[2018] UKFTT 304 (TC)

TC06534

Appeal number: TC/2017/03502

VALUE ADDED TAX – Decision to issue a Post Clearance Demand Notice (C18) – Procedure - Application to strike out an appeal – Rule 8(2) – Mandatory strike out sought on basis of want of jurisdiction

First Issue – Whether decision appealed against was 'a relevant decision' – FA 1994 s 13A(2)(iii) – Yes – But only basis of appeal against the decision is a dispute of fact whether the correct rating was shown for the commodity code on the online tariff website in May 2013 – Even if Appellant right on the point, it is still appropriately characterised as legitimate expectation - Tribunal does not have jurisdiction – Abdul Noor and R & J Birkett discussed and applied

Second Issue - Community Customs Code – Articles 220.2(b) and 239 –No request by the Appellant for a remission decision – FA 1994 s 13A(2)(iv) - No such decision – No appealable decision

Rule 8(2) – Whole appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

K2 (NORTHWEST) LIMITED Appellant
Trading as 'ZIMA TRADING INTERNATIONAL'

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at the Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 18 April 2018

Mr Mahmood Sheikh, a Director, for the Appellant

Mr Simon Charles, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is my decision in relation to HMRC's application, dated 30 November 2017, to strike-out the whole of this appeal (made by way of a Notice of Appeal dated 24 April 2017) pursuant to Rule 8(2) of *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273.*

2. Rule 8(2) is in mandatory terms. That is to say, the Tribunal must strike out the whole or any part of proceedings if the Tribunal *'does not have jurisdiction in relation to the proceedings or that part of them'* and does not exercise its power to transfer the appeal to another court or tribunal under Rule 5(3)(k).

3. For the sake of completeness, I note that HMRC does not contend that the Tribunal should exercise its discretion to strike-out the appeal under Rule 8(3).

Two preliminary observations, and a direction

4. I make two preliminary observations, and a direction.

5. Firstly, in my view, easily as much time – and perhaps more - has been taken up in preparing for the strike-out application (involving the preparation of a hearing bundle of 174 pages, and a 169 page authorities bundle), hearing it (half a day), and considering the materials and the competing submissions as would have been taken up in simply preparing for and hearing the substantive appeal, giving the Appellant its day in court, with the chance to give and challenge evidence: see the remarks of Judge Staker in *Garland v HMRC* [2016] UKFTT 573 (TC) at [17], which were endorsed by the Upper Tribunal (Judge Sinfield and Judge Scott) in *Liam Hill v HMRC* [2018] UKUT 45 (TCC). I respectfully agree with those remarks.

6. In that light, this strike-out application is not self-evidently efficient litigation, nor does it really further the overriding objective.

7. Secondly, the Appellant complains that it is unfair for HMRC to have positively encouraged the Appellant to make an appeal to this Tribunal, only for HMRC to then apply to strike it out on the basis that the Tribunal does not have jurisdiction.

8. I have some sympathy for the procedural situation which the Appellant now finds itself in. In my eyes, there is some justification in the Appellant's criticism. The basis for the argument as to want of jurisdiction which is now advanced and relied upon by HMRC was not articulated (nor even hinted at) in HMRC's Statement of Case (26 September 2017) nor in any of the earlier correspondence. Indeed, in the review letter, HMRC, knowing what the Appellant's case was, and knowing what the key elements of the factual dispute were, had suggested that the best way to resolve this appeal would be:

"....for both parties to submit witness and documentary evidence to the Tribunal so that the Tribunal can reach a view having considered that evidence.... I suggest you will need to consider lodging an appeal where the facts can be ... established by way of witness evidence and cross-examination."

9. The application to strike-out the Appeal is obviously inconsistent with what was said by HMRC at the time. A strike-out application does not ordinarily involve the hearing and testing of oral evidence in cross-examination, so it has not been possible to establish the facts by way of witness evidence and cross-examination. The Appellant expected – on the basis of what he had been told by HMRC - that the dispute could be resolved in the Tribunal. The strike-out application goes against that expectation, and frustrates such a course of action.

10. Nonetheless, and for the reasons which I set out below, I have concluded that I must strike out the appeal on the basis that the Tribunal does not have the jurisdiction to hear it. Ultimately, that is a question of the proper analysis of the Grounds of Appeal, the identification and application of relevant law, and the proper application of the Tribunal's own Rules, which are a Statutory Instrument.

