TC05755

Appeal number: TC/2016/03281

PROCEDURE – application to strike out appeals against excise duty assessment and penalty assessment for "wrongdoing"– whether HMRC acted unreasonably in bringing strike out application: yes - costs awarded to appellant.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LIAM HILL **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the issue without a hearing having read the representations made by HMRC under Rule 10(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

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DECISION

1. On 19 December 2016 I heard an application by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to strike out proceedings 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) ("the 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, 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. 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 have become applicable if I did not strike out both appeals.

5. At the end of the hearing I announced that I had decided not to strike out either appeal and so the applications were dismissed. I made directions in relation to the statement of case. In my written decision released on 3 January 2017 (published with neutral citation [2017] UKFTT 18 (TC)) I included the following passage:

> "136. In view of the effect [*of the strike out applications*] 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.
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> 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."

6. On 2 February 2017 HMRC sent its representations under Rule 10(5) to the Tribunal. On 28 February 2017 I issued a summary decision. On 1 March 2017 HMRC requested a "full findings and reasons" decision and this is that decision.

Background facts

7. On 8 June 2016 the appellant appealed to the Tribunal against an assessment to excise duty and an assessment of a penalty under paragraph 4 Schedule 41. The assessments relate to an incident at the Port of Hull on 24 March 2015.

8. On 30 August 2016 HMRC applied to strike out the appellant's appeals against duty and penalty assessment on the grounds that the Tribunal lacked jurisdiction or that there was no reasonable prospect of the appellant succeeding.

9. HMRC's case was based on the binding Upper Tribunal case of *HMRC v Race* [2014] UKUT 331 (TCC) ("*Race*"), which held that an appeal against an assessment to duty could not succeed solely on the ground that, where goods had been seized, those goods were for the appellant's personal use if he had not successfully contested the seizure in the Magistrates Court.

10. At the hearing I declined to strike out either appeal, while accepting that *Race* was binding on me for what it decided.

11. In my decision on the strike out applications I gave four possible grounds, personal use apart, which the appellant might be able to employ in a hearing of the appeal against duty and I gave six grounds in relation to the appeal against the penalty.

12. I also informed HMRC that I agreed with the decision of Judge Staker in this tribunal in *Garland v HMRC* [2016] UKFTT 573 (TC) that it could be inappropriate where the appellant is unrepresented not to allow the appellant a hearing of their appeal and that the hearing of the appeal itself would have taken no more time than the hearing of the application.

Reasons for decision

13. Striking out a case before hearing has been variously described as a "last resort" and a "nuclear option", for obvious reasons. It determines the appeal without a hearing and without considering any arguments the appellant may be able to being against the assessments.

14. It may however be the kindest option, per Walker J in *Chambers v Rooney and another* [2017] EWHC 285 (QB):

> "17. Striking out decisions can, among other things, bring to an end parts of a claim which are unsound in law. Parts of a claim with no real prospect of success can also be brought to an end by using the summary judgment procedure. Bringing to an end such parts of a claim can be of particular value to litigants in person. In the remainder of this section I explain why. When doing so I shall, for convenience, refer simply to striking out part of the claim. Such references, however, should be treated as being references to one or other or both of striking out of, or the grant of an adverse summary judgment on, part of the claim.

> 18. There is a real danger that litigants in person may press on with parts of a claim which seem to them to demonstrate how badly the other side has behaved but for which there is no legal basis. Similarly, there may be parts of the claim for which, despite the strong suspicions or firm belief of the litigant in person, there is plainly no factual basis.
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> 19. It will generally be of great assistance for litigants in person if these parts of the claim are struck out. Of course any strike out application will have been made because the other side thinks that striking out will be in its interests. However where a strike-out application succeeds against litigants in person, or the court of its own motion strikes out part of a claim by litigants in person, then litigants in person have a benefit that they would not otherwise have received. The relevant part of the claim has been examined by the judge, and disposed of at an early stage."

