



TC04603

**Appeal numbers: TC/2014/01764
TC/2014/05772**

EXCISE DUTY – Excise assessment and excise wrongdoing penalty applied in relation to goods seized from the appellant - Application to strike-out, on both mandatory and discretionary basis - Rule 8(2)(a) - Want of jurisdiction - HMRC v Nicholas Race [2014] UKUT 0331 (TCC) considered - Assessment arguably 'otherwise deficient' - Rule 8(3)(c) - 'Reasonable prospect of success' - Triable issues of fact and law identified - Application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL AYRE

Appellant

- and -

**(1) THE COMMISSIONERS FOR HER
MAJESTY'S**

Respondents

REVENUE & CUSTOMS

(2) THE DIRECTOR OF BORDER REVENUE

**TRIBUNAL: JUDGE DR CHRISTOPHER MCNALL
MR PETER SHEPPARD FCIB FCIS
CTA**

**Sitting in public at City Exchange, 11 Albion Street, Leeds LS1 5ES on 4 August
2015**

**Mr Tony Harris, of Harris Taxation and Management Services, for the
Appellant**

Mr Rupert Davies, Counsel, for both Respondents

DECISION

1. On 27 September 2013, Mr Ayre was stopped at Leeds/Bradford airport. He had 3,291 cigarettes and 30 cigars ('the Goods') with him. He was interviewed for about 50 minutes and the Goods were seized. On 15 September 2014, a decision was made not to restore the Goods to him. An excise assessment and an excise wrongdoing penalty were imposed. Mr Ayre did not challenge the seizure in the Magistrates' Court. On 23 October 2014, he issued his Notice of Appeal. He sought to appeal both the refusal to restore the Goods, the assessment, and the penalty.
2. Mr Ayre's appeal, in broad terms, was that he was not given any reason for the seizure at the time of the seizure, and indeed, he contends, was not given any reason (which was that the Goods were believed to be held for a commercial purpose) until almost a year later - that is, on 15 September 2014.
3. On 24 February 2015 the Director of Border Revenue applied for the appeal to be struck-out, either on the basis of want of jurisdiction (Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009: 'the Tribunal Rules') or on the basis that the appeal enjoyed no reasonable prospect of success: Rule 8(3)(c)
4. The application relied on the decision of Warren J, the then-President of the Tax and Chancery Chamber, sitting in the Upper Tribunal in *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) ('*Race*').
5. That decision binds us. However, as the President makes clear, the well-understood effect of the deeming provisions contained in Schedule 3 of the *Customs and Excise Management Act 1979* ('the 1979 Act') do not deprive this Tribunal of jurisdiction in all circumstances.
6. As the learned Judge remarked (at Para. [34]):
- "In any event, it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person, or is otherwise deficient so that the factual issues in relation to an assessment and penalty assessment are likely to be different"
7. Thus, Warren J. identifies four scenarios in which the taxpayer, even if he has not made a claim or engaged in condemnation proceedings in the Magistrates' Court, may nonetheless have recourse to this Tribunal.
8. The first three categories could be said to belong together as dealing with matters of ascertainable fact. For instance, an assessment is either correctly calculated - as a matter of arithmetic - or it is not.
9. However, the fourth - 'otherwise deficient' - is of a more generic character. It is clear that it must deal with deficiencies which fall outside the first three heads. But its extent or scope is unclear - perhaps deliberately so.

10. Mr Davies sought to persuade us that the qualification articulated by the learned Judge - *'so that the factual issues in relation to an assessment and penalty assessment are likely to be different'* - operated generally so as to impose some limit to the scope of the fourth category. We respectfully agree.

5 11. However, we are not prepared to hold - at least, not in the context of an application for summary disposal, and without hearing full argument on the point - that the qualification introduced by Warren J. operates in the circumstances of this particular appeal to justify striking it out.

10 12. It seems to us that a challenge on the footing that no ground for the seizure was given at the time of the seizure is - at least arguably - a challenge to the assessment as 'otherwise deficient'.

13. Therefore, the application to strike-out the appeal on the footing of want of jurisdiction is dismissed.

15 14. When it came to the application to strike-out on a discretionary basis, Mr Davies accepted that the test to be applied was whether the grounds of appeal could be characterised as no more than false, fanciful or imaginary. That is akin to the test which is applied by the civil courts in cases where it is argued that a party's case enjoys 'no real prospect' of success. For the purposes of this application, we did not consider there to be any material difference between 'reasonable' in Rule 8(3)(c) of the
20 Tribunal Rules and 'real' in Rule 24.2 of the Civil Procedure Rules.

15. An application for summary disposal by way of strike-out is not a mini-trial. For the purposes of Rule 8(3)(c) we simply have to consider whether there are issues in this case which genuinely warrant a full hearing and investigation of the facts.

25 16. We consider that there are. A number of triable issues, both of fact and of law, emerged during the course of argument before us. It seems to us that amongst these are:

(1) Whether a 'commerciality statement' was read to Mr Ayre at the beginning of the interview or not;

30 (2) Even if such a statement was read to him, whether its effect was (adopting Mr Davies' expression) 'pervasive', so that it can be relied upon as providing the reason for seizure at the end of the interview, even if it is found that no reason was explicitly given at that time;

35 (3) Whether such a statement can or should be treated as the giving of 'the grounds' for a seizure within the meaning and effect of Paragraph 1 of Schedule 3 of the 1979 Act;

(4) Whether Mr Ayre was issued with a Notice 12A at the airport; and, if not, what effect, if any, that had;

40 (5) Whether time for making a Notice of Claim had begun to run against Mr Ayre at all, or whether he could still insist on HMRC bringing condemnation proceedings;

5 (6) The effect (if any) of the amendments made to the 1979 Act by section 226 of the *Finance Act 2013*, and especially the introduction of provisions for detention under the new Schedule 2A ('Supplementary Provisions relating to the detention of things as liable to forfeiture'). The Tribunal notes that this Act gained Royal Assent on 17 July 2013, that is just over ten weeks before Mr. Ayre was stopped.

17. We wish to be clear that we do not express even a provisional view about any of these issues and how - if at all - they might ultimately affect these appeals. We did not hear any evidence, and we have not made any findings of fact on the contested issues.

10 18. The hearing of the application, including our reading time and deliberations took approximately four hours. In the circumstances, being seized of the appeals, and as part of our case-management powers, we decided that it was appropriate and proportionate to adjourn the hearing of the substantive appeals, not only to allow them to be dealt with fairly and justly, but also to afford the Second Respondent an opportunity to file a Statement of Case. We have given directions accordingly.

15 19. 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.

25 **DR CHRISTOPHER MCNALL**
TRIBUNAL JUDGE

RELEASE DATE: 25 AUGUST 2015

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