11. Rule 8(2) does not afford me any discretion as to the extent of my jurisdiction. I either have jurisdiction, or I do not. If the Tribunal does not have jurisdiction, the parties cannot confer jurisdiction on it, whether by agreement or by representing that the Tribunal has jurisdiction when it does not. Arguments about whether HMRC encouraged the Appellant's belief that it could appeal to the Tribunal and would not be met with any argument about jurisdiction are, in my view, ultimately arguments about legitimate expectation and reasonableness which I do not have jurisdiction to determine, for the same reasons that I do not have jurisdiction to deal with the alleged error on the online tariff system.

12. Rule 8(2) does not allow me to reward a party for good litigation conduct; or to punish a party for bad litigation conduct. But I am bound to observe that HMRC's overall approach to this appeal is not attractive. I say this for the following reasons:

(1) HMRC positively invited an appeal to the Tribunal (I have set out one instance of this above, but there are more in the papers);

(2) HMRC filed a Statement of Case which engages at length and substantively with the appeal, and which can only be read in the sense that it impliedly accepted that the Tribunal had jurisdiction, and which takes no point about jurisdiction; and

(3) Afterwards, HMRC applied to strike out the appeal on the basis of want of jurisdiction.

13. The Tribunal's time and resources (which are public resources) and the time and resources of the parties (insofar as those had been directed towards preparation for a substantive hearing) have been wasted. Moreover, considerable delay has now been brought about by the fact that this appeal was advanced in this Tribunal, and not elsewhere. The perception of unfairness only falls to be heightened when it is recalled

that time has been running against the Appellant, and time limits vary from jurisdiction to jurisdiction.

14. Given my decision on the justiciability of the key disputed issue in this appeal, then the appropriate venue for any challenge to the Decision is not this Tribunal but is the Administrative Court exercising its judicial review jurisdiction under Part 54 of the Civil Procedure Rules.

15. If any judicial review proceedings are brought by the Appellant then it will be important for that Court to understand what has already happened, when, and why. If such a claim is brought, then I direct that HMRC shall, together with any Acknowledgment of Service, file a complete copy of this Decision with the Administrative Court.

Background

16. The Appellant is in the business of importing fruit-flavoured soft drinks.

17. The Notice of Appeal concerns HMRC's decision of 21 October 2016 (upheld by formal departmental review on 27 March 2017) to raise a Post Clearance Demand Note (C18) calling for (reclaimable) input VAT of £105,482.77 in respect of 40 entries of fruit-flavoured soft drinks made between 30 October 2013 and 27 November 2015 ('**the Decision'**).

18. In broad terms, the Decision was on the footing that the drinks were standard-rated for the purposes of VAT and were not zero-rated.

19. The factual background is set out at some length in the Grounds of Appeal and the supporting documents, which focus on what is described as

> *"some problem, intermittent or continuous, with the online tariff website run by HMRC which clearly existed in May 2013 and which was still there in July 2016….the Company declared its products correctly and honestly and fulfilled its responsibility to the best of its ability. It cannot possibly be punished for a technical malfunction of HMRC's website after 3 years."*

20. HMRC latterly accepted that there was at least one inaccuracy on the gov.uk website and on the so-called 'CHIEF' ('Customs Handling of Import and Export Freight') system. It accepts that, from 1 January 2016 onwards, the website incorrectly stated that goods which fell within the commodity code being used by the Appellant (220290 **19 11**) from 1 January 2016 (as well as three other commodity codes, none of them relevant to this appeal) were said to be zero rated when they should have been standard rated.

21. That realisation is what led to HMRC's 'Tariff Stop Press Notice 23 – Problems with the On-Line Tariff' which was issued on 3 August 2016.

22. But HMRC does not accept that the error so identified affects the duty demand which is the subject matter of the present appeal.

23. I agree. This duty demand relates to a period which ended on 27 November 2015.

24. The Appellant says that in May 2013, it formed the view that its products – which it had already been importing for several years as fruit juice - were in fact most appropriately dealt with under commodity code 220290 **10 11**. There is a dispute of fact, which I need not resolve, as to whether the Appellant came to that view through being under-cut by its competitor, which was using that code, or whether the Appellant simply wanted to make sure that it was using the most appropriate commodity code.

25. The Appellant says that it consulted (or its agents, on its behalf, consulted) the Online Trade Tariff section of gov.uk in relation to that commodity code and its appropriate VAT treatment.