15. But as was stated by Judge Staker in *Garland* on a similar application to this by HMRC:

> "14. As regards HMRC's reliance on rule 8(3)(c), the Tribunal accepts that if the notice of appeal sets out no grounds of appeal with any reasonable prospect of succeeding, the Appellant risks a successful strike out application being made by HMRC. However, in cases involving unrepresented appellants, it can occur that the notice of appeal fails to disclose any arguable grounds of appeal, even though there is potential merit in the appeal.
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> 15. In *Aleena Electronics Limited v Revenue and Customs* [2011] UKFTT 608 (TC), it was said at [60]:
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> > '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.'
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> 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"

5 16. A strikeout application engages the overriding objective of the tribunal as set out in Rule 2 of the FTT Rules. Rule 2(4) provides that it is not just the Tribunal itself which must have the objective in mind in all it does: the parties must co-operate with the Tribunal generally and specifically must help the Tribunal to further the overriding objective.

10 17. In relation to a strike out application it seems to me that the following parts of the overriding objective are particularly in point:

> (1) dealing with the case in ways which are proportionate to the anticipated costs and the resources of the parties (Rule 2(2)(b))
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> (2) ensuring, so far as practicable, that the parties are able to participate
> 15 fully in the proceedings (Rule 2(2)(d)
>
> (3) avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2)(e)

18. In order that this tribunal can achieve the overriding objective it is incumbent on HMRC to prepare its strike out application with care and with attention to the facts of
20 the particular case as they are disclosed. Failure to do so would be one indication to the Tribunal that HMRC's conduct in bringing the strike out application was unreasonable.

19. Where as here they rely on a single case, *Race* (they do of course lay much stress on *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones & Jones*") but that case
25 relates only to a restoration appeal which this is not) HMRC must ensure that there is an overwhelming case that the propositions of law for which *Race* stands will inevitably have the effect that, if applied to the particular facts of the case in question, the appeals will fail.

20. When considering its case for a strike out HMRC, which will be aware of all
30 decisions of this tribunal, must always take into account relevant decisions of the tribunal both in relation to the general attitude of the tribunal and in relation to particular arguments that have been found not to have to rely on the proposition that *Race* stands for.

21. Obviously such decisions are not binding, but HMRC should also know that one
35 judge will generally follow a fully reasoned decision of another judge at the same level of the judicial hierarchy unless they think it clearly wrong. There are a number of such decisions referred to in my strike out decision, including *Garland*, which I consider that HMRC should have taken into account.

22. As I have said HMRC must always consider the evidence in the particular case as
40 it appears in the papers they have. 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.

23. In relation to the application to strike out the appeal against the assessment of duty it was plain to me that the appellant would have a non-fanciful argument that the decision of Judge Charles Hellier in *John Patrick Lewis v HMRC & anor* [2015] UKFTT 640 (TC) ("*JP Lewis*") could apply. This was not only because of Mr Hill's evidence in his correspondence with HMRC but also because of the entries in the Border Force officer's notebook. It was apparent from that notebook that the Border Force officer's sole concern was whether *some* of the hand rolling tobacco ("HRT") the appellant had brought back from Belgium was free gifts for others especially his mother or was for sale. Mr Hill apparently passed the "roll your own" test set him. The appellant's evidence was that he was told that had the Border Force officer been able to contact Mr Hill's mother then the appellant would have been allowed to take all his HRT: something which did in fact happen to his friend who was travelling with him and who assisted him in the appeal hearing.

24. In *JP Lewis* Judge Hellier held that because it seemed that Mr Lewis's own goods were seized with those intended for others as being "mixed in" with dutiable goods "we cannot conclude that the tribunal would have to assume that the goods were not for Mr Lewis's own use" so that *Jones & Jones* and *Race* did not preclude a "private use" defence to the duty and penalty assessment.

25. This failure of HMRC to recognise the possibility of an argument on the basis of *JP Lewis* was in my view unreasonable in the context of an application for strike out of the appeal against the duty assessment.

26. It is also equally unreasonable to fail to recognise that a *JP Lewis* argument would also affect the penalty as it would change the amount of potential lost revenue on which the penalty was calculated.

27. It might also give the appellant an argument that he had a reasonable excuse for his actions.

28. Thus on the basis of the *JP Lewis* point alone I consider that HMRC "acted unreasonably in bringing … the proceedings" in terms of Rule 10(1)(b) of the FTT Rules.

