. These remarks apply to this case just as they did to *Garland*. It came as no surprise to Miss Young that I quoted from *Garland* to her, as she was the HMRC presenting officer in that case. She told me that HMRC did not agree with Judge Staker's views. Well I do, and I imagine so do many other Tribunal judges.

133. It is difficult to think of much that would have been needed for this hearing to have been an appeal hearing. Witness statements would have been needed from Border Force and HMRC officers which would put in summary form some of the contents of the Border Force officer's notebook and the HMRC correspondence.

134. There would have been some additional cost to HMRC in producing the officers for cross-examination, but against that is that for this strike out hearing an HMRC presenting officer, and in others often counsel, is employed and that person will then repeat their role, and much of their material, at the appeal. A strike out and an appeal also involves the Tribunal in incurring double the costs, and it very likely inconveniences the appellant and costs the appellant money.

135. It is also my experience that excise duty appeals of this sort do not go beyond half a day, the minimum period for which a case of this type is listed.

136. In view of the effect on the appellant I asked Mr Hill if he had incurred costs in attending the Tribunal. He said he had. I asked Miss Young if HMRC were willing to pay Mr Hill's costs, but she refused to commit to that.

137. I therefore give HMRC notice that I am minded to award costs to the appellant on the basis that HMRC have acted unreasonably in bringing the proceedings (Rule 10(1)(b)). This then is the opportunity referred to in Rule 10(5) for HMRC to make

representations as to why they should not pay the appellant's costs. HMRC should inform the Tribunal if they agree to pay the appellant's costs or, if not, make their representations under Rule 10(5), in either case within 30 days of the release of this decision.

Observations on the Application and the legislative authorities

138. I have indicated that I was not happy with the Application. That is an understatement. It is not the first one I have seen in that form, and it is not unusual for counsel or the presenting officer to effectively abandon them and occasionally to produce a much better skeleton. In fact the problem with statements of case and notices of application to strike out in excise duty cases has been apparent for several years now – see *Newman v Director of Border Revenue* [2014] UKFTT 1073 (Judge Guy Brannan and Mr Les Howard) at [33] for example.

139. The one in this case represents a new low in quality for me: it was disgracefully slipshod. A non-judicial adjective much beloved of journalists on *Private Eye* came to mind, but I will desist from using it.

140. Rather than say more in the body of this already long decision I have added an Appendix in which I list the more obvious errors and infelicities. Miss Young seemed to ask for this to be done to help HMRC. I have to say that Miss Young did her best with the materials she had and in the face of my persistently returning to the Application.

141. I also need to mention the statutory provisions given to me in the bundle. In the index to the bundle Tab 4 is said to comprise "Copy other documentation". It lists 14 statutory provisions and two other documents, those two being Notice 1 and Notice 12A.

142. The 14 statutory provisions include ss 8 (part), 13(1) and 16 FA 1994. Sections 8 and 13 are irrelevant as they relate to excise civil evasion penalties which were not charged here. Section 16 is shown in its full form with copious footnotes, although very few subsections are relevant.

143. Seven sections of Part 3 of FA 2003 are included. The sections relate to penalties for evasion of customs duty and VAT. There are no such penalties in this case (because no customs duty and VAT was chargeable).

144. Two sections of CEMA are listed, but unlike the other statutes, these are listed as "Copy CEMA 1979 – Section X", not just "Section X". The first section is s 78 (Customs and excise control of person entering and leaving the United Kingdom). This may have been relevant to something done in this case except that ss (1B) provides that s 78 does not apply to arrivals from another member state – Belgium is a member state. Section 78 was not cited in the application.

145. The other section of CEMA given to me was s 139 (Provisions as to detention, seizure and condemnation of goods). This was the basis on which the Border Force was acting. This section was mentioned in the Application.

146. Schedule 41 FA 2008 was also listed. The whole of it was included with a large number of unnecessary paragraphs (including some not in force at the time of the alleged wrongdoing) and other material such as footnotes.

147. Finally the Tobacco Products (Description of Products) Order 2003 "Point 4 – cigarettes" was included. "Point 4" is in fact "Article 4" and it did indeed define what a cigarette is for the purpose of the Tobacco Products Duty Act 1979. I did not need to know that, as this case involved hand-rolling tobacco which is defined in article 6. Not that I needed to know what the definition of that was either, as everyone agreed it was HRT that was in issue in this case. No mention was made of this instrument in the Application.