26. Here, there emerges the underlying dispute of fact which is at the heart of this appeal.

27. The Appellant says that the online tariff gave only one option, which was zero-rating (ZR). That is to say, the Appellant says that the online tariff system indicated that goods under that commodity code could only be zero-rated. The Appellant is adamant that there was no alternative standard rate option. The Appellant says that this is confirmed, as a matter of fact, by the evidence of Mr Denny, a director of its import agent, CCT Worldwide Ltd.

28. For the sake of clarity, it is important to note that the Appellant makes this allegation only in relation to the online tariff website. The Appellant does not make this allegation in relation to the CHIEF system. As the Appellant says in its letter of 3 April 2017, it never even had access to CHIEF, '*and we were not in a position of even commenting about possible malfunctioning of the same let alone insist on it'*.

29. HMRC says that the online tariff website for the commodity code ending 10.11, in May 2013, and during that period of these imports, gave both zero- and standard-rating options. As HMRC puts it in Paragraph 35 of the review letter:

> *"Just to be clear, the position of HMRC is that up until 31 December 2015, contrary to what [the Appellant] suggests in [its] letter of 17 January 2017, CHIEF gave the option of both zero and standard rated for goods entered to community code 220290 10 11 in line with what was shown in the printed version and on-line versions of the UK Tariff'*. (emphasis added by me).

30. In its letter of 21 October 2016, HMRC says that it has checked this on its Online Trade Tariff which gives the option of changing dates so as to allow the system to be interrogated for ratings in force on those dates. In its Statement of Case (at Para 11) it suggests that a check was made as at 1 August 2015, and the VAT rating – at least on 1 August 2015 – 'had both zero and standard rating options to choose from'. Nothing is said in the Statement of Case about checks for earlier dates, or later dates.

Section 13A(2) Finance Act 1994

31. Section 13A(2) of the *Finance Act 1994* lays down the extent of the Tribunal's jurisdiction.

32. Under that section, in relation to a customs debt, the Tribunal only has jurisdiction where a 'relevant decision' has been made.

33. A 'relevant decision' is a reference to any decision by HMRC

> *'in relation to any customs duty … as to –*
>
> *(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or*
>
> *(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."*

34. HMRC accepts that the Decision is a 'relevant decision' under s13A(2)(iii) of the Finance Act 1994. It concerns the amount of liability.

35. But HMRC goes on to say that the only ground of challenge to the Decision is the alleged content of the online tariff in May 2013. It says that the matter is not justicable since, even if the Appellant is right, its argument is in substance one of legitimate expectation, which falls outside the Tribunal's jurisdiction, and hence must be struck-out under Rule 8(2).

Classification

36. Much of the documentation placed before me, and most of HMRC's Statement of Case, deals with the issue of classification.

37. However, I understand that there is no challenge to the categorisation of the fruit drinks which the Appellant was importing. HMRC correctly observes that the Notice of Appeal does not explicitly raise any issue as to the correct classification of the soft drinks.

38. For the sake of clarity, the issue of classification is whether the drinks were zero-rated or standard-rated. This is a 'hard-edged' issue.

39. The drinks were standard-rated. They were composed of up to about 25% juice together with added sugar and about 80% water. They were not '*fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter'* (§22.09) but were '*Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09'* (§22.02).

40. These were standard-rated through the application of VAT Notice 701.14 Paras 2.2 ('Other beverages, and preparations for making them'), 3.7, and 3.7.2 ('Fruit cordials and squashes').

41. The fact that the Appellant may have believed that the drinks were zero-rated does not affect their actual rating. The Appellant's subjective belief or state of mind is not something which can change the correct rating of the goods. The actual rating of the goods does not depend on what the Appellant thought or believed the rating to be.

42. I emphasise this point because, before me, Mr Sheikh conceded that there was no dispute as to the correct classification of the drinks which the Appellant was importing. I understood that concession to be to the effect that the Appellant accepted that the drinks were – as a matter of fact, and a matter of law, and irrespective of what may have been the Appellant's subjective belief at the time – correctly classified as standard-rated.

The Grounds of Appeal

43. With there being no issue as to classification, HMRC contends that the Notice of Appeal can therefore be read as raising two issues, namely:

(1) The Appellant's failure to pay the relevant import VAT was as a result of an error contained on HMRC's website ('**the Alleged Error Issue**'); and

(2) Import VAT charged to the Appellant on the relevant C18 (Post Clearance Demand Notice) should be remitted under Article 220 or 236 of the Customs Code ('**the Remission Issue**').