29. But I also consider that it was unreasonable in terms of Rule 10(1)(b) for HMRC not to consider, in relation to the penalty, that in *Race* the observations by Warren J about penalties was *obiter*, and that if they had not fully appreciated that (though they

should) they would have been left in no doubt by the decision in *van Driessche v HMRC* [2016] UKFTT 441 (TC) ("*van Driessche*") (Judge Ann Redston and Julian Stafford) that this Tribunal would be likely to consider that, even ignoring *JP Lewis*, a "for own use" argument might succeed in displacing a penalty.

30. In my summary decision I also suggested that Warren J's remarks about the tribunal's ability to take into account procedural issues relating to the assessment to duty had been ignored by HMRC. This was a minor factor in my decision. It may even be that HMRC did take this into account (as I know they have in other similar cases) but if they did it was not apparent from the notice of application.

31. That notice was also a factor, albeit a minor one also, in my decision. A strike out application is an important matter, a nuclear option. There should be a clear and logical account of the facts and reasons for HMRC's having put their finger on the nuclear button. The notice of application in this case was the antithesis of that. Paragraphs [138] to [149] and an Appendix of more than four pages of my decision on the application were devoted to the shortcomings of the application which I described as "disgracefully slipshod", "incompetently prepared" and in the summary decision on costs "appallingly badly drafted". Nothing I have since seen or been told has led me to change my view of the application.

32. All the evidence on which I have relied in reaching my view of HMRC's conduct was obviously available to HMRC when they compiled the application for a strike out. Producing a document of that calibre amounts to a failure to co-operate with the Tribunal. And the appellant would have been totally unable to make head or tail of it and would not have been able to participate meaningfully in the proceedings had I not ensured that he was told by me in clear terms what the proceedings were about.

33. The application notice and the proceedings founded on it could in my view arguably have led to the appellant being deprived, contrary to Article 6 of the European Convention on Human Rights, of his right to be presumed innocent until found guilty and even "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This is because had the appeals been struck out solely on the basis of the application he would be deprived of the right to appeal against a penalty which undoubtedly amounts to a "criminal offence" within Art. 6 ECHR.

34. I also consider that HMRC's conduct in seeking a strike out in this case was unreasonable because it may well have forced the appellant to incur costs that he would not otherwise have had to incur. Had, as *Garland* suggests, the appeals themselves been considered at the half day hearing for the strike out application, only one set of costs, including those of the Tribunal, would have been incurred.

35. At a hearing of the appeals in this case HMRC's extra costs will be small as the application, once translated into literate English, will serve as a statement of case. HMRC will need to produce witnesses particularly in relation to the penalty as the burden is on them to show the penalty is justified. But these costs to an organisation with the resources of HMRC will be an insignificant matter by comparison with the

appellant's costs of having to attend a hearing in Leeds, prepare for it and possibly lose earnings for another half day or more.

36. One facet of the overriding objective is as I have mentioned "dealing with the case in ways which are proportionate to the anticipated costs and the resources of the parties." The Tribunal cannot do that in this case because of the actions of HMRC. But it can recognise the disproportionate effect as to costs that HMRC's actions in this case have had on the appellant by ordering it to pay the appellant's costs of the strike out application.

37. I would stress again that this decision is very much based on the facts of the appellant's case and of HMRC's conduct in this case. I do not take the view that every failed application to strike out an appeal against a duty assessment or a penalty in the general circumstances of this case (an individual traveller arriving from another member state of the EU with more goods than the guideline amounts which are seized by Border Force) would have the effect that costs should be awarded. The important unreasonableness was the failure to consider the facts that were apparent from the evidence in the case.

Decision

38. As set out above I consider that for the reasons given, HMRC acted unreasonably in bringing the proceedings in terms of Rule 10(1)(b) of the FTT Rules.

39. I therefore order HMRC to pay the appellant's costs, and in particular

(1) Costs incurred by the appellant and Mr Ross Durham in travelling to and from the hearing.

(2) Costs (if any) incurred by the appellant in preparing for the hearing.

(3) If the appellant was an employee and used part of his annual leave to attend the hearing or was not paid by his employer for the time during which he travelled to and from and attended the hearing, an amount equal to the appellant's pay for half a day.

40. If the parties are unable to agree the costs to be paid I will on an application made by either party (or both) summarily assess them under Rule 10(6)(a) of the FTT Rules.

41. 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: 06 APRIL 2017