148. The Application did however refer to several pieces of legislation which were *not* in the bundle of documents. These were, in order of appearance, Rule 8 of the FTT Rules, regulation 88 of the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations"), Schedule 3 to CEMA, regulation 13 of the 2010 Regulations, s 12 FA 1994, Regulation 10 of the 2010 Regulations and section 5 CEMA (though that I think is a mistake).

149. This list of statutory authorities was more incompetently prepared that anything I have seen in my time on the Tribunal.

Decision

150. My decision is, as already indicated, that HMRC strike out application in relation to the duty assessment and the penalty assessment is dismissed.

151. I have made a direction concerning the production by HMRC of a statement of case.

152. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 3 JANUARY 2017

APPENDIX

I have included in the first part of this Appendix what I consider to be important errors. I have in most cases put more minor errors (inconsistencies of usage, typos, grammatical errors etc) in the second part.

In the Application each paragraph was numbered "n)" and in what follows a number with ")" after it (but not before it as well) indicates that numbered paragraph in the application.

PART I

3) asks for the Tribunal's request for the list of documents to be stayed as well, but no such request had been made, and it would in any case be made of the appellant.

5) says that Mr Hill "confirmed that he had purchased 18 pouches" when he was only asked if he had bought tobacco, not whether he had bought 18 pouches.

10) of the Application says that the case was referred to HMRC for consideration of further action in relation to "unpaid Excise duty" with no mention of a penalty. The opening HMRC letter referred to both. In fact the penalty seems very much of an afterthought in the Application, being explicitly mentioned only in 12), 14) and 16) (which describe the correspondence), 28) (the appellant's grounds of appeal) and 35) (the effect of *Staniszewski*). There is also a reference to the wrong penalty provision (see my remarks about 37) below).

11) says incorrectly that in his letter of 23 December 2015 Officer Ansah told the appellant that criminal proceedings would not be taken. His letter does not mention prosecution.

12) refers to an "enquiry", but Mr Ansah's letter says nothing about an enquiry being undertaken, and the notion of an enquiry is inconsistent with the statement in 12) that the letter requested representations.

13) says that, in a response of 2 January 2016, the appellant "gave a disclosure". He gave nothing of the kind. He gave his side of the interview with Border Force and his representations about the penalty and about Mr Ansah's description of his behaviour as "wrongdoing".

16) says that in the review the non-deliberate penalty was reduced to 21% of the PLR. This omits to mention that Mr Ansah's penalty assessment was on the basis of a deliberate act – he had reduced the penalty in response to the appellant's representations but had not changed his mind about the behaviour being deliberate. It was the reviewing officer who reclassified the behaviour as not deliberate and reduced the penalty to 21% of the PLR.

17) says that HMRC wrote on 11 May 2016 to the appellant to "confirm" a "full" review had been carried out. It would not have been necessary to "confirm" anything about a review, but for the completely incorrect approach of HMRC revealed in its

letter of 6 May, five days earlier. That letter told Mr Hill that HMRC were still to consider whether a review was appropriate (a matter which is not theirs to decide if a person asked for a review). And I don't understand why the reference is to a "full" review, unless HMRC is lauding the fact that in five days or less they apparently made the decision to carry out a review and to carry it out so as to reach a conclusion.

17) also adds that a "full" explanation of the review was given. What scope is there for anything less? Similarly with the statement that the appellant was "fully advised" that he had a right of appeal to the Tribunal. Why should he expect anything less?

18) This paragraph incorrectly states that the appeal was received by the Tribunal on 10 October 2016 – it was 10 June.

21) to 25) is headed "Considerations of Law". I do not know what that means.

23) refers to a duty point being "prompted" as a result of the deemed condemnation. I don't know what "prompted" means here. If it is saying that a duty point occurs at the time of the condemnation, that undermines HMRC's case for the penalty at least and probably also for the duty assessment.

25) in full reads "The Legal provision for charging the amounts of the duty assessment and wrongdoing penalty are chargeable under Section 12 (1A) of the Finance Act 1994." Section 12(1A) FA 1994 has nothing to do with the penalty.

26) Challenge to the seizure is said to be required by "*Schedule 3 Section 5 of the Customs and Excise Management Act 1979* (HMRC's underlining and italicisation). "Section 5" is wrong, but even if it was meant to be "paragraph 5" it is still wrong – it is paragraph 3.