44. HMRC argues that the Tribunal has no jurisdiction to consider either of those issues.

The Alleged Error Issue

45. The core of the Appeal is that the Appellant used a commodity code which, it alleges, only had a zero rating option on the online tariff. It says that it consulted an authoritative online source, and that the source told it that the rating was zero; and moreover did not even hint that the goods should, or could, be standard rated, and so did not permit them to be standard-rated. The Appellant therefore says that the online tariff system therefore contained an error, that it relied on that erroneous information, that its reliance was reasonable and that it cannot in those circumstances now be subject to a post-clearance demand for input tax.

46. The Appellant also says (in its email of 7 July 2016) that '*if a mistake is made in a Customs Entry and if the information entered does not meet the criteria of a particular commodity code, the customs computer would reject the Entry showing error/s. Please note that, as per my knowledge, not a single Entry had been rejected by customs".*

47. On that footing, it says that the Decision is wrong and should be overturned by the Tribunal.

48. HMRC argues this argument, as summarised by me above, is in reality or substance one of legitimate expectation, and on that footing goes on to argue that this means that this Tribunal does not have jurisdiction.

49. The Upper Tribunal has repeatedly held that the First-tier Tribunal does not have any jurisdiction, when dealing with a VAT appeal, to consider a taxpayer's claims based on the public law concept of 'legitimate expectation'.

50. *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) is a decision of Warren J (the then-President of the Tax and Chancery Chamber of the Upper Tribunal) and Judge Bishopp (the then-President of the Tax Chamber of the First-tier Tribunal). It is binding on me. Whilst the FTT has no general supervisory jurisdiction, it is open to the FTT to consider public law issues "*only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction*": Para 31. In that case, the Upper Tribunal did not consider that Mr Noor's claim as to a legitimate expectation that the input tax would be dealt with in a particular way was a matter within the competence of the FTT under section 83 of the VAT Act.

51. *"Legitimate expectation"* describes the situation that, where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so … [this is] a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public': see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68] *per* Laws LJ; and see Michael Fordham QC, Judicial Review Handbook, §41.1.1.

52. The Appellant accepts that the factual scenario considered by the Upper Tribunal in *Abdul Noor* was one of legitimate expectation. But the Appellant argues that the background in that case (in short, a phone conversation between HMRC and Mr Noor) does not directly or exactly match the circumstances in its case.

53. I agree that the precise factual circumstances are different. But I do not agree that they are so materially different so as to mean that I am not bound by *Abdul Noor*.

54. I do consider that the circumstances here are really ones which are appropriately be characterised as "legitimate expectation".

55. Both *Abdul Noor* and this case involve a representation made, or alleged to have been made, by HMRC to a taxpayer. It does not make a material difference that *Abdul Noor* involved something alleged to have been said during the course of a phone call, and that this appeal involved something alleged to have been written online. Both are representations.

56. In *Abdul Noor* (as, on the Appellant's case, here) it was said that the representation made was made intended to be relied upon, and was in fact relied upon. The Appellant says that information provided by a call handler "*cannot possibly be compared with written online information".* For the reasons already set out, I disagree.

57. I have also considered what the Appellant says about the customs entries with zero-rating being accepted, and not rejected, by CHIEF. Looked at objectively, this is also a kind of representation – albeit one by silence (that is, there were no error messages indicating to the Appellant that the zero rating for the commodity code was correct, or a simple refusal of the system to accept the entry). But in terms of this dispute, I do not see that the treatment of the entries by CHIEF can be separated from what the Appellant says about the content of the Online Trade Tariff in May 2013. The two aspects of the issue are intertwined. Not getting an error message from CHIEF, or having the customs entry refused, both gave rise to an expectation that the entries were correct.

58. *Abdul Noor* was considered and followed by another composition of the Upper Tribunal (Nugee J and Judge Greenbank) in *R & J Birkett v HMRC* [2017] UKUT 0089 (TCC).

59. Again, I am bound by that decision. It sets out a summary of the relevant principles at Paragraph 30, which reads as follows:

> (1) "The FTT is a creature of statute. It was created by section 3 of the Tribunals, Courts and Enforcement Act 2007 (TCEA) "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory;
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the Upper Tribunal (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA) (and none of which appear to me to be engaged in the circumstances of the present appeal);
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In Oxfam at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In Hok at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (Wandsworth LBC v Winder [1985] AC 461), or whether a compulsory purchase order had been vitiated (Rhondda Cynon Taff BC v Watkins [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In Noor at [73] the UT accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific

jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction;

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

60. I do not consider that this aspect of the present appeal raises an issue clearly falling within my jurisdiction within the meaning of Paragraph 31 of Noor. I take the opposite view. The issue raised as to a mistake on the online tariff system is one which, in my view, falls clearly outside my jurisdiction.

61. In my view, this is a case of legitimate expectation, and I do not have the jurisdiction to give effect to any legitimate expectation which the Appellant may have had: see Paragraph 87 of *Noor*.

62. Rule 5(3)(k) does not apply, because there has not been any *'change of circumstances since the proceedings were started'*. Moreover, I do not consider that this is a matter within the judicial review powers of the Tax and Chancery Chamber of the Upper Tribunal under sections 15 and 18 of the Tribunals Courts and Enforcement Act 2007.

63. This is a further illustration of the practical effect of not having a 'one-stop shop' for tax disputes. A dispute which has been running in this Tribunal for over a year has been brought to a shuddering halt, leaving the Appellant (if it can) to pursue a remedy elsewhere, but based on the self-same evidence. This is incongruous since this Tribunal (for example in restoration decisions) routinely exercises powers of review which are virtually indistinguishable from conventional judicial review in the Administrative Court.

64. In the context of our sister Chamber, the Property Chamber of the First-tier Tribunal, where there is a similar split between disputes allocated to courts and those to the Tribunal, the Chancellor of the High Court, speaking extra-judicially, has recently remarked (in the particular context of employment and housing problems) "*There is … a great imperative … to ensure that such legal issues can be resolved speedily, at minimum cost, and without the need to bring or defend multiple proceedings in different legal fora.*': see Sir Geoffrey Vos, Speech to the Professionalism in Property Conference (9 May 2018). In his speech (at Paragraph 19), the Chancellor identifies one kind of overlap in tax cases between tribunal appeals and judicial review - where a taxpayer wants to first run an argument that HMRC have misconstrued the taxing legislation when issuing the assessment (which goes to the tribunal) and secondly, in the alternative, an argument that HMRC raised a legitimate expectation that the taxing legislation would be construed in a way contended for by the taxpayer even if that does not in fact turn out to be the correct interpretation (which goes to the court). The present appeal shows another kind of overlap.

65. Therefore, and although the Decision appealed against is a relevant decision for the purposes of FA 1994 s 13A(2)(iii), the only grounds upon which the Decision is challenged are, read in the round, and fairly and objectively, ones of legitimate expectation.

66. As such, I do not have jurisdiction to address them, and therefore Rule 8(2) means that I must strike out the appeal against the Decision.

The Remission Issue

67. My conclusion on the Alleged Error Issue means that I do not need to consider the Remission Issue in great detail.

68. I heard lengthy argument on it, but the Remission Issue is, in my view, somewhat of a red herring.

69. The Remission Issue comes about in this way. The Appellant rightly says that its notice of appeal "is NOT directed to the question of remission" (emphasis in the original).

70. But Mr Charles argues that the Notice of Appeal, read purposively, in the sense most favourable to the Appellant, and bearing in mind that it was composed by the Appellant and not by lawyers, mounts a factual challenge which is arguably referable to either Article 220(2)(b) or Article 239 of the Community Customs Code.

71. It seems to me that Mr Charles' approach in this regard is appropriate. Not least, it is fair to the Appellant in pointing out a potential avenue of challenge legally available to the Appellant which (at least potentially) flows from the circumstances which the Appellant describes. It is a point which may well have been asked by the Tribunal at a substantive hearing anyway.

72. Article 220(2)(b) appears in part of the Code dealing with "Recovery of the Amount of the Customs Debt – Entry in the accounts and communication of the amount to the debtor". It reads:

> *"Except in the cases referred to in the second and third paragraphs of Article 217(1), subsequent entry in the accounts shall not occur where…*
>
> *(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration."*

73. In its review letter, HMRC accepts (at Paragraph 34) that the provisions of Article 220(2)(b) can apply to import VAT.

74. Article 239 appears in that part of the Code dealing with "Repayment and Remission of Duty". It reads:

> *"1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:*
>
> - *to be determined in accordance with the procedure of the Committee;*
>
> - *resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be determined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.*
>
> *2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor."*

75. HMRC submits that, if the Appellant wants to rely on any of those Articles, then it must make an application to HMRC for HMRC to decide whether to set the C18 aside. HMRC submits that, unless and until that is done, then there is no relevant decision under FA 1994 s 13A(2)(iv) (*'in relation to any customs duty … as to – (iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."*).