27) says that it is HMRC's contention that the goods are now forfeit and that that is based on *Jones & Jones*. But that has already been established in 26) and *Jones & Jones* does not *establish* that in this situation the goods are forfeit. *Jones & Jones* is about the consequences of that forfeiture. The paragraph then sets out 6 findings it says the Court of Appeal made. They are correctly stated but the purpose of stating them is unclear.

28) sets out Mr Hill's grounds of appeal. The summary fails to mention the dispute over the Border Force phoning his mother.

29) argues that the Tribunal in this appeal "would not be allowed" to hear evidence about whether the goods were for personal use. That is a very unfortunate way of putting matters.

30) claims that it is under "Section 5 of CEMA" that the goods have been condemned as forfeit. This must be a reference to paragraph 5 Schedule 3, and had the author noted what is in the immediately preceding paragraph they would have seen the correct reference to the provision in question.

32) The second paragraph in the second bullet point says that *Race UT* is authority for the proposition that an appeal against an assessment on the single ground of non-commercial use cannot succeed and "would, without hesitation be struck out". Indeed so, but the paragraph fails to mention that the whole of the appeal in *Race UT* was not struck out and that there was more than one ground of appeal in this case.

33) tells me that in the light of "Jones and another" (correct this time) that my jurisdiction under s 16(1) and (1A) is limited to considering whether the Commissioners have correctly identified the appellant and whether the assessment meets the statutory requirements. However s 16(1) and (1A) are not about the jurisdiction of the tribunal, but are about how an appeal may be made to the Tribunal in a restoration appeal, which this is not (the correct provision about making an appeal in such a case as this is section 16(1B)).

Jones & Jones was heard before the change in HMRC's policy about issuing assessments in seizure cases. It is *Race UT* which talks about the grounds of appeal against assessments to duty.

34) refers to *EBT*. The Application refers to the case only for the extract from the Court of Appeal decision which appears to criticise FTT judges for expressing dissatisfaction with *Jones and Jones* and says we are in fact dissatisfied instead with the statutory scheme. A Court of Appeal judge may lecture Tribunal judges about their errors, but I do not see what point HMRC are making by quoting that passage.

35) refers to *Staniszewski* and says that the hearing was as a result of the decision in *EBT* and directions issued by Judge Walters. Neither in Judge Walters' case management decision in *Staniszewski* nor in Judge Brooks decision is there any mention of *EBT*. Nor is there any mention of the "consumption" and "proportionality" arguments heard in *Staniszewski* to be found in the Court of Appeal decision in *EBT* which was in fact heard after Judge Brooks' hearing and was dated 16 February, the same day as Judge Brooks' decision. There was nothing in the UT or FTT decisions in *EBT* on the point either.

The second bullet in 35) tells me that Judge Brooks held that "the penalty regime does not comply with the principle of proportionally". Had I taken that at face value I would have dismissed HMRC's application about the penalty for that reason, but fortunately for them I knew that Judge Brooks held no such thing.

36) merely says "the Respondents contentions for this strike out application are that the Appellant has stated the goods were for personal use only". That is not a contention – it is a statement of fact.

37) points out, it says, that:

> "the inability to pay cannot be taken into account, which is stated in the Finance Act 1994, chapter 9, Section 8 (5)".

Where do I start? There should be a gap between "(8)" and "5". "Chapter 9 of what Part of FA 1994?" was my reaction, but I found that FA 1994 has no Chapter 9

anywhere. Finally I twigged. FA 1994 is chapter 9 (c. 9), ie the ninth Act given royal assent in the calendar year 1994 (see the Acts of Parliament Numbering and Citation Act 1962 (10 & 11 Eliz. 2 c. 34)). This is a wholly unnecessary and confusing insertion. As if that was not bad enough, s 8 FA 1994 is about civil evasion penalties for excise duty which is not what this case is about. Section 8(5) FA 1994 is indeed about inability to pay not being taken into account when HMRC or the Tribunal exercise their general power to reduce a penalty under s 8 FA 1994. In this case "inability to pay" is (by paragraph 20 Schedule 41 FA 2008) not a reasonable excuse, but that is qualified by it being a reasonable excuse if outside the appellant's control. So it may be taken into account in some circumstances. But the real mystery about paragraph 37) is why it is there at all. How is it relevant to a strike out application?

39) asks me to issue directions to strike out the appeal. I do not issue directions to do that, I just do it, or in this case, don't do it.

PART 2

1) This paragraph (and the next) refers to "appeal" in the singular, but there are two. In giving the full name of the FTT Rules it uses plural "Chambers" instead of the singular.

2) There should be an apostrophe in "Appellants".

3) should be qualified to say that the direction requested is only necessary if the Tribunal fails to strike out both appeals. The apostrophe in "Respondent's" should come after the word, as the application refers to the Commissioners as plural respondents.

9) "if it is not believed that the goods were seized legally" should be "if it is believed that the goods were not seized legally.

11) to 20) are headed "The decision". This is a reference to both assessments and should be in the plural.

18) an apostrophe is missing in "Appellants".

20) The "20)" in this paragraph should not be in bold.

21) "The goods were seized as liable to forfeiture under the s 139 Customs and Management Act 1979 (CEMA) because of a liability to forfeiture under Regulation 88 Excise Goods (Holding, Movement etc.) Regulations 2010 … ." There is one reference to liability to forfeiture too many here. The goods were seized because they were liable to forfeiture.

There is an extraneous "the" before "s 139" and the Act is misnamed ("Excise" is missing) as are the regulations. And why the (inconsistently used) underlining for these (and other) statutory provisions?

21) also purports to spell out the reason for the forfeiture of the appellant's tobacco, namely for a contravention of a provision in ("of?") the regulations, "including the

non-payment of duty". No doubt the regulations have many provisions contravention of which may give rise to liability to forfeiture, and they include non-payment of duty in an intra-EU tobacco case, but by saying "including" here the Application is implying that Mr Hill's non-payment of duty is only one of the contraventions he was committing, for which there is no allegation anywhere else.

22). There is no need for a comma after CEMA (in the first place it occurs). The paragraph refers to the Court of Appeal decision in *Jones & Jones* but gives the neutral citation for the High Court decision.

23) The title of the 2010 Regulations is wrongly described again but in a different way from the error in 21).

24) says the liable person for the duty is identified "in the Regulation 10(1) of the 2010 Regulations". No "the" is required, and the label "2010 Regulations" has not previously been mentioned as an abbreviation for the full title of the regulations (not that the correct full title of the regulations was ever given).

25) Why a capital in "Legal"? Why "are" for a singular subject "provision"? Why "assessment"? "*Charging* the amounts of duty" is what it should say. Why the gap between "12" and "(1A)"? Anyway, section 12(1A) FA 1994 has nothing to do with the penalty. Finally this sentence is saying ludicrously that "the provision for charging … are [is] chargeable under Section 12 …". "Section" should not have a capital "S".

26) to 39) are the "Grounds for Application" Application of what? It should be Grounds for <u>the</u> Application.

26) refers to the "seizure action of the goods". The goods did not seize themselves. Why the underlining and italics? Why spell out CEMA when it has been abbreviated before and CEMA used before? "[B]y due process the said goods, being 9Kg of tobacco, were condemned as forfeit to the Crown". This is unnecessarily pompous and stylistically not in tune with what has gone before.

30) The citation for *Jones & Jones* is now the Court of Appeal one, but incorrectly says "EWCFA" instead of "EWCA". It wrongly refers to "Jones and other" not "Jones and another" or "Jones and anor". Perhaps it is referring to Mrs Joan Jones as her husband's "other half".

32) tells me that *Race UT* was released on 14 July 2014. True but unnecessary information. The name of the appellant is between single quotation marks as if Nicholas Race was not his true name. The citation given is the UT's reference, not the neutral citation. I am also told that the appeal to the Upper Tribunal was heard on "03 June 2014". It was "3 June 2014" and it is also unnecessary information. There is an extraneous "is" in the opening words of the second paragraph of 32) (which should have been separately numbered or continued from the sentence that constitutes 32).

34) and 39) the number is italicised for some reason.

37) the numerous minor errors are dealt with in Part I with the numerous major errors.

35) cites the *Staniszewski* Tribunal appeal number, not the neutral citation. It says (unnecessarily) that the case was heard on 04 (*sic*) February 2016.

36) has only one candidate for being a "contention" whereas the paragraph uses the plural. There should be an apostrophe after "Respondents".