76. With that in mind, at the outset of the hearing, it appeared to me that one way of appropriately managing the case, consonant with the overriding objective, was to stay both the appellant's appeal and HMRC's application to strike it out for a short period so as to allow the Appellant to request a remission decision from HMRC satisfying FA 1994 13A(2)(iv).

77. Although Mr Charles accepted that was a course of action open to me, as a matter of case management, the Appellant did not wish to ask for a stay. Mr Sheikh was very clear with me that he was not asking for a remission, but was asking for the Decision to be overturned.

78. The suggestion of a stay was a simple one. It was explained by me to the Appellant. I am confident that the Appellant understood what was being discussed, and the implications of it. The Appellant not only resisted the suggestion but advanced a contrary positive case - namely that the Decision is, as a matter of law, appealable in this Tribunal, with the consequence that the strike-out application should fail. But, and as already explained, I have rejected the Appellant's argument in that regard.

79. I have carefully reflected on the guidance given by the Upper Tribunal (Judge Sinfield and Judge Scott) in *HMRC v Liam Hill* [2018] UKUT 45 (TCC) at Paras 34

and onwards as to the correct approach to take in interlocutory applications where one side is not legally represented.

80. I have decided that I should take what the Appellant says at face value. It would not have been fair or just for me to order a stay simply to afford the Appellant the chance to pursue a course of action it has not yet taken, which it does not wish to take, and which it may never take. To order a stay in those circumstances would simply be to bring about further delay for no purpose.

81. HMRC relies on the decision of this Tribunal in *LMD Trading v HMRC* [2017] UKFTT 760 (Judge Poon). Like this appeal, that was a decision on an application to strike-out an appeal under Rule 8(2). Unlike this appeal, LMD was a case in which the Appellant had asked for a remission decision under Article 236.

82. In deciding to strike-out the Appeal under Rule 8(2), Judge Poon remarked as follows (at Para [35]):

> *"…I am satisfied that the appellant is left with a remedy against the instant appeal being struck out. The application for remission …will, in due course, result in a decision by the Commissioners on the matters relating to remission. That decision by the Commissioners is an appealable decision. If the appellant is not in agreement with the Commissioners' decision in relation to the remission of the duty demands, an appeal can be lodged anew against that decision under FA 1994 s 13A(2)(a)(iv)."*

83. As already explained, I was bound to strike out this appeal under Rule 8(2) on the basis that it dealt with matters of legitimate expectation which are not justiciable in this Tribunal.

84. But, as in *LMD Trading*, that does not leave the Appellant without a remedy. Over and above any action challenging the Decision which the Appellant might be able to bring in the Administrative Court (and without expressing any views as to the prospects or merits or advisability of any such action) the Appellant could still apply to HMRC for a remission decision.

85. In this regard, and whilst I have not decided the point, I am not intuitively attracted to what seems to be HMRC's 'fall-back' position, expressed in Paragraph 38 of its Statement of Case that, even if there were shown to have been an error in the Online Tariff at the appropriate time, '*a prudent importer would have had regard to the hard copy of the tariff and the VAT Notice 701.14, and as an experienced importer should have known that the goods imported were standard rated for VAT purposes'*.

86. Firstly, it is not immediately apparent to me why a prudent importer, if obtaining information from gov.uk, which is ostensibly reliable and accurate, should then consult the paper tariff to 'cross-check'.

87. Nor is it immediately apparent to me why an importer should be deemed to have actual or constructive knowledge of VAT Notice 701.14. I am taking it that HMRC's contention, in Paragraph 39 of its Statement of Case – namely, that a failure to have

regard to VAT Notice 701.14 would be *'obviously negligent'* - does not in fact express a concluded view on any application for a remission decision by this Appellant. As a matter of law, it could not be a concluded view, since no remission decision has been requested.

88. Any remission decision, if adverse to the Appellant, would be a relevant decision under FA 1994 s 13A(2)(iv) and could still be appealed to the Tribunal. I say that without expressing any view as to whether any remission decision would itself end up being subject to the same arguments as to legitimate expectation and jurisdiction which have been addressed in this decision.

89. Helpfully, Mr Charles confirmed to the Tribunal:

(1) That it is not too late for the Appellant to request a customs decision under FA s13A(2)(iv) and Article 239 (for which the time limit is three years); and

(2) If the Appellant does request such a decision, that HMRC will not subsequently seek to contend that the Appellant - by virtue of this appeal having been struck-out – is subject to an issue-estoppel or any like doctrine barring it from advancing any subsequent appeal.

Outcome

90. The Appeal is struck-out under Rule 8(2).

91. 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 11 JUNE